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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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., ... Respondent.

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 Petitioner.

APPENDIX

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Clifton Newman

C.A. No.: 2015-CP-10-05463

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 and 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 Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that Laurence Stoney could not maintain this derivative action seeking relief on behalf of the Boathouse at Breach Inlet, LLC where there was “undisputed evidence of [a] loss” in excess of \$4,000,000 to the company because of the actions of Richard Stoney and Crew Carolina, LLC?
2. Did the trial court err in ordering the dissociation of Laurence Stoney as a member of the Boathouse at Breach Inlet, LLC?

STATEMENT OF THE CASE

On October 9, 2015, Laurence Stoney, a minority member of the Boathouse at Breach Inlet, LLC (the “Company”), filed this derivative action on behalf of the Company against Defendants Richard Stoney and Crew Carolina, LLC (“Crew Carolina”) (collectively, “Defendants”), asserting claims for breach of fiduciary duty, conversion, recovery for unlawful distributions, unjust enrichment, and an accounting.¹ (R. at 43-60). The Company also sought to impose personal liability on Richard, punitive damages, and an award of attorney’s fees and costs. (*Id.*). Richard and Crew Carolina filed an answer on November 12, 2015, asserting a general denial, failure to state a claim, the statute of limitations, laches, lack of standing under multiple theories, the business judgment rule, waiver and estoppel, and unclean hands and demanding the recovery of attorney’s fees and costs. (R. at 60-67)

Upon a motion by the Company, this action was assigned to the Business Court on December 9, 2016. (R. at 1). By order filed March 21, 2017, the Company was granted leave to amend its complaint to conform to the evidence adduced during discovery and to refine the allegations as to the parties in this action. (R. at 2-4, 151-73). On June 22, 2017 with the Company’s consent, Company members, Theodore Stoney, Jr. (Richard’s brother, “Ted”) and Gregory G. Holmes (Richard’s friend) (collectively, “Intervenors”), intervened on Defendants’ behalf. The Intervenors responded to the complaint, raising the same defenses as Defendants. (R. at 183-90).

On March 29, 2018, Defendants and Intervenors filed a motion to bifurcate this action into two phases, arguing that the issue of Laurence’s standing as a representative plaintiff was distinct from the issues of Defendants’ liability and damages. (R. at 191-206). With the parties’ consent,

¹ In order to minimize confusion as between members of the Stoney family, this brief will refer to individual family members by their first names.

the trial court conducted a preliminary trial on standing on December 13-14, 2018, at which time the parties called witnesses and introduced evidence. On May 20, 2019, the trial court issued a preliminary order determining that Laurence had standing to serve as representative plaintiff for the Company such that the case could proceed to trial on the merits. (R. at 5-17). The order included conclusions of law that this action seeking to recover Company assets was correctly brought as a derivative, rather than an individual, action; that laches did not bar Laurence from maintaining this action; and that Laurence could maintain this action and fairly and adequately represent the interests of the Company even if he was not supported by the Company's other members. (*Id.*).

On January 7, 2020, Defendants filed a motion to dissociate, seeking to expel Laurence from the Company. (R. at 211-57). The trial court conducted a hearing on Defendants' motion to dissociate and, on February 24, 2020, issued an order preliminarily denying Defendants' motion. (R. at 18-20).

The case proceeded to trial for a full and final determination of all claims and defenses on March 9-11, 2020.² Notwithstanding its finding that the Company had suffered more than \$4,000,000 in losses at the hands of Defendants, the trial court issued an order, filed on July 7, 2020, denying the Company any relief for lack of standing on Laurence's part and granting the motion to dissociate Laurence. (R. at 21-37). The trial court's order made no ruling on whether Richard had unclean hands, whether the business judgment rule applied to his actions, or whether

² Consistent with Rule 208(b), SCACR, the Company has attempted to provide a "concise history of the proceedings, insofar as necessary to an understanding of the appeal." A review of the public index for this matter reveals, however, that the Defendants and Intervenors embarked upon a successful strategy to keep this case from reaching a determination on the merits for almost five years. (R. at 39-42).

his actions were permitted under the business judgment rule if it applied.³ Nor did the trial court evaluate the full extent of the damage to the Company.

The Company filed a motion to alter or amend on July 16, 2020. In that motion, the Company sought to correct certain factual errors and omissions and to address the omissions and errors of law in the order, including the following:

1. The trial court did not address whether Richard had unclean hands, whether the business judgment rule applied to his actions, or whether his actions were permitted under the business judgment rule if it applied.
2. The trial court did not apply the correct analysis in finding that Laurence could not maintain this action on the Company's behalf.
3. The trial court erred in finding that Laurence could have filed an action in his individual capacity under S.C. Code Ann. § 33-44-410.
4. The trial court erred by disregarding the fact that the Company is the real party in interest—not Laurence in his individual capacity. Accordingly, the trial court erred in granting Defendants relief against Laurence in his personal, individual capacity.
5. In addition, the trial court erred by misapplying S.C. Code Ann. § 33-44-601(6)(iii), which strictly evaluates whether it is reasonably practicable for a business to continue to operate with a given member n granting the motion to dissociate.
6. The trial court further erred by permitting Defendants to assert their equitable claim for dissociation without addressing whether Richard has unclean hands.

(R. at 258-64). The trial court summarily denied the motion by order filed August 10, 2020. (R. at 38). This appeal followed with the service of a notice of appeal on August 28, 2020.

³ In addition, the trial court did not make any factual findings on these points. (R. at 21-37). The ruling was based solely on the threshold issue of standing; thus, none of these defenses can serve as an alternate sustaining ground as envisioned by Rule 220, SCACR. The Company seeks reversal and a remand for a full determination on the merits of the Company's claims based on the evidence presented at trial.

FACTS

The Company is a manager-managed LLC that operates a successful restaurant on the Isle of Palms, the Boathouse at Breach Inlet (“Breach Inlet”). (R. at 1146-79). It was formed in 1997, and the original members were Richard (80%), Ted (10%), Laurence (5%), and Richard Stoney, Jr. (5%, held in trust by Ted).⁴ (*Id.*). Richard has been the Company’s manager since its inception. (*Id.*).

Following the success of Breach Inlet, Richard sought to open other restaurants and food service businesses. (R. at 965:6-78:23, 990:15-19). These other restaurants and businesses were each owned by different LLCs, each of which had different members. (*Id.*). The common element was that each of these businesses was managed by Richard and Richard held the majority membership interest in each. (R. at 779:14-81:1, 783:7-10).

As his portfolio grew, Richard formed Crew Carolina, a single-member LLC, wholly owned and controlled by Richard. (R. at 784:1-15, 967:7-18). At trial, Richard acknowledged that Crew Carolina does not have an operating agreement and it does not maintain corporate records or follow corporate formalities. (R. at 784:22-85:5, 790:25-91:5). Instead, Crew Carolina serves as Richard’s “alter ego” for the purpose of moving funds from his successful restaurant, Breach Inlet, to his other ventures and to himself. (R. at 788:16-790:15).

To move Breach Inlet’s money to himself and Crew Carolina, Richard booked payments from Breach Inlet to himself and Crew Carolina as a “Due From/Due To.” (R. at 1122-24, 567:7-73:20). According to the Company’s financial records, Richard owes the Company \$42,835.19,

⁴ Over time, the ownership interests changed, and by the time of trial, the ownership of the Company was as follows: Richard (55%); Ted (10%); Ted as trustee for Richard Stoney, Jr., Richard’s son (5%); Lori Stoney, Richard’s ex-wife (5%); Lori as trustee for Croft Stoney, Richard’s daughter (5%); Laurence (5%); Holmes Capital Management, LLC (10%); MWC Properties, LLC (5%). (R. at 779:4-13).

and Crew Carolina owes the Company \$4,194,264.66. (R. at 1128-29, 574:2-12). These numbers are not contested and were confirmed in the trial court's order. The testimony further reflects that there was no plan or intention to repay these funds to the Company. (R. at 1186-88 at ¶ 3, 861:17-62:7, 913:19-14:20).

By way of example, entries on the Company's general ledger booked as "Due From Richard Stoney" show that Richard used Breach Inlet funds to host a friend from Italy; to take personal trips to the Bahamas, New York, Belgium, Chicago, and Key West; to buy feed for his polo horses; to pay the mortgage at his country house, Kensington Plantation; and to pay his personal taxes. (R. at 1122-24, 569:2-71:18, 648:22-49:9). Similarly, Company funds designated as "Due from Crew Carolina" were used for Richard's personal benefit, including funds used to pay for landscaping work at Kensington Plantation, to buy his girlfriend tickets to a fashion show, to fund his Christmas shopping, to pay his veterinary bills, and to write himself checks for "weekend cash." (R. at 1122-24, 650:5-52:14).

With respect to the use of Company funds to support Richard's other ventures, Chip Robinson, Breach Inlet's former controller, testified as follows: "Q. And isn't it true that the profits of [Breach Inlet] that you described as a cash cow and blood donor kept Richard's other [restaurant ventures] afloat? A. Yes." (R. at 853:25-54:3). This practice that Richard described as "robbing Peter to pay Paul" created cash flow problems for the Company, resulting in bounced checks and periods where the Company was unable to timely pay vendors and employees.⁵ (R. at

⁵ Richard is no stranger to this Court. In reviewing Richard's divorce action from Lori, this Court noted that "[t]hroughout the trial, Husband [Richard] referred to 'robbing Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 70, 819 S.E.2d 201, 207, 214 (Ct. App. 2018) (noting that Breach Inlet was Richard's "only income-producing asset" "which he in turn used for personal expenses or to satisfy other obligations" as well as Richard's "evasive" "antics" and "contemptuous behavior" before the trial court).

645:20-47:24, 854:4-56:10). In addition, the Company incurred interest charges and penalties for failure to pay taxes on time. (R. at 1127, 645:20-47:24).

Richard's attorney warned him as early as 2007 that his practice of self-dealing and comingling funds was inappropriate and instructed him to stop moving money from the Company to entities with different owners unless all of the Company's members agreed to it in writing. (R. at 515:5-18, 891:12-20, 429:25-33:6). In addition, in 2013, the Company's accountant, Dennis Jarvis, was concerned about the "Due From/Due To" and was worried the investors would "hold him accountable for it." (R. at 1186-88). As testified by Chip Robinson:

Q. I want to talk about the red flags and concerns raised by Mr. Jarvis. I believe your testimony [to] Mr. Barr was about how [the "Due From/Due To"] was booked. In fact, sir, he said to you that he had a real problem with "what's going on down there," and he was afraid that investors were going to "hold him accountable"?

A. Yes, sir.

...

Q. The CPA for the company was "freaking out" because he was scared that investors were going to hold him accountable?

A. Yes, sir.

Q. So in addition to your red flags that you raised to Richard where you told him it wasn't sustainable, Dennis Jarvis was waving red flags too, correct?

A. Correct.

Q. And the most important red flag was raised in 2007 when you understood from a legal standpoint that the practice needed to stop unless you got [approval] in writing from the members, correct?

A. . . . You're referring to our meeting with Mr. Pearlman, [the Company's lawyer]?

Q. Yes, sir.

A. Then yes, sir.

(R. at 890:15-91:20).

Richard ignored the advice of his accountant, controller, and attorney, and continued to move money out of Breach Inlet to make payments to himself and Crew Carolina without obtaining permission from the members of the Company. (R. at 1122-24, 860:13-61:2). Instead, Richard instructed the Company's accountant "not to discuss the Due To/Due From with other members of the Boathouse and did not permit [him] to share the Company's tax returns with certain members, including Laurence Stoney." (R. at 1186-88 at ¶ 8). Further, the testimony showed that there was no intention that these funds would ever be repaid to the Company. (*Id.*; R. at 861:17-62:7, 913:19-14:20).

The harm to the Company was not limited to the "Due From/Due To" loans to Richard and Crew Carolina. Breach Inlet sits on a waterfront property that is supported and protected by a bulkhead (a wooden sea wall). (R. at 761:19-22). Richard owns the real estate in his individual capacity, and the Company pays him rent. In 2011, Richard executed a lease agreement between himself and the Company. (R. at 1130-32). This lease (the "2011 Lease") provided that Richard was responsible for any bulkhead repairs. (*Id.*). In addition, the 2011 Lease gave the Company the unilateral right to extend the lease term in five-year increments to December 2035. (*Id.*).

In 2015, after Richard knew Laurence had retained counsel and sought additional information about the Company's dealings, Richard entered a new lease on behalf of himself and the Company (the "2015 Lease"). (R. at 1133-45, 756:5-24). In the 2015 Lease, Richard made three major changes to the 2011 Lease: (1) he replaced himself as landlord with 101 Palm Boulevard, LLC, a single-member LLC owned and controlled by Richard; (2) he altered the lease term so that it expired in 2020 (rather than being renewable through 2035); and (3) he shifted responsibility for any bulkhead repair, which was estimated to cost in the hundreds of thousands

of dollars, from himself as landlord, to Breach Inlet as tenant. (*Id.*). Despite materially altering the Company's financial position to benefit himself, Richard concealed the existence of the 2015 Lease from the members of Breach Inlet. (R. at 766:9-17).

In addition, on June 5, 2008, Richard took out a personal loan from First Federal Savings and Loan ("First Federal") in the amount of \$1,677,331.89, plus interest. (R. at 1183-85). Without asking permission from the members of the Company, Richard entered into a Commercial Guaranty Agreement wherein he caused Breach Inlet to serve as Guarantor for his personal loan with First Federal. (*Id.*). In 2012, when Richard failed to make payment on his personal loan with First Federal, to stave off foreclosure, he caused Breach Inlet to enter into a Confession of Judgement for \$1,812,017.69 in favor of his personal creditor, Charleston Capital Corporation (who had purchased the loan from First Federal). (R. at 1180-82, 817:14-18).

Lastly, Richard caused the Company to make distributions to Holmes and Cox when he did not make distributions to the Company's other members.⁶ (R. at 583:8-84:16). Based on the Company's accounting records, these "disproportionate distributions" totaled \$234,857.00. (R. at 1125).

Laurence brought this action on behalf of the Company in an attempt to right the wrongs committed at the Company's expense. These are not small matters and directly impact the Company and, in turn, derivatively impacted the value of the members' investments. Just by way of example—and ignoring interest and damages for the unauthorized lease amendment, the confession of judgement, and the disproportionate distributions—Laurence's share (5%) of the "Due From/Due To" entries owed by Crew Carolina (\$4,194,264.66) would total \$209,713.23.

⁶ Holmes owns Company member, Holmes Capital Management, LLC (Holmes and Holmes Capital Management, LLC, collectively "Holmes"). Cox owns Company member, MWC Properties, LLC (Cox and MWC Properties, LLC, collectively "Cox").

STANDARD OF REVIEW

This action sounds in equity. *See Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (holding derivative actions arise in equity); *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) (finding request for dissociation of LLC member is in equity). As such, this Court “may find facts in accordance with [its] own view of the preponderance of the evidence.” *Straight v. Goss*, 383 S.C. 180, 191–92, 678 S.E.2d 443, 449 (Ct. App. 2009); *Inlet Harbour v. S.C. Dep’t of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). Indeed, the appellate courts have a *de novo* standard of review as to facts in equity cases. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). “*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” *Id.* at 390, 709 S.E.2d at 654-55. However, this 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*, 383 S.C. at 191–92, 678 S.E.2d at 449.

ARGUMENTS

The trial court ruled that Laurence lacked standing to maintain this action on behalf of the Company. (R. at 33). This result was driven by the trial court’s determination that Laurence was motivated, not by concern for the Company, but rather out of personal interest and vindictiveness toward Richard. (R. at 32-33). The trial court also found that Laurence could have filed an individual action pursuant to S.C. Code Ann. § 33-44-410. In an effort to redress its perception of bad blood between Richard and Laurence, the trial court further ordered that Laurence should be dissociated from the Company pursuant to S.C. Code Ann. § 33-44-601(6)(iii) and that he should be bought out pursuant to the terms of S.C. Code Ann. §§ 33-44-701 and -702. (R. at 33-35).

These rulings are in error and fail to provide any remedy for the undisputed harm to the Company because of the actions of Richard and Crew Carolina. As stated by the trial court,

The accounting expert of the Plaintiff concluded that the Boathouse at Breach Inlet had sustained a loss of \$4,194,264.66 representing liabilities owned by Crew Carolina in the “due to/due from” category previously described. The accounting expert further concluded that, another liability of \$42,835.19 is owed by Richard Stoney individually in the same “due to/due from” category.

(R. at 28). The trial court excused these breaches of Richard’s fiduciary duties as manager simply because other members of the LLC opposed the lawsuit, as follows:

Notwithstanding the undisputed evidence of the loss as noted above to [Breach Inlet], not a single member other than the former wife of Richard Stoney, Lori supports Laurence in pursuing the lawsuit (*sic.*). Laurence holds a 5% interest and Lori holds a 5% interest. Therefore, 90% of the membership of the Boathouse at Breach Inlet, LLC oppose this lawsuit.

(R. at 29 (emphasis added)). By failing to remedy the losses to the Company and ordering dissociation, the trial court is allowing Richard to profit from his wrongdoing while also reducing the value of Laurence’s interest in the Company, and as a result, reducing the “fair value” to be paid to Laurence for his interest. Such a result is patently inconsistent with the overriding equitable principle that “[j]ust as nature abhors a vacuum, so equity abhors a wrong without a remedy.” *State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937). Accordingly and for the reasons set forth below, the trial court’s order must be reversed and this matter must be remanded for a full determination on the merits of the evidence presented at trial.

I. A derivative action is the proper means of seeking redress for wrongs to an entity, such as the Company. The trial court erred in finding Laurence lacked standing to maintain those claims.

A. Laurence could not have brought this action in an individual capacity.

An LLC is an entity separate and distinct from its members. S.C. Code Ann. § 33-44-201. As a result, harm to the LLC must be pursued by way of a derivative action. *Park Regency, LLC*, 402 S.C. at 417, 741 S.E.2d at 536. Recently, the South Carolina Supreme Court held in the context of an LLC dispute that a claim must be brought as a derivative action if the member's loss is "derivative of the loss suffered by [the company] and not separate and distinct from losses suffered by [the company]." *Wilson v. Gandis*, 430 S.C. 282, 311, 844 S.E.2d 631, 647 (2020) (dismissing individual members' breach of fiduciary duty claims and holding that the members were required to bring the claims derivatively after finding that "[a]ny loss suffered by [the members] would be derivative of the loss suffered by [the company] and not separate and distinct from losses suffered by [the company].").

This is consistent with the law applicable to corporations, as follows:

An action seeking to remedy a loss to the corporation is generally a derivative one. An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation."

If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder. It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated.

Patterson v. Witter, 425 S.C. 213, 231–32, 821 S.E.2d 677, 687 (2018) (citations and quotations omitted). This Court further explained the reasons for this general rule in the following quote:

1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; 3) it

protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares.

Brown v. Stewart, 348 S.C. at 33, 46–51, 557 S.E.2d at 676, 683–85 (Ct. App. 2001).

Individual LLC members have only a limited ability to bring an action against an LLC itself or other members to enforce: “(1) the member’s rights under the operating agreement; (2) the member’s rights under this chapter; and (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member’s relationship to the company.” S.C. Code Ann. § 33-44-410. However, “[a] member of a limited liability company may 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” S.C. Code Ann. § 33-44-1101.

As shown above, this action was commenced to restore assets to the Company in excess of \$4,000,000 and to otherwise right wrongs to the Company at the hands of Richard and Crew Carolina. Laurence is not seeking to enforce his rights under the operating agreement or his rights under the LLC act or any other personal interest, nor is he seeking a remedy for any “loss [] separate and distinct from that of the [Company].” As such, this action could not have been brought in an individual capacity. The trial court erred in ruling otherwise. (R. at 31).

B. The trial court erred in finding Laurence could not maintain this action on behalf of the Company.

The trial court found there was “undisputed evidence of [] loss” to the Company at the hands of Richard and Crew Carolina. (R. at 29). It excused that loss, however, because only one other member of the LLC (Richard’s ex-wife, Lori Stoney) supported the derivative action. (*Id.*). Lori (holder of 5% and another 5% in trust for her daughter) agreed that any funds taken out of the Company should be restored. (R. at 329:18-30:8). She further testified that Laurence and his lawyers were trying to protect the interests of the Company. (*Id.*). Thus, the trial court erred in

finding 90% of the membership interest opposed the action (that number should have been 85%). In addition, although he was opposed to the lawsuit, when asked “But you agree with me that if \$4,000,000 was returned to the [Company], that would be a good thing for the company; correct, sir?” Ted responded, “Of course, if it was obtainable.” (R. at 823:22-25).⁷ Thus, while he disagreed with the lawsuit against Richard and Crew Carolina, Ted agreed that the Company should be made whole.

This LLC only has a few members, all of whom were closely associated with Richard (his brother, his children in trust, his cousin, and his ex-wife) or were receiving benefits from Richard’s conduct (his business associates). Yes, a majority of the membership supported Richard and benefitted from his actions in breach of his fiduciary duties to the Company, but that does not mean Richard—the Company’s manager and majority member—has an unfettered right to loot the Company. As set forth above, a derivative action is the only mechanism to make the Company whole and, in turn, to “adequately compensate[] the injured [member] by increasing the value of his [membership interest].” *Brown*, 348 S.C. at 46–51, 557 S.E.2d at 683–85 (Ct. App. 2001).

After the trial in this matter, the trial court reversed its preliminary ruling that Laurence could maintain this action on behalf of the Company. (*Compare* R. at 5-17 *with* R. at 30-33). The trial court’s change of heart was based on its findings 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” and that “Laurence is not a fair and adequate representative under Rule 23(b)(1). His motivations are more vindictive and personal, than they are to vindicate a corporate wrong. The equitable remedy sought by Laurence is too tainted by his inappropriate conduct, particularly in

⁷ In fact, Ted testified that “one of the reasons” he opposed the lawsuit was that his brother Richard personally owed him a “substantial sum in excess of \$3 million.” (R. at 823:213-21).

light of the overwhelming opposition to the action by ninety percent of the membership of the LLC.” (R. at 32-33). These rulings fell under two headings (“Personal Motivation” and “Vindictiveness toward Defendant”), but both go to Laurence’s ability to “adequately defend the best interest of the Company.” (R. at 31-33).

With respect to the derivative relief sought in this case, the right to bring an action is governed by S.C. Code Ann. § 33-44-1101 (“A member of a limited liability company may 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.”) and Rule 23(b)(1), SCRCF (“In a derivative action brought by one or more [] members to enforce a right [] of an unincorporated association, the [] association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a [] member at the time of the transaction of which he complains []. . . . The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the [] members similarly situated in enforcing the right of the [] association . . .”).⁸

“The burden is on the defendants to show that the plaintiff will not fairly and adequately represent the corporation and its [similarly situated] shareholders.” *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) (“The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative.”); *Brandon v. Brandon Const. Co.*, 776 S.W.2d 349, 353 (Ark. 1989)

⁸ Defendants did not challenge whether Laurence met the derivative action demand requirement. Presumably, this is because the demand requirement is excused for futility where, as here, “the directors or managing board are themselves the wrongdoers.” *Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976).

(“The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.”).

Neither S.C. Code Ann. § 33-44-1101 nor Rule 23(b)(1) requires that a party bringing a derivative action on behalf of an LLC not have personal motivations for bringing the action, nor do they require that a representative-plaintiff not stand to gain personally. In fact, the reason for a derivative suit is to restore the assets to the Company such that the members receive the benefits of their ownership in the Company. *See Brown*, 348 S.C. at 46–51, 557 S.E.2d at 683–85.

Here, the parties stipulated, “Laurence O. Stoney is not similarly situated to any other member of the Boathouse at Breach Inlet, LLC.” (R. at 207-08). Therefore, the trial court erred in considering the other dissimilarly situated members in making its standing determination.

Although the trial court did not rule on this basis in its final order, it preliminarily found:

Where, as here, there are no members similarly situated to a derivative-action plaintiff, the derivative-action plaintiff is treated as a class of one and is not required to represent the interests of any other member in a company. *See e.g., Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), *cert. denied sub nom. Round Table Pizza, Inc. v. Larson*, 498 U.S. 1012, 111 S. Ct. 580 (1990) (finding that a shareholder can be a legitimate class of one where other shareholders are not similarly situated to the derivative-action plaintiff).

(R. at 16).⁹ This preliminary ruling comports with *Walbeck v. The I’On Co., LLC*, Op. No. 5588 (Ct. App. filed August 8, 2018) (Shearouse Adv. Sh. No. 32 at 125) (“Walbeck I”), the only South

⁹ This preliminary ruling is consistent with the overwhelming majority of case law from other jurisdictions. *See also Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412-13 (W.D. Va. 1990) (holding, “[s]ince defendants apparently concede that the other shareholders are not similarly situated vis-a-vis plaintiff, the court concludes that the plaintiff constitutes a legitimate class of one”); *ShoreGood Water Co. v. U.S. Bottling Co.*, No. CIV.A. RDB08-2470, 2009 WL 2461689, at *6 (D. Md. Aug. 10, 2009) (stating, “[a] sole shareholder may . . . bring a derivative suit”); *Halsted Video, Inc.*, 115 F.R.D. 177 (finding that a derivative-action plaintiff is a class of one where he is uniquely positioned in a company); *Cattano v. Bragg*, 727 S.E.2d 625, 629 (Va. 2012) (establishing the rule in Virginia that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162–63 (Tex. 1990) (establishing the rule in Texas that a derivative-action plaintiff can maintain a derivative suit as a

Carolina opinion addressing the issue of whether a member who is uniquely positioned in a Company can maintain a derivative action as a class of one. Although Walbeck I was later withdrawn and replaced with a substitute opinion that did not reach this issue, *Walbeck v. The I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2019) (“Walbeck II”), there is no reason to believe that the reasoning in Walbeck I on this point is incorrect.

This is an issue of first impression in South Carolina. Other jurisdictions, however, recognize that the “class of one doctrine” is particularly apt in the context of closely held companies. Such companies are ripe for malfeasance by self-interested managers, and the close ties between owners makes it difficult for minority members to challenge managerial wrongdoing for fear of further mismanagement or being expelled from the business. As explained by the Utah Supreme Court,

In closely held corporations, it becomes easy for the majority shareholders to identify themselves as the corporation. . . . [W]e recognize that closely held corporations may be more vulnerable to malfeasance. . . . [T]he nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance.

Angel Inv'rs, LLC, 216 P.3d at 950-51. The Texas Supreme Court similarly found,

Furthermore, we question the wisdom of construing [Rule 23(b)(1)] in any manner which prevents a shareholder in a close corporation from enforcing his rights.

class of one); *Brandon*, 776 S.W.2d at 354 (establishing the rule in Arkansas that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Angel Inv'rs, LLC v. Garrity*, 216 P.3d 944, 951 (Utah 2009) (establishing the rule in Utah that a derivative-action plaintiff can maintain a derivative suit as a class of one); *Demoulas v. Demoulas Super Markets, Inc.*, No. 902927B, 1993 WL 818670, at *4 (Mass. Super. Oct. 29, 1993) (finding that in Massachusetts a derivative-action plaintiff can maintain a derivative suit as a class of one). Notably, even where the derivative-action plaintiff is a class of one and not required to represent the interest of other members in a company, he still must fairly and adequately represent the interests of the company he seeks to protect. Rule 23(b)(1), SCRCPP; *see also ShoreGood Water Co.*, 2009 WL 2461689, at *6 (“in order for a sole shareholder’s derivative claim to proceed, it must fairly represent the interests of the corporation.”).

Under the facts of this case, such an interpretation could deprive the corporation of any remedy it might have as the result of wrongs done it by the major shareholders.

Eye Site, Inc., 796 S.W.2d at 162–63. If courts were to prevent a uniquely positioned member from standing as a class of one, that would “permit corporate looting and malfeasance in circumstances where all but one shareholder benefited personally from the illegality” *Angel Investors, LLC*, 216 P.3d at 950–51. Denying a class of one in a case such as this one is patently inconsistent with the maxim that equity will not allow a wrong without a remedy.

The trial court did not change its position on the class of one issue. Instead and despite the plain language of S.C. Code Ann. § 33-44-201 providing that “a limited liability is a legal entity separate and distinct from its members,” the trial court found that the interests of the majority were the interests of the Company and therefore Laurence was not a fair and adequate representative. (*See R.* at 33). However, for all of the reasons given above, Laurence must have standing to assert these claims on behalf of the Company because there is no other way that the Company can be made whole for the wrongs it has suffered due to the conduct of its majority member and manager.

Walbeck I is the only South Carolina case that has considered how the “fair and adequate” representation test applies in the context of Rule 23(b)(1). *Shearouse Adv. Sh. No. 32* at 125. In that case, this Court ruled that “[i]n determining whether the plaintiff would be an adequate . . . representative, . . . it must appear that the representative will **vigorously prosecute the interests of the [company] through qualified counsel.**” *Id.* (emphasis added). Here, there has been no finding that Laurence has not vigorously prosecuted the Company’s interests through qualified counsel. He and his attorneys have spent more than five years trying to restore the Company’s assets.

The trial court did not apply this analysis and relied primarily on two out of circuit federal cases in considering whether Laurence was a fair and adequate representative, *Davis v. Comed*,

619 F.2d 588 (6th Cir. 1980) and *Smith v. Ayres*, 977 F.2d 946 (5th Cir. 1992). *Smith* is inapplicable on its face because the parties have stipulated that no other members are similarly situated to Laurence. 977 F.2d at 949. *Davis* provides an eight-factor test to determine if a representative plaintiff is “fairly and adequately” representing the interests of a company in a derivative action, as set forth below:

Among the elements which the courts have evaluated in considering whether the derivative plaintiff meets [Rule 23’s] representation requirements are: [1] economic antagonisms between representative and class; [2] the remedy sought by plaintiff in the derivative action; [3] indications that the named plaintiff was not the driving force behind the litigation; [4] plaintiff’s unfamiliarity with the litigation; [5] other litigation pending between the plaintiff and defendants; [6] the relative magnitude of plaintiff’s personal interests as compared to his interest in the derivative action itself; [7] plaintiff’s vindictiveness towards the defendants; and, finally, [8] the degree of support plaintiff was receiving from the shareholders he purported to represent.

619 F.2d at 593-94. In applying the *Davis* factors, no one factor is determinative. *Id.* Instead, should this Court adopt the *Davis* factors, Defendants in order to prevail would be required to prove that Laurence cannot satisfy a “combination of factors.” *Id.* The trial court did not perform this analysis and instead looked solely to its perception of vindictiveness and the support of other members that the parties stipulated Laurence was not representing. (R. at 31-33).

A review of the *Davis* factors shows that Laurence was “fairly and adequately” representing the Company’s interests and that he met seven of the eight *Davis* factors (assuming for the sake of argument that the trial court was correct in his assessment that there was evidence of vindictiveness). Specifically, there are no economic antagonisms between Laurence and his class (he is a class of one), Laurence has the full support of the class of members he represents (he is a class of one), there is no other litigation pending between Laurence and Defendants, Laurence has only asked the Court for the return of Company monies, and Laurence has no personal financial stake in this litigation other than his interest in it as a member of the Company. In addition, there

was no evidence presented that would tend to show that Laurence was not the driving force behind the litigation or that he was unfamiliar with the litigation.

With respect to the vindictiveness element, this consideration is strictly construed in the context of family-owned, closely held companies, as courts recognize that such litigation typically induces emotionally charged responses. The Virginia Supreme Court reasoned:

Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations. Nevertheless, a single shareholder derivative claim is still possible, provided that the totality of the circumstances support a finding that the plaintiff's personal interests do not preclude the shareholder from fairly and adequately representing the corporation. In closely held corporations, **we 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.**

Cattano, 727 S.E.2d at 629 (emphasis added and citation omitted). Admittedly, there was evidence of ill will between Richard and Laurence; however, with respect to the lawsuit, the recovery sought was for the Company, not the individual. Moreover, this element alone is not dispositive and all of the other factors support Laurence's ability to bring this action on behalf of the Company.

Laurence further notes that there is no evidence that he was antagonistic toward the Company with respect to any of the wrongdoing alleged in his Complaint. The Complaint exclusively seeks recovery of Company assets and for wrongs done to the Company by Defendants.

In its findings of fact, the trial court disregards these facts and finds Laurence "does not seek to vindicate a corporate wrong." The trial court focused on the relationship between Laurence and Richard and Laurence and Richard's other businesses, rather than focusing on any alleged wrongdoing with respect to the Company and the restaurant at Breach Inlet. For example, (1) the trial court discusses the familial relationship between Laurence and Richard (R. at 24); (2) the trial

court discusses Richard's general business plan and the "Crew Carolina management concept" (R. at 25-26); (3) the order discusses the opening of the Boathouse at East Bay, additional restaurants in Asheville and Knoxville, three more restaurants in the Charleston area, and a related business, Blue Water Management, that published a cookbook, sold to grocery stores, and did catering (R. at 26); (4) the order spends several paragraphs discussing Laurence's conduct with respect to the Boathouse at East Bay, a separate LLC (R. at 27); (5) the order discusses Laurence's testimony in Richard's divorce, including Laurence's testimony that he would not object to a change in management of the Company (R. at 28); however, while this testimony may have an adverse impact on Richard it would not necessarily have harmed the Company; and (6) the order discusses threats Laurence made to Ted regarding Richard (*Id.*).

Also in its findings of fact, the trial court found that Laurence "breached the implied covenant of good faith and fair dealing" as follows:

Laurence was aware as early as 1999, that the cash generated by the [] Breach Inlet was being used to support other restaurants and made no complaint as long as he benefitted; Laurence admittedly engaged in communications with food purveyors and Ted Stoney of [] Breach Inlet restaurant in which he was critical of the credit standing of [Breach Inlet] to those purveyors causing strain to [Breach Inlet] with the purveyors. Laurence attempted to purchase the land of Boathouse on East Bay despite knowing that Richard and Ted were attempting to purchase the land for the benefit of the [Boathouse on East Bay]. Additionally, Laurence testified adversely to Richard Stoney in the divorce trial between Richard and Lori Stoney, advocating that the Family Court award the interest of Richard in Breach Inlet to Lori, and further advocating change of management.

(R. at 29-30). These findings are in error because Laurence, as a minority member of a manager-managed LLC, does not owe any duty of good faith and fair dealing to the Company. S.C. Code Ann. § 33-44-409(h)(1) (imposing an "obligation of good faith and fair dealing" on members in member-managed companies and only on managers in manager-managed companies). The trial court's "finding of fact" on this point should therefore be disregarded, or if recast as a conclusion

of law, should be reversed. The standing issues in this case should not be impacted by the trial court's erroneous determination that Laurence breached a duty he did not owe.

The only portion of the order reflecting possible negative conduct toward the Company on Laurence's part is the limited testimony relating to what Laurence may have told vendors about the Company's creditworthiness. (R. at 28). However, a review of the record shows that Laurence did not share any untrue information, and Laurence's testimony is only that he answered direct questions when asked. (R. at 714:9-17:4, 835:21-36:1, 994:21-95:1). Contrary to the trial court's order, Laurence did not concede any disloyalty to the Company. (R. at 28). When asked, "So you're saying that maybe it would be disloyal if you had told these purveyors that Breach Inlet was having some credit problems?" Laurence responded, "The question is, did they tell me about it or did I tell them? I never told them anything. I listened to them." (R. at 716:15-20). Given the testimony, there is no indication that these comments were false or intended to harm the Company.

Are there hard feelings between the cousins in this case? Yes. However, any hard feelings toward Richard on Laurence's part are not disloyalty to the Company, and the trial court erred in ruling otherwise. Very simply, the trial court's order permits Richard to get away with looting the Company by finding that Laurence has no standing to maintain this action.

II. The trial court erred in granting Defendants' motion to dissociate Laurence from the Company.

Adding insult to injury, the trial court exercised its equitable powers to dissociate Laurence from the Company in its current, diminished state. S.C. Code Ann. § 33-44-601(6)(iii) ("Section 601") permits a court to expel a member of a LLC only if that member "engaged in conduct relating

to the company's business which makes it not reasonably practicable to carry on the business with the member.”¹⁰

A. Defendants did not meet their burden of showing that it is “not reasonably practicable to carry on the business with” Laurence.

No appellate court in South Carolina has addressed the issue of judicial expulsion of an LLC member. However, in the exceptional instance in which courts outside of South Carolina have judicially expelled company members, courts recognize that “LLC members seeking to [judicially] expel a fellow member . . . are required to clear a high bar [, and the Statute does not] authorize a court to dissociate an LLC member merely because there is a conflict.” *IE Test, LLC v. Carroll*, 140 A.3d 1268, 1279 (N.J. 2016).

In *IE Test*, one member of a three member LLC would not agree to execute an operating agreement such that the LLC could not obtain a line of credit or financing from a bank. *IE Test, LLC* at 1280. Despite the significant obstacle created by the dissenting member—making it impossible for the engineering company to borrow money to operate—the court refused to judicially expel the dissenting member because he did not engage in conduct with respect to the business that made it “not reasonably practicable” for the business to continue. *Id.*

In “ascrib[ing] to the statutory words their ordinary meaning and significance,” the *IE Test* court reasoned that for it to expel a member, that member must have engaged in conduct such that “it must be unfeasible, despite reasonable efforts, to keep the LLC operating while the disputed member remains affiliated with it.” *Id.* at 1278 . The court further observed that the statute was not “satisfied by the mere existence of a conflict among LLC members,” and that:

¹⁰ Defendants did not move to expel Laurence from the Company for making it “not reasonably practicable to carry on the Company’s business” until January 7, 2020, more than four years after Laurence filed this lawsuit. Common sense dictates that if it was not practicable to carry on the Company’s business with Laurence Stoney, Defendants would have moved to expel him sooner.

[T]he Legislature did not authorize a court to premise expulsion . . . on a finding that it would be more challenging or complicated for other members to run the business with the LLC member than without him. . . . Instead, the Legislature prescribed a stringent standard of prospective harm: the LLC member's conduct must be so disruptive that it is "not reasonably practicable" to continue the business unless that member is expelled.

Id. The court concluded that judicial expulsion is inappropriate if "the LLC can be managed notwithstanding [the dissenting member's conduct]." *Id.*

In the case at hand, Defendants' primary complaint is that Laurence brought this derivative action. Asserting a statutory right to pursue relief of behalf of the Company, however, cannot be a reason to expel a member of an LLC. It would be nonsensical to require the expulsion of a member simply for seeking a statutorily guaranteed right to redress for the misconduct of the LLC's manager.

Laurence is a minority member of the Company with no access to or control over its operation or finances. He has been a passive investor in Breach Inlet since its inception in 1997, and the Company has been a successful venture. Nothing about Laurence's minority interest prevents Breach Inlet from conducting its business in the ordinary course.

Dissociation under Section 601 is improper unless Defendants prove that it is unfeasible to keep Breach Inlet operational while Laurence is a member. Defendants did not meet this burden. In reaching this result, the trial court again looked to the relationship of the parties and conduct relating to other entities, rather than the actual ability to operate the Company. (R. at 35). This was error and is inconsistent with the language of Section 601.

In fact, Richard testified that based on first quarter sales he projected Breach Inlet to earn up to half a million dollars more in 2020 than in 2019. (R. at 748:12-18). Given Richard's testimony, under any test the Court might apply regarding the "reasonably practicable" standard, it is "reasonably practicable to carry on the business" with Laurence as a passive investor. The

trial court's deference to the members' testimony that they did not want to be in business together anymore simply does not go to whether the LLC can continue to operate as required by the statute. Therefore, the trial court's order should be reversed.

B. The trial court erred in awarding relief against Laurence in his individual capacity.

In addition, Laurence is not an individual party to this action, and the trial court erred in granting the motion to dissociate against his individual interest. Quite simply, “[i]n a derivative action in this state the stockholder is the nominal plaintiff and the corporation is the real party in interest.” *Ward v. Atlas Constr. Co.*, 276 S.C. 346, 347, 278 S.E.2d 621, 622 (1981). A claim must be filed against an opposing party in the same capacity in which they have sued. *McLeod v. Sandy Island Corp.*, 260 S.C. 209, 220, 195 S.E.2d 178, 183 (1973); *see also Higgins v. Shenango Pottery Co.*, 99 F. Supp. 522 (W.D. Pa 1951) (recognizing “the general rule existing in many state courts that a counterclaim must be filed against an opposing party in the same capacity in which he sues” and dismissing a claim for relief against the plaintiff shareholder because the derivative action was commenced by the plaintiff in a representative capacity as a shareholder, not in an individual capacity); *Conant v. Schnall*, 307 N.Y.S.2d 902, 905 (N.Y. 1970) (noting that “a shareholder bringing a derivative action is not subject to counterclaims against him individually”). Therefore, the trial court erred in dissociating Laurence from his membership in the Company.

Laurence raised these concerns before and during the trial of this action. (R. at 489:3-4 (“And yes he is on behalf of the company maintaining this derivative lawsuit.”), 1090:18-21 (“[T]here are a lot of cases that say in derivative actions that Laurence Stoney is non-complainant.

That the real party at interest here is the company.”¹¹). He raised them again in his post-trial motion. (R. at 258-64).

This error has additional significance because if Laurence is no longer a member of the Company, he would lose his right to seek derivative relief. *Johnson v. Baldwin*, 221 S.C. 141, 149–50, 69 S.E.2d 585, 589 (1952). As stated there,

The right of a stockholder to maintain a derivative action against the directors of a corporation ‘inheres in and attaches to his ownership of its stock and does not exist apart from such ownership. It is a right which depends on status. If there is a loss of status, the action abates so far as the stockholder bringing the action is concerned, although the cause of action itself survives. Accordingly, it has been held that where such a derivative action is instituted by preferred stockholders and thereafter the preferred stock is retired, the plaintiffs have no further standing, whether the action is abated or not. . . .

It is our conclusion that the right of the plaintiff to continue to prosecute this action depends upon her retaining her status as a stockholder and if she ceased to be a stockholder, the cause of action abated so far as she is concerned. There would be no one left in court with the capacity to continue the litigation. She cannot prosecute an action as a member of a class to which she does not belong. Of course, as previously pointed out and apparently conceded by the defendants, the cause of action itself would not be extinguished.

(citations omitted). Again, this would leave the Company without a remedy to address the “undisputed loss” for want of a nominal plaintiff. As such, equity will not allow the dissociation order to stand.

If the Court were to reverse the trial court’s ruling and find that Laurence can maintain this action, it must also reverse the portion of the order relating to dissociation so that Laurence would retain his ability to maintain this action as a member of the Company.

¹¹ The rough version of the transcript reads slightly differently, as follows: “And there are a lot of cases that say in derivative actions that Laurence Stoney is a nominal plaintiff. That the real party in interest here is the company.” (R. at 1108:12-15).

C. The trial court erred in awarding equitable relief as requested by Defendants without making an assessment as to whether Richard had clean hands.

Finally, the trial court erred by granting Defendants' motion in equity without addressing whether Richard has unclean hands (though the trial court did note "the undisputed evidence of loss" to the Company at the hands of Richard and Crew Carolina). It is axiomatic that "he who seeks equity must do equity." *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551 (1920); *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). The trial court noted in its preliminary order on standing that Defendants and Intervenor appeared to have unclean hands. (R. at 13). However, after making that finding and ruling that there was undisputed evidence of loss to the Company, in its final order, the Court awarded equitable relief requested by Defendants in dissociating Laurence without determining whether Defendants had unclean hands.

For all of these reasons, the trial court erred in granting the motion to dissociate Laurence and that portion of the order should be reversed.

CONCLUSION

The trial court acknowledged that Richard diverted in excess of \$4,000,000 from the Company.¹² Instead of holding Richard accountable for this misconduct and issuing a ruling on the merits of the claims and defenses raised by the parties, the trial court found that the Company could not maintain this action because its representative, Laurence, had hard feelings towards his cousin Richard. In so ruling, the trial court acknowledged the Company had been wronged but effectively left the Company with no way to pursue a remedy. The trial court's ruling that

¹² The trial court did not make any findings as to the remaining allegations of wrongdoing to the Company, interest, punitive damages, or attorney's fees and costs. The Company believes the evidence presented at trial supports all of these measures of damage/recovery in its favor; however, at the very least, the trial court has acknowledged there was harm to the Company.

Laurence cannot serve as the Company's representative stripped the Company of its only shield against Richard's misconduct. For the reasons set forth above, this ruling should be reversed and remanded to the trial court for a ruling on the merits of the parties' claims and defenses as presented at the trial of this matter.

In addition, not only did the trial court decline to make the Company whole, it ordered that Laurence, individually, must be bought out of his membership interest based on the diminished value of the looted Company. It did so notwithstanding the fact that Laurence is not a party to this action in an individual capacity, without evaluating whether the party seeking dissociation had clean hands, and without considering the fact that the Company has operated successfully with Laurence as a member since its inception. In addition, removing Laurence as a member of the Company would mean that Laurence could not pursue relief on the Company's behalf. Therefore, this ruling must also be reversed.

Respectfully submitted,

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May 24, 2021

Greenville, South Carolina

RECEIVED

May 21 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman,
Circuit Court Judge

Case No. 2015-CP-10-05463

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

vs.

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 and 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.....Respondent.

BRIEF OF RESPONDENT

Charleston, South Carolina
May 21, 2021

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in its finding that Appellant Laurence Stoney lacked the requisite standing under Rule 23(b)(1), SCRCF, to maintain a shareholder derivative lawsuit?
2. Did the Trial Court err in ordering the dissociation of Laurence Stoney as a member of The Boathouse at Breach Inlet, LLC?

STATEMENT OF THE CASE

1. Appellant filed his Summons and Complaint with the Charleston County Circuit Court on October 9, 2015 against the Respondents Richard Stoney and Crew Carolina, LLC, as a shareholder derivative lawsuit on behalf of the Boathouse at Breach Inlet, LLC; alleging, *inter alia*, that he “will fairly and adequately represent the interests of Boathouse and its members in enforcing and prosecuting the rights of The Boathouse.”
2. Respondents Richard Stoney and Crew Carolina filed their Answer November 12, 2015.
3. On October 18, 2016, Ted Stoney and Gregory Holmes, also members of the LLC, filed their Motion to Intervene, alleging, *inter alia*, that they are members of the LLC, that the Appellant had not consulted with them about his filing of the action; that they oppose the action; and that Appellant could not adequately represent the interests of the members.
4. On November 23, 2016, Appellant filed his Motion to Amend Complaint to allege, *inter alia*, that he would represent “similarly situated” members of the company; and further alleging that Ted Stoney and Greg Holmes were not “similarly situated”.

5. On November 28, 2016, the parties filed their Consent Motion to assign the case to the Business Court.

6. On December 9, 2016, the Chief Business Court Judge assigned the case to the Honorable Clifton Newman as Business Court Judge.

7. On March 21, 2017, Judge Newman filed his Order granting Appellant leave to amend his Complaint.

8. Appellant's Amended Complaint was filed March 29, 2017.

9. Respondent and Defendant Crew Carolina filed their Answer April 13, 2017.

10. On January 22, 2017, Judge Newman filed his Order granting the Motion of Ted Stoney and Gregory Holmes to intervene as Third-Parties in the case.

11. On July 24, 2017, Third-Party Intervenors filed their answer alleging, *inter alia*, that despite purporting to represent their interests, Appellant had not consulted with them before filing the action; that they oppose the action; and further alleging that Appellant had filed the action only to benefit himself.

12. On March 29, 2018, Respondent and Third-Party Intervenors jointly filed their Motion to Bifurcate the proceedings, to conduct a trial or hearing to decide whether Appellant Laurence Stoney had standing to prosecute the action in the name of corporation.

13. By Stipulation filed December 7, 2018, the parties stipulated that Laurence Stoney was a "class of one" in the membership of the LLC; that is to say that there were no other members similarly situated.

14. A Preliminary Hearing on Appellant's standing to maintain the action was heard before Judge Newman on December 13th and 14th, 2018, at which the Court heard from witnesses and received exhibits.

15. On May 20, 2019, Judge Newman filed his Order from the Preliminary Hearing, concluding, without prejudice, that Respondent had standing to maintain the action.

16. Respondents appealed Judge Newman's May 20, 2019 Order to the Court of Appeals. The Appeal was dismissed by Order filed October 24, 2019.

17. On January 7, 2020, Respondent and Third-Party Intervenors jointly filed their Motion to Dissociate Laurence Stoney from The Boathouse at Breach Inlet, LLC.

18. Following Hearing January 16, 2020, Judge Newman filed his Order February 24, 2020, preliminarily denying, without prejudice, the Motion to Dissociate Laurence Stoney from the LLC.

19. A full trial on the merits of the case was heard by Judge Newman on March 9, 10, and 11, 2020.

20. On July 7, 2020, Judge Newman filed his Order denying the relief sought by Appellant in his Complaint and ordering that he be dissociated from the LLC.

21. On July 16, 2020, Appellant filed his Motion to Alter or Amend the July 7, 2020 Order of Judge Newman.

22. By Order filed August 10, 2020 Judge Newman denied Appellant's Motion to Alter or Amend.

23. On August 25, 2020, Respondent filed his Return to Judge Newman's Order of Dissociation, which had required delivery of a purchase offer to Plaintiff.

24. On August 28, 2020, Appellant filed his Notice of Appeal to the Court of Appeals.

STANDARD OF REVIEW

In the case of *Wilson v. Gandis*, 430 S.C. 282, 844 S.E.2d 631 (S.Ct.2020), the South Carolina Supreme Court most recently articulated the standard of review applicable to an action in equity: “This Court reviews factual findings and legal conclusions in an equitable action *de novo*. See *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241-248, 715 S.E.2d 348,352 (Ct.App.2011). Therefore, we may find facts according to our own view of the preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). However, this broad scope of review does not require this Court to disregard the findings below or to ignore the fact that the trial judge was in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). In addition, a petitioner is not relieved of its burden of convincing this court that the trial court committed error in its findings. *Id.* at 387-388, 544 S.E.2d at 623.”

STATEMENT OF FACTS

Respondent Richard Stoney is an attorney on active status with the South Carolina Bar, although his principal occupation since 1997 has been that of restaurateur. (R.p. 942 Lines 3-19; R.p. 953 Lines 8-22.) The Third-Party Intervener Theodore Stoney, Jr. (“Ted”) is Richard’s brother, and is a retired realtor. Appellant Laurence O. Stoney, Jr. (“Laurence”) is a first cousin of Richard and Ted. (R.p. 940 Lines 14-21). Laurence owns and operates a ship chandler business, Coleman Supply Company, that supplies ships serving the Port of Charleston with a broad range of provisions, from food-stuffs to tools, maritime and other

equipment, and navigational materials.¹ (R.p. 707 Line 10 to R.p. 708 Line 15).

In 1996-1997, after practicing law for eighteen years, Richard set out into the restaurant business on a site at Breach Inlet, which separates Isle of Palms from Sullivan's Island. That restaurant became The Boathouse at Breach Inlet. To start up the Boathouse restaurant, Richard negotiated a lease agreement with option to purchase, and he borrowed approximately \$500,000 secured by a second mortgage on his Sullivan's Island home to fund construction. (R.p. 952 Line 20 to R.p.953 Line 7). Richard testified that he had long been intrigued by the hospitality industry, and that he had been inspired to begin the Boathouse restaurant after a visit to the California coast. (R.p. 943 Line 20 to R.p. 944 Line 13). He performed due diligence by consulting texts, attending seminars, and consulting with restaurant professionals before commencing the Breach Inlet venture. (R.p.944 Line 14 to R.p. 946 Line 17; R.p. 949 Line 2 to R.p. 951 Line 17).

There was conflicting testimony at trial whether Richard and Laurence, who are two years apart in age, had been close in their younger years. Whereas Richard and Ted Stoney described Laurence's arrogant manner during their younger years, all were in agreement that by the time of the formation of the Boathouse restaurants in 1997 and 1999, Laurence had encountered business and other setbacks while employed as a broker in New York, following which he had returned to Charleston as a "more humble and gentle" person, by Richard and Ted's description. (R.p. 958 Line 13 to R.p. 960 Line 1).

When time came to open the doors of the restaurant in the Fall of 1997, Richard needed additional capital to fund start-up costs. He borrowed additional funds from US Foods, a food purveyor for the restaurant. And it was then that he formed the LLC party to

¹ Because three parties, and other witnesses, bear the surname "Stoney", they will be referred to by their first names in most instances, for clarity.

this case, The Boathouse at Breach Inlet, LLC, and offered membership interests to his brother Ted, and to his cousin Laurence, with whom he was by then on better terms. (The Boathouse at Breach Inlet will sometimes be referred to in this Brief as “Boathouse” or “Breach Inlet”.) Ted contributed \$50,000.00, in addition to providing his personal services to the business during the period of construction. Laurence contributed \$28,750.00. (R.p. 962 Line 16 to R.p. 963 Line 6). The initial membership interests in the LLC were: Richard Stoney, 80%; Laurence Stoney, 5%; Ted Stoney, 10%; and a 5% interest was created for Richard’s son, Richard Stoney, Jr., which is held in trust by Ted. (R.p. 955 Lines 11-25).

In subsequent years, Richard transferred portions of his interest to others, so that at the time of trial the membership interests in the Boathouse at Breach Inlet, LLC were held: Richard Stoney, 60%; Laurence Stoney, 5%; Ted Stoney, 10%; Ted Stoney as trustee for Richard Stoney, Jr., 5%; Lori Stoney (Richard Stoney’s former wife), 5%; Lori Stoney as trustee for Croft Stoney (daughter of Richard and Lori), 5%; and Greg Holmes, 10%. (R.p. 603 Line 16 to R.p. 604 Line 3).

Upon its opening, the Boathouse restaurant was an immediate success, owing in large part to two things: its location at Breach Inlet, and the creative talents of Richard Stoney. (R.p. 963 Line 7 to R.p. 965 Line 5). Building upon that success, in the following year Richard formed a second Boathouse restaurant in the City of Charleston which he named Boathouse on East Bay. (R.p. 965 Line 6 to R.p. 966 Line 1). At the same time, and based upon research and the advice of persons experienced in the restaurant industry and in general business administration, he formed a management company that he named Crew Carolina, LLC, a single member LLC of which Richard is the sole member. (R.p. 967 Lines 7-25).

The Crew Carolina management concept was this: the business costs associated with

accounting and personnel management, the common costs of health, worker's compensation and liability insurance, and the costs of food and restaurant material acquisition are radically reduced when multiple restaurant operations are consolidated under an umbrella of common management. At the same time management tasks, as well as operational tasks (including servers), associated with each restaurant can be shared among fewer management and operational personnel than would be required with multiple restaurants operating separately. Richard testified that he envisioned four or five restaurants operating under central management would provide the most viable return on the investments of the principals. (R.p. 950 Line 8 to R.p. 951 Line 9; R.p. 411 Line 12 to R.p. 415 Line 5).

As recounted by Chip Robinson, today a Baptist minister who had been the Boathouse's controller from 2002 to 2010, the economies of scale offered by the consolidated management provided by Crew Carolina afforded cost savings to every entity, including the Boathouse at Breach Inlet. (R.p. 870 Line 24 to R.p. 873 Line 14). At its peak, the Boathouse "Brand" included fourteen to fifteen entities, all managed by Crew Carolina. (R.p. 885 Line 23 to R.p. 886 Line 2). It included multiple restaurants; a catering company, "Carolina Catering"; and "Bluewater Management" which published a cookbook and prepared and sold specialty foods to grocery stores such as Whole Foods. (R.p. 886 Line 3 to R.p. 887 Line 11).

Early on, multiple bank accounts were created for each entity within the Boathouse family, all with the same bank, which imposed a cumbersome management and accounting task. After consulting with bankers at Wachovia Bank, banking arrangements were streamlined to create a "sweep" account, whereby funds, usually by credit card payments, were nightly deposited to an entity's account, and then overnight all funds were "swept" into

a central account in the name of Crew Carolina. The funds were tracked, nevertheless, in the name of the depositor entity. Crew Carolina then paid expenses from the central account, allocating each expense payment to the appropriate entity. In the instance where an entity account did not contain sufficient funds to pay an expense, the payment was made from the central sweep account and noted as an amount “due from” the liable entity, and “due to” the central Crew Carolina account. (R.p. 874 Line 17 to R.p. 876 Line 24).

The individual expenses of each restaurant, in the circumstances where that restaurant’s revenues were not sufficient to cover expenses, were therefore “borrowed” from the revenues in Crew Carolina’s central account. These “loans” were regularly accounted for and were regularly reported on the books of Crew Carolina and on the books of the related entities as the “due to/due from” entries. (R.p. 876 Line 25 to R.p. 880 Line 22). This operating framework was openly accounted for on the books, and was known to all members, including to the plaintiff Laurence Stoney. (R.p. 411 Line 22 to R.p. 414 Line 4).

Even before its opening, The Boathouse at Breach Inlet received local, state and national media attention. (R.p. 963 Line 7 to R.p. 964 Line 12). The potential for a successful organization was significant. If the business plan had been successful, every entity that was managed by Crew Carolina, including Boathouse at Breach Inlet, would have benefitted and prospered. Crew Carolina’s then-controller Chip Robinson wrote a memo in 2007 that stated, in part: (with reference to the centralized accounting and banking) “This banking convention has significantly decreased the money we are spending on bank fees (specifically NSF fees) to the tune of approximately \$500 - \$1,500 per major account per month, or roughly \$50,000 - \$100,000 annually. In addition, it has reduced the amount of time needed to reconcile the bank accounts from roughly 3-5 days monthly to 1-

1.5 days.”

Beginning in 2003, however, the organization of restaurants encountered a series of business catastrophes that ultimately caused most of them to fail. In 2003, the manager of Boathouse at East Bay, Patrick Ringwald, was savagely murdered in an armed robbery attempt at the restaurant, that chilled consumer interest and effectively destroyed the business. (R.p. 980 Line 16 to R.p. 984 Line 5). In 2005, the North Carolina Department of Transportation began road construction that blocked access to the then-operating Boathouse on Lake Julian in Asheville; and access was blocked for twenty-four months. (R.p. 985 Line 21 to R.p. 988 Line 12). The national business recession of 2008 negatively affected all business operations. Finally, in March 2009, only thirty days after it had opened, the Boathouse on Ellis Creek burned to the ground. (R.p. 977 Line 23 to R.p. 978 Line 23).

Accordingly, over a span of about six years, all of the related business entities failed except for Boathouse at Breach Inlet. The other entities had been formed after Breach Inlet’s immediate success, and they never had the opportunity to realize the degree of success that Breach Inlet had achieved. Because of the central banking and accounting methodology created with the formation of Crew Carolina, utilizing the sweep of bank accounts and the central accounting for debits and credits with the “due to/due from” entries, the net result after the other entities had failed was that Breach Inlet, the only surviving restaurant, carried substantial accounts receivable from Crew Carolina. Although booked as owed by Crew Carolina to Breach Inlet, the expenditures had been used in the final analysis to pay expenses of the other entities that had ultimately failed. (R.p. 876 Line 25 to R.p. 880 Line 1; R.p. 879 Line 11-20).

Richard described himself as the “eternal optimist”, believing that the business plan

would succeed and everything would work out in the end. Crew Carolina's former controller, Chip Robinson, echoed the sentiment: "Richard is one of the most optimistic people I've ever worked with. And consistently when I would raise concerns about sustainability, his opinion was that things would turn around very, very soon." (R.p. 885 Lines 4-18).

Through it all, nevertheless, the accounting records of Boathouse at Breach Inlet and Crew Carolina openly reported the liabilities. They regularly reported, and reported in currently dated exhibits admitted at trial, an account entry on the balance sheet entitled "due from Crew Carolina" that states the cumulative total of funds that were administered by Crew Carolina for the expenses of the related restaurant entities, and that are owed to Breach Inlet. The most current balance sheet of Boathouse at Breach Inlet reported the amount due from Crew Carolina to Boathouse at Breach Inlet on December 31, 2019 to be \$4,194,264.66. (R.p. 878, Line 19 to R.p. 880 Line 8). In turn, each of the related entities, although now defunct, owe liabilities to Crew Carolina that equal the same \$4,194,264.66 due from Crew Carolina to Boathouse at Breach Inlet. (R.p. 877 Line 14 to R.p. 878 Line 12).

There is a lesser sum showing on the balance sheet of Boathouse at Breach Inlet as "due from" Richard Stoney individually. That sum according to the balance sheet as of December 31, 2019 was \$42,835.19. (R.p. 880 Line 23 to R.p. 881 Line 15).

Respondent Laurence Stoney's Personal and Vindictive Agenda.

In early 1999, after Breach Inlet had been in business a little more than a year, and after the opening of Boathouse on East Bay and Crew Carolina, a meeting was held at Richard Stoney's law office on Broad Street in Charleston. Present were Richard, Laurence, Ted, tax attorney Bobby Pearlman, CPA Harold Pratt-Thomas, and Jane Baker, an administrative assistant. (R.p. 724 Line 7 to R.p. 725 Line 7; R.p. 968 Line 1 to R.p. 970

Line 5). In that meeting, Richard described the concept of central management provided by Crew Carolina. (R.p. 970 Lines 1-5). The members of the two restaurant LLCs that had been formed as of that date were essentially the same: Richard, Laurence, Ted, and Ted as Trustee for Richard, Jr. were members of both LLC's. Additionally, in the East Bay restaurant Richard and Ted's sister Beverly was a member, as was Charleston attorney Michael Molony.

The 1999 meeting exposed a measure of the contentious relationship between Laurence and the other members, that was to grow over time until festering into the present case. In the meeting Laurence disputed the payment to Richard of a car allowance, and he also objected to Richard's position that artwork placed in the Boathouse at East Bay restaurant was to be considered Richard's asset. "Laurence absolutely came unglued, used profanity, was extremely rude to Bobby Pearlman, who he had never met...Harold (Pratt-Thomas) was offended. Jane, everybody was offended. Everybody was offended. Everyone was shocked. I think everyone walked out. But he was completely out of control. And the demeanor that His Honor observed in this Courtroom, it is – it would be a starter kit to what happened in that room that night." (R.p. 411 Lines 2-21).

The East Bay restaurant was located on leased property owned by the Drew family. Almost from the outset of the lease term, disagreements between landlord and tenant were encountered, principally related to the physical condition of the property, which was subject to tidal flooding that created mold, mildew and odor issues. The relationship became so contentious that, in the words of Richard, Ted and Laurence, Boathouse at East Bay was in jeopardy of losing its lease. (R.p. 999 Line 22 to R.p. 1004 Line 10).

To protect the interests of the East Bay restaurant, Richard and Ted began

negotiations with the Drew family to purchase the property from them. (R.p. 1002 Line 20 to R.p. 1003 Line 5). However, while those negotiations were on-going, and unknown to anyone else, Laurence approached the Drew family and made offers to buy the property for himself. Although Laurence knew that Richard and Ted were attempting to buy the land to protect the interests of the restaurant, Laurence did not disclose to Richard or Ted or to any other member that he was also seeking to purchase the property. In the final analysis, and even though Laurence had offered a higher purchase price for the land, the Drew family sold the land to Richard and Ted, although for a higher price than had been previously offered. (R.p. 1003 Line 6 to R.p. 1004 Line 10).

Laurence would not admit in his testimony at trial that his attempted purchase of the East Bay property was disloyal to the LLC, stating instead that it was “a good business deal”. When asked why he did not inform Richard and Ted of his overtures to purchase the land, his response was, “why would you tell your competitors?”. (R.p. 720 Lines 18-25).

Because of the personality and business friction existing between Richard and Ted on the one hand, and Laurence on the other, Laurence was not thereafter invited to participate in any of the additional restaurants formed after Boathouse at East Bay. (R.p. 1007 Lines 4-25).

In 2009, Richard Stoney and his then wife, Lori Stoney, were separated and a divorce action had been filed by Lori. The Stoney divorce trial was removed from Charleston to Orangeburg for trial before a Family Court judge there. One of the issues in the Stoney divorce trial was the equitable division of property, a principal asset of which was the Boathouse at Breach Inlet restaurant. Lori Stoney was seeking an order of the Family Court awarding the Breach Inlet restaurant to her as a part of the Court’s equitable division of the

marital assets.

In support of Lori's case, she called upon Laurence to testify. Although Laurence testified that he had been subpoenaed to appear, he nevertheless admitted that he had voluntarily appeared with Lori at her lawyer's office to prepare for his testimony. (R.p. 299 Line 21 to R.p. 301 Line 5). At trial, Laurence testified that he would not object to the award of Breach Inlet to Lori as a marital asset, or to the hiring of Charleston restaurateur Bill Hall to manage the restaurant. (R.p. 728 Line 13 to R.p. 729 Line 24). In that trial, Laurence also testified that the "crux of the matter" with Richard was "where is my money?" (R.p. 729 Line 25 to R.p. 730 Line 22). This was referring to his constant refrains, complaining to his lack of distributions as a member of the Boathouse at Breach Inlet, LLC.

In similar context, when asked at trial before the Trial Court when his relationship with Richard began to deteriorate, Laurence testified that it was when the distributions stopped coming. (R.p. 726 Lines 6-15). Although he did not file this action until 2015, Laurence testified that he had suspected Richard of "robbing Peter to pay Paul" as long ago as 1999. (R.p. 323 Line 16 to R.p. 324 Line 8; R.p. 361 Line 20 to R.p. 363, Line 1).

Laurence Stoney's ship chandler company also does business with some of the same purveyors who supply food to the Boathouse at Breach Inlet restaurant. (R.p. 707 Line 10 to R.p. 708 Line 16). Laurence was examined at trial about his communications with the food purveyors in common, which included Limehouse Produce and US Foods, about the credit worthiness of Beach Inlet. He conceded in his testimony that he had corroborated with the purveyors the credit problems that he believed Breach Inlet was encountering. When challenged about those communications and their effect on Breach Inlet, Laurence's response was "it was the truth." He also conceded that such a conversation "maybe it would be

disloyal” to Breach Inlet. (R.p. 366 Line 4 to R.p. 367 Line 18; R.p. 714 Line 4 to R.p. 716 Line 14).

Ted Stoney testified about numerous complaints and threats that Laurence had made. He recalled a specific conversation in June of 2010 in which Laurence complained that he was not getting his fair share of distributions from the restaurant, and that “Boathouse at Breach Inlet was subsidizing some of the other entities.” In that same conversation Laurence had repeated his allegation that Breach Inlet was “slow in paying its bills”. (R.p. 835 Line 16 to R.p. 836 Line 12).

Ted described a conversation with Laurence in the back bar of the Carolina Yacht Club shortly before this case was filed in 2015. After complaining to Ted about a dispute relating to the adjoining properties each of them own in rural Berkeley County, Laurence told Ted that Richard “had been stealing from him...he had been taking money from the Boathouse at Breach Inlet to support the other restaurants.” Ted further testified: “And I will never forget his last few words to me.” “I’m going to get Richard. I’m going to turn his world upside down.” Ted described the conversation as “very intimidating”. “I remember that quite vividly because I was personally shaking after the confrontation.” (R.p. 1023 Line 10 to R.p. 1024 Line 15; R.p. 1028 Line 5 to R.p. 1029 Line 5).

Ted Stoney’s testimony is notably credible, particularly because of his other testimony at trial, expressing candid criticism of his brother’s personal spending habits.

Plaintiff’s accounting expert concluded that the Boathouse at Breach Inlet had sustained a loss of \$4,194,264.66 representing liabilities owned by Crew Carolina in the “due to/due from” category previously described. Another liability of \$42,835.19 is owed by Richard Stoney individually in the same “due to/due from” category. (R.p. 627 Lines 1-14;

R.p. 628 Lines 3-9; R.p. 879 Line 17 to R.p. 881 Line 3). Significantly, and although Plaintiff's expert was paid \$80,000.00 (R.p. 628 Line 17 to R.p. 629 Line 12) and studied three million bits of data for the case. (R.p. 548 Line 14 to R.p. 549 Line 16). In the final analysis he utilized the identical sums openly reported by Boathouse at Breach Inlet on its balance sheet as owed by Crew Carolina and Richard Stoney, respectively. (R.p. 627 Line 5 to R.p. 628 Line 12).

Laurence Stoney purports to bring this action as a "class of one". The parties have stipulated that no other member of the LLC is similarly situated. Although there are three other 5% members, the distinctive difference between Laurence Stoney and every other member, including the other 5% members, as he testified at the preliminary hearing on standing, is that all other members had received disproportionately greater distributions than he. The single distinguishing fact that makes Laurence Stoney a "class of one" is disproportionate distributions. In the preliminary hearing on standing, he testified that the factual distinction between him and every other member is they got distributions when he did not, "that is my stance". (R.p. 333 Line 11 to R.p. 334 Line 18; R.p. 364 Lines 1-9). This case has always been about Laurence Stoney's distributions, and nothing else.

As previously observed, Laurence Stoney has paid his forensic accountant \$80,000 for his work in this case. Although no testimony was offered at the February, 2020 trial relating to attorney fees paid by Laurence, he testified in the Preliminary Hearing in December of 2018 that he had then paid about \$200,000.00 in fees and expenses as of that date. In that hearing, Laurence testified that he "didn'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 8-25).

Notwithstanding the undisputed evidence of the loss to the Boathouse at Breach Inlet,

LLC, not a single member other than Richard Stoney's former wife Lori supports Laurence's lawsuit. (R.p. 699 Line 12 to R.p. 700 Line 14). Laurence holds a 5% interest and Lori holds a 5% interest. Therefore, 90% of the membership of the Boathouse at Breach Inlet, LLC oppose this lawsuit. It should be noted that, although Lori also holds a 5% interest in trust for Croft Stoney, the daughter of Richard and Lori, Croft, who is now emancipated and in college, testified at trial that she does not support this lawsuit brought by Laurence. (R.p. 893 Line 2 to R.p. 894 Line 17).

Laurence Stoney was not invited to participate in future restaurant LLC's after 1999 because it was not reasonably practicable for him to do so in light of the contentious relationship between Richard and Laurence, as manifested by Laurence's attempts to buy the East Bay property, his testimony against Richard in the divorce trial, his criticisms of Breach Inlet to food purveyors, and the obvious distrust between them. (R.p. 1029 Line 24 to R.p. 1030 Line 18). In his testimony at trial, Laurence candidly testified, "I don't want to be in the restaurant business with Richard"; (R.p. 702 Lines 17-25) and although it would be difficult but not impossible for them to continue as members together, he agreed it would not be practicable: "that's a good term". (R.p. 703 Lines 10-16).

Likewise, both Richard and Ted testified that it would not be reasonably practicable to carry on the business of the Boathouse at Breach Inlet with Laurence as a member. (R.p. 745 Line 1 to R.p. 746 Line 6) (R.p. 1029 Line 24 to R.p. 1030 Line 18).

In the Preliminary Hearing on standing, heard December 13-14-2018, Lori Stoney, Richard's ex-wife and 5% member of The Boathouse, testified that after she had been served with a subpoena in this case by Respondent's counsel to produce documents, she consulted with attorney McQuillan, who is presently Respondent's attorney in this case, because she

had also previously consulted with Mr. McQuillan about issues relating to The Boathouse at Breach Inlet. Although Ms. Stoney denied colluding with Appellant to file this lawsuit, she did admit to consulting with attorneys McQuillan and his partner Scott Barnes about the “disparate treatment of the members” of The Boathouse at Breach Inlet.

In that same preliminary hearing, Laurence Stoney admitted to communications with Lori Stoney before he filed this lawsuit. Lori emailed Laurence on March 9, 2016, asking who his accountant would be for this case, and then asked “What’s the latest? Still no word on the appeal, unfortunately.” (Referring to the pending appeal of her divorce case.) Laurence’s reply was: “The usual foot dragging crap. Last I heard, the accountants were going through the books. Comment from all – this is after they looked at the books, Dick is toast.” (emphasis added). (R.p. 321 Line 8 to R.p. 322 Line 15; Ex. 10, R.pp. 1120, 1121). “Dick”, in Laurence’s email, is Respondent Richard Stoney; and “Dick is toast” is a reference that Laurence casually dismissed in his testimony as “(no) acrimony...just a phrase”. (R.p. 322 Lines 14-23).

ARGUMENTS

I. INTRODUCTION.

The opening paragraphs of Appellant’s arguments propose that the Trial Court’s Order be reversed because of “the undisputed harm (suffered by) the company”, and suggesting that the Trial Court “excused” breaches of fiduciary duty by Richard Stoney.

Appellant’s opening argument improperly places the cart before the horse. Rule 23(b)(1) of the SCRCP expressly provides: “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.” Notwithstanding evidence of harm or loss to the corporation, therefore, the derivative lawsuit may not proceed -- it “may not be maintained”-- if it is determined that the putative plaintiff cannot fairly and adequately prosecute the interests of the corporation. In the case law, the competence of a putative plaintiff to bring the action under 23(b)(1) is recognized as a form of “standing”, as discussed below.

Appellant’s arguments about the harm suffered by the corporation therefore seek to obfuscate Laurence Stoney’s personal agenda in filing this case. The heart of the case presently centers upon the question of Laurence’s standing. The Trial Court properly held that he lacks standing, for the reasons discussed below. Accordingly, the case need go no further.

II. THE TRIAL COURT PROPERLY HELD THAT LAURENCE STONEY LACKED STANDING TO PROSECUTE A SHAREHOLDER DERIVATIVE SUIT PURSUANT TO RULE 23(b)(1) SCRCP.

It is a prerequisite of a stockholder derivative lawsuit brought under Rule 23 of the SCRCP that the putative plaintiff must “fairly and adequately represent the interests of the stockholders or members similarly situated in enforcing the right of the corporation or association”. Rule 23(b)(1), SCRCP. Although no South Carolina cases have discussed to any extent the factors weighing on the “fair and adequate representation” requirement, treatises and the case law elsewhere are universal in setting down the relevant considerations.

Perhaps the most substantial and frequently cited source of authority in the area of shareholder derivative litigation is contained in the federal cases and treatises. In 5 Moore’s Federal Practice-Civil, Section 23.1.09 [1] it is stated: “Rule 23.1(a) (the federal

rule equivalent of SCRCP 23(b)(1)) *provides that a representative plaintiff may only maintain a derivative action if the plaintiff fairly and adequately represents the interests of similarly situated shareholders in enforcing a right of the corporation. Constitutional requirements of due process mandate that absent shareholders are not bound by a judgment in a derivative action unless the named plaintiff is a fair and adequate representative. Because the representative shareholder seeks to protect interests that are broader than his or her own stake in the corporation, the representative stands in a fiduciary relationship with the corporation and the other shareholders."*

Moore's Federal Practice further describes in Section 23.1.09(3) the standard for evaluating the adequacy of a putative plaintiff's representation. *"For a plaintiff to be a fair and adequate representative, the plaintiff must have the capacity to vigorously and conscientiously prosecute a derivative suit and must not have interests that are antagonistic to those of the other shareholders."*

"In addition, the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation."

"The application of these general principles is highly dependent on the facts of a particular case. The following factors bear on the adequacy of the representative plaintiff:

- 1. Economic antagonism between the representative and the class;*
- 2. The remedy sought by the plaintiff in the derivative action;*
- 3. Indications that the named plaintiff was not the driving force behind the litigation;*
- 4. Plaintiff's unfamiliarity with the litigation;*
- 5. Other litigation pending between the plaintiff and the defendant;*

6. *The relative magnitude of the plaintiff's personal interests in matters beyond the scope of the derivative action, as compared to his or her interests in the derivative action;*

7. *The plaintiff's vindictiveness toward the defendants; and*

8. *The degree of support the Plaintiff received from the other shareholders that he or she purports to represent."*

"A plaintiff will not be disqualified as a representative merely because of conflicting interests that go beyond the subject matter of the derivative action."

In support of the factors cited above, *Moore's* cites *Davis v. Comed, Inc.*, 619 F.2d 588, 593-594 (6th Cir.1980). Also cited in support of *Moore's* § 23.1.09 [3]: *GA Enterprises, Inc. v. Leisure Living Communities, Inc.*, 517 F.2d. 24, 26 (1st Cir.1975); *Vanderbilt v. Geo Energy Limited*, 725 F.2d. 204, 207 (3rd Cir.1983); *Larson v. Dumke*, 900 F.2d 1363, 1368 (9th Cir.1990).

In the case of *Smith v. Ayres*, 977 F2d 946 (C.A. 5), the Fifth Circuit Court of Appeals decision cited by the trial court in its order, and argued to the trial court by all parties, and also cited in *Moore's Federal Practice* discussed above, the Court of Appeals affirmed a District Court ruling that the putative plaintiff lacked the requisite standing to maintain a shareholder derivative lawsuit. The Court's reasoning was almost exclusively based upon the evidence of plaintiff's personal vindictiveness toward the defendant.

In that case, Smith was a "class of one" plaintiff in a closely held corporation, who sought to sue Ayres, the corporation's attorney, in the name of the corporation. Observing that Smith, unlike the plaintiff in the cited case of *Larson v. Dumke*, 900 F.2d 1363 (9th Cir.1990), was not the individual who created, nurtured and operated the corporation from

inception; and Smith retained only a negligible interest in the corporation, the court observed that “a Plaintiff in a derivative action owes the corporation his undivided loyalty. The Plaintiff must not have ulterior motives and must not be pursuing an external, personal agenda.” 977 F.2d. 949. The court further observed that Smith had “an unmistakable personal and professional dispute with Ayres. His brief is peppered with vituperative epithets, pugilistic metaphors, and descriptions of Ayres as ‘satanic’ and ‘evil’”. Smith was quoted as saying he is committed to “ruin ten years of (Ayres’ life) because I’m going to make sure that Pat Holloway prevails...and he – if he thinks this is even the end of the tenth round, I mean we’re – we’re not even in the first round.”. 977 F.2d at 949.

Smith’s words in *Smith v. Ayres* are eerily reminiscent of Laurence Stoney’s words in this case as recounted by Ted Stoney, describing the conversation he had with Laurence in the back bar of the Carolina Yacht Club in 2015, shortly before this case was filed:

“Then he launched into a tirade about Richard and the same thing, the money being used for Breach Inlet for other entities and he wasn’t getting his fair share and he needed his money and Richard was skimming, you know, money from one to pay for the other. And then he said, I’m going to get Richard. I’m going to turn his whole world upside down.” (R.p. 379 Line 6 to R.p. 380 Line 9; R.p. 1028 Line 5 to R.p. 1029 Line 5). This was “several months prior to” the filing of this case. (R.p. 380 Lines 16-19).

The case of *Davis v. Comed, Inc.*, supra, cited above in *Moore’s Federal Practice*, which was also cited by the trial court in its order, and argued to the trial court by both parties, is particularly instructive as the source case for the eight factors in evaluating the quality of standing, quoted above in *Moore’s*. See 619 F.2d at 593, 594. *Davis* is extensively cited in derivative cases from multiple jurisdictions.

The *Davis v. Comed* court expressly rejected earlier decisions which held that a shareholder's motive in bringing the derivative action was immaterial to his right to sue in Federal Court if the corporation had been injured by the wrongful act of an officer or director, because "in prosecuting a derivative claim, a shareholder acts in the stead of the corporation, as a corporate surrogate seeking vindication of a corporate right." 619 F.2d at 593. Thus, "should any 'ulterior' motives of plaintiffs which are inimical to their ability to adequately represent the other shareholders become manifest, the court is free to make appropriate adjustments." *Id.*

"The proceeds of the action belong to the corporation and it is bound by the result of the suit. The heart of the action is the corporate claim." *Davis v. Comed, Inc.*, *supra*, 619 F.2d at 593 citing *Ross v. Bernhard*, 396 U.S. 531, 538-39, 90 S. Ct. 733, 738, 24 L.Ed.2d 729 (1970). The assurance demanded by due process and Rule 23 is that the representative party in a class action be free of any interests which holds the potential of influencing his conduct of the litigation in a manner inconsistent with the interests of the class." *Id.* citing *Seiden v. Nicholson*, 69 F.R.D. 681, 687 (N.D.Ill. 1976); *Schulman v. Ritzenberg*, 47 F.R.D. 202, 207 (D.D.C.1969).

As recounted in the Statement of Facts of this Brief, evidence of Laurence's vindictive animus consists of far more than his overt threat made to Ted before filing this lawsuit which is recounted above. There was the meeting in Richard's law office as early as 1999, in which Laurence threw a fit over the prospect that Richard would be paid a car allowance, and that the paintings hanging at Boathouse on East Bay would belong to Richard.

There was Laurence's backstabbing attempt to surreptitiously buy the property on which Boathouse on East Bay was located, knowing that Richard and Ted were negotiating to buy the property in order to protect the interests of the company. Laurence's intervention caused Richard and Ted to pay a higher price for the land. When asked why he did not tell them he was also trying to buy the land, Laurence responded, "why would you tell your competitors?" (Emphasis added.)

Further, there was the evidence that Laurence denigrated the credit standing of The Boathouse at Breach Inlet to its food vendor creditors.

In Richard's divorce trial with his wife Lori, Laurence voluntarily met with Lori and her lawyers, and testified at trial that he would support the removal of Richard and the substitution of Charleston restaurateur Bill Hall as Manager of The Boathouse at Breach Inlet.

Laurence's interests in filing this case have always been to seek payment for the distributions he believes were not fairly paid to him. In the Family Court Hearing in Orangeburg, as well as in the trial of this case before Judge Newman, Laurence agreed that the crux of this case is "where is my money?" (R.p. 303 Line 13 to R.p. 304, Line 11; R.p. 364 Lines 1-4).

This evidence conclusively supports the Trial Court's findings that Laurence's filing and prosecution of this case was for the purpose of recovering his distributions, notwithstanding Laurence professing that it was brought to restore funds to the company, and that the suit's purpose was further to vindicate Laurence's personal animus for his cousin Richard.

Perhaps the strongest evidence to support the conclusion that this case is about Laurence's distributions is his rationale for the proposition that he is a "class of one"; that no other member is "similarly situated".

Laurence holds a 5% interest in The Boathouse at Breach Inlet, LLC. But there are three other 5% members, as well: Lori Stoney, Croft Stoney (whose 5% interest is legally held by Lori as Trustee), and Richard Stoney, III (whose 5% interest is held in trust by his Uncle Ted). Why and how is Laurence's 5% interest different from the other three?

The difference between them is that the others received distributions when Laurence did not. He testified:

Q. Okay. So you are a class of one?

A. Correct.

Q. Right? Now, is it correct that what makes you a class of one is that everybody's got distributions when you did not?

A. They enjoyed distributions in one form or another and I did not.

Q. And you did not. So the distinction in the classes has to do with the distributions; isn't that correct?

...

Q. So the factual distinction between you and the rest of them is, they got distributions and you didn't, isn't that right?

A. That is my stance, yes.

(R.p. 333 Line 11 to R.p. 334 Line 4)

Thus, the very essence of Laurence's status as a plaintiff in this case centers on his distributions; the fact that he received less in distributions than did others, including the

other 5% members. Laurence's distributions comprise his central purpose in filing this case.

In his Brief, Appellant pays only lip service to the essence of Trial Judge Newman's ruling that Laurence cannot fairly and adequately represent the interests of the company because of his personal vindictiveness toward Richard, and because of his underlying motivation to recover his distributions. Appellant in his Brief (pages 19-23) relies upon and cites the case of *Walbeck v. The I'on Company, LLC*, Op.No.5588 (Ct.App. filed August 8, 2018; Shearouse Advance Sheet No. 32 at 125) ("*Walbeck I*"), for the proposition that the test for standing required to prosecute a shareholder's derivative lawsuit is only "that the representative will vigorously protect the interests of the company through qualified counsel".

Appellant, in his Brief, then dismisses the trial court's reliance upon *Davis v. Comed*, supra and *Smith v. Ayres*, supra, as "out of circuit Federal cases", apparently to suggest that those cases carry no weight in South Carolina courts on the standing issue now before this Court.

In the first place, as Appellant acknowledges in his Brief, the opinion in *Walbeck I* was withdrawn by the Court of Appeals, and its replacement decision, *Walbeck v. I'on Company, LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct.App. 2018) ("*Walbeck II*"), as Appellant also concedes, does not address at all the standing issue discussed in *Walbeck I*.

Additionally, and more significantly, the standing criteria from *Walbeck I*, argued by Appellant to be that "the representative will vigorously prosecute the interests of the company through qualified counsel", cites for the proposition the case of *Runion v. U.S. Shelter*, 98 FRD 313, 317, a 1983 South Carolina District Court decision. However,

Runion was a Rule 23 class action lawsuit and was not a shareholder derivative lawsuit. For a multitude of reasons, therefore, the *Walbeck I/Runion* criteria argued by Appellant simply do not apply to this case, nor to any shareholder derivative lawsuit, for that matter. Appellant's reliance on *Walbeck I* is misplaced.

Appellant's casual dismissal of *Davis v. Comed*, supra, as an "out of circuit Federal case" disrespects the stature of the case. *Davis* has been cited in no fewer than 68 Federal Court opinions and 42 State Court opinions, as well as in law review articles and, as before discussed, in legal treatises including *Moore's Federal Practice*. It is fair to say that the *Davis v. Comed* standing criteria are universally accepted and applied in American jurisprudence.

At the same time, *Davis v. Comed*, as well as its progeny, recognizes that no single factor is determinative of the standing issue, and that each case must be assessed on its own facts. As articulated in *Davis*, although it is frequently a combination of factors which leads a court to conclude that a Plaintiff does not fulfill the requirements for standing, "often a strong showing of one way in which the Plaintiff's interests are actually inimical to those he is supposed to represent fairly and adequately, will suffice in reaching such a conclusion". *Davis v. Comed*, supra, 619 F.2d.593. (Emphasis added.)

Without regard, however, to any rigid checklist of criteria, the essence of standing requires that the representative plaintiff be free to act in vindicating the corporate interests without extraneous entanglements; that is to say, "unfettered" by them. As demonstrated by the evidence in this case, Laurence Stoney is fettered by his thirst to recover distributions that he believes were wrongfully withheld from him. More significantly,

Laurence seeks vengeance against his cousin Richard, as expressed by his own words: “I’m going to get Richard. I’m going to turn his world upside down”.

The Trial Court’s ruling, that Laurence is not a fair and adequate representative because he is acting out of vindictiveness, spite, and for personal gain, must be affirmed.

Appellant’s arguments about the harm suffered by the corporation therefore seek only to obfuscate Laurence Stoney’s personal agenda in filing this case.

Credibility of the Witnesses; Appellant’s Personal Agenda.

Trial Judge Newman heard the evidence in this case in two lengthy and contested hearings, spanning a total of five days. (R.pp. 273-451; R.pp. 502-1108). Most significantly, the Trial Judge had the full opportunity to assess the evidence and the credibility of the witnesses. Judge Newman heard testimony from the three Stoney cousins, Laurence, Richard, and Ted, in both of the hearing sessions.

No appellate record can begin to replicate the credibility of a witness, his demeanor on the witness stand, the manner in which he speaks the words later appearing in a printed transcript.

At times, however, the printed words suggest the demeanor of the witness as he expresses them. For example, in the first Hearing in this case held December 13-14, 2018, Laurence testified that he had paid “around \$200,000” in fees and costs as of that date to prosecute this case; and he agreed that in his deposition he had testified “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 8 to R.p. 297 Line 2). Although Laurence did not testify about his fee payments in the 2020 Hearing, his expert accountant, Mr. Hollerbach, testified that as of that date he alone had been paid \$80,000.

Laurence admitted that he had accused Richard of “skimming” funds and that he had asserted that to a multitude of people: “I have no problem with telling the truth.” (R.p. 292 Line 19 to R.p. 293 Line 15). He admitted that he had concealed from Richard and Ted his efforts to buy the East Bay property, while Richard and Ted were also attempting to buy it to protect the interests of the company, and stated: “Why would you tell your competitor?” (R.p. 720 Lines 18-23). (Emphasis added.)

Although professing to be “close” with Richard, Laurence testified that their relationship changed “when the checks from Boathouse at Breach Inlet stopped coming in”. (R.p. 285 Lines 9-20; R.p. 726 Lines 6-15).

Laurence also testified, “Listen, Capers, I had suspicions and told you I’ve had suspicions. But I never had any proof. And it took lawyers in courtrooms in order to get the proof. Now can we dispense with a lot of this repetition?” (R.p. 733 Lines 3-13). And, “Come on, man. Bring that letter out and I will read that sentence to you again so maybe you will understand why I didn’t do anything. I trusted my first cousin.” (R.p. 734 Lines 4-10). And, “What difference does it make if it’s (Richard’s office) physically near me? What difference does that make, Capers? Tell me about it. Q: How long would it take you to walk from your office to Richard’s office? A: It’s very close, Capers. We’ve already established that. I want you to tell me what the difference is between me and Los Angeles, California.” (R.p. 742 Lines 1-9) (This exchange was in reference to questions why Laurence did not accept Richard’s offer to examine the business records in Richard’s office.).

Laurence was questioned about an email he wrote to Richard on December 17, 2014 (Exh.6; R.p. 1114, 1115) in which he told Richard, “make your best offer” to buy him

out. (R.p.315 Line 16 to R.p. 316 Line 4). In part his answer was, “Good God, how many times are you going to ask the same question?” (R.p. 341 Line 25 to R.P. 342 Line 1).

The testimony of Laurence Stoney recited above suggests the arrogance and the hostility he openly expressed in his demeanor on the witness stand. While openly professing love for his first cousin Richard, Laurence was at the same time backstabbing him by slandering his name to their social friends, by denigrating the credit standing of the Boathouse Restaurant, and by surreptitiously bidding against Richard and Ted for the East Bay property.

Appellant attempts to discredit the evidence of his malevolence toward Richard by deflecting that evidence: it (the evidence) is not, Appellant argues, “possible negative conduct toward the company”. (Brief at pg. 22). In other words, Appellant argues that the magnitude of the evidence of Laurence’s improper motivations, because they are not “directed toward the company”, should be disregarded.

Appellant’s argument overlooks the reality that The Boathouse at Breach Inlet, LLC is predominantly a family, closely held LLC. But for Greg Holmes and the non-voting interest of Michael Cox, the members are all Stoneys. For all intents and purposes, Laurence’s misconduct directed at The Boathouse at East Bay property was Stoney misconduct directed at other Stoneys, who were also members of the Boathouse at Breach Inlet. Laurence’s attempt to buy the East Bay property was more than deceitful. His attempts to remove Richard as Manager of Breach Inlet, in collusion with Lori in the divorce case, was “negative conduct toward the company”. His personal agenda in filing this action because he had not been paid his fair share of the distributions is “negative conduct toward the company.” His vindictive agenda, to retaliate against Richard,

“whatever the cost”, is negative conduct toward the company. And his denigration of the company’s credit standing is certainly, as Appellant seems to concede, “negative conduct toward the company”.

Appellant carries the burden of persuading this Court in its *de novo* review of the Trial Record that Judge Newman’s factual conclusions must be reversed. Appellant has failed to do that.

Perhaps Judge Newman’s factual characterization of Laurence’s misconduct as breaching an implied covenant of good faith and fair dealing should have been more appropriately characterized as evidence of his vindictiveness, his spite, and his personal agenda to recover his distributions; and to have another party pay the fees and costs of that effort. The findings should certainly not be disregarded, as Appellant urges this Court to do.

III. THE TRIAL COURT DID NOT CONCLUDE THAT LAURENCE COULD HAVE BROUGHT THIS ACTION IN AN INDIVIDUAL CAPACITY.

Appellant’s lead argument on the standing issue is that the Trial Court erred by holding Laurence could have brought this derivative action in his individual capacity. The argument is a red herring. The Trial Court did not hold that Laurence could bring a shareholder derivative suit in his individual name. Rather, and because the Trial Court also found that Laurence’s underlying motivation was for personal gain to recover his own distributions, the Court found that Laurence could have filed suit to recover those distributions under Code § 33-44-410. That is the Code section cited by the Court in its Order. The Court’s finding has nothing to do with a derivative suit, but rather provides the

circumstances under which Laurence as an individual may sue for his personal claim of loss. Laurence chose not to pursue that course of action.

IV. THE TRIAL COURT PROPERLY ORDERED THE DISSOCIATION OF LAURENCE STONEY'S INTERESTS IN THE LLC.

A. The evidence at Trial was overwhelming that it is “not reasonably practicable” to carry on the business with Laurence as a member.

“The term ‘dissociation’ refers to the change in the relationships among the dissociated member [of an LLC], 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 v. R&D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012), citing S.C. Code § 33-44-601. “[A]n action for dissociation is [...] equitable in nature.” *Id.* See also *Ballard v. Robinson*, wherein the South Carolina Supreme Court affirmed the trial court’s decision, ordering a Company to buy the stock of a minority shareholder who had filed a derivative action against the majority. In rendering its decision, the Supreme Court noted that “[a] shareholder’s derivative action, as well as stockholder oppression, is one in equity.” 399 S.C. 588, 733 S.E.2d 107 (2012).

The South Carolina Uniform Limited Liability Company Act of 1996 (the “Act”) sets forth the procedure for dissociation of LLC members and buyout of their membership interests. Specifically, S.C. Code § 33-44-601(6)(iii) states:

Events causing member’s dissociation. A member is dissociated from a limited liability company upon the occurrence of any of the following events: [...] (6) on application by the company or another member, the member’s expulsion by judicial determination because the member: [...] (iii.) engaged in conduct relating to the company’s business which make it not reasonably practicable to carry on the business with the other member. [Emphasis added]

In addition, § 33-44-702 of the Act authorizes the Court to determine the fair value of a party's distributional interest, setting forth the factors that the Court should consider.

The Boathouse at Breach Inlet, LLC Operating Agreement authorizes the Company to buy out a Member's interest upon their dissociation from the Company. Section 3.24 of the Operating Agreement sets forth the agreement of the parties:

§ 3.24 Buyout of disassociating member.

If, following the death, retirement, resignation, **expulsion**, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company, a Majority in Interest of the remaining Members vote to continue the Company, **the disassociating Member shall be entitled to receive any distribution which the disassociating Member was entitled to receive prior to the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company.** Subject to any Agreement of the Members otherwise, **the Member shall additionally receive the fair value of the Member's Membership in the Company as of the date of the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company determined as provided in Section 33-44-701 of the Act.** The date of payment shall be made pursuant to the provisions of Section 33-44-701 (b) of the Act. [Emphasis added]

In the case of *I.E. Test, LLC v. Carroll*, 226 NJ 166, 140 A.3rd 1268 (S.Ct. N.J., 2016), cited by all parties to the Trial Judge, the New Jersey Supreme Court reversed an order of dissociation citing, among other decisions the Colorado case of *Gagne v. Gagne*, 2014 COA 127, 338 P3d 1152 (Ct.App, Colo. 2014), and articulating a seven factor test to determine whether the conduct of a member "makes it not reasonably practicable to carry on the business with the member", as follows:

- a. The nature of the LLC member's conduct relating to the LLC's business;
- b. Whether, with the LLC member remaining a member, the entity may be managed so as to the promote the purposes for which it was formed;
- c. Whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals;
- d. Whether there is a deadlock among the members;
- e. Whether, despite that deadlock, members can make decision on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions;
- f. Whether, due to the LLC's financial position, there is still a business to operate; and
- g. Whether continuing the LLC with the LLC member remaining a member is financially feasible.

The New Jersey Court in *I.E. Test* emphasized that every case is fact specific, requiring an analysis of the record using the factors, and other considerations raised by the record, with no requirement that all factors support expulsion and no single facts determining the outcome. 140 A.3rd at 1279.

The phrase "not reasonably practicable to carry on the business" with the member is not defined in the statute. New Jersey's statute and South Carolina's contain almost identical provisions, both derived from uniform acts. It is a prospective, forward-thinking standard, looking to the future of the operations of the business *I.E. Test*, 266 NJ at 181-182.

As for the phrase “not reasonably practicable”, the *I.E. Test* court wrote: “interpreting the statutory text, ‘we ascribe to the statutory words their ordinary meaning and significance.’ (Citations omitted). Black’s Law Dictionary defines ‘reasonable’ to mean ‘fair, proper or moderate under the circumstances; sensible.’ *Black’s Law Dictionary*, 1456 (10th Edition, 2014). It defines ‘practicable’ to denote ‘reasonably capable of being accomplished; feasible in a particular situation.’ Thus, the pivotal language suggests that it must be unfeasible, despite reasonable efforts, to keep the LLC operating while the disputed member remains affiliated with it.” 226 NJ at 182.

Analyzing the Boathouse case in light of the seven factors set forth in *I.E. Test*, where the court need not find that all factors have been established (see *Gagne*), it is apparent that dissociation was properly ordered.

From the testimony of Richard Stoney and Ted Stoney, and Laurence Stoney himself, in the bifurcated hearing on standing, it is apparent that Laurence is an obstructionist and an outlier. He has been critical not only of Richard Stoney, but, more importantly, of the operation of the restaurant, itself, causing economic harm. Whereas Laurence had the constitutional right to file this lawsuit, when he did so he also released that fact to the newspapers, which published derogatory reports, not so much about Richard Stoney, but about the restaurant and its operations. The newspaper article is of record from the bifurcated hearing on December 13-14, 2018.

Dissociation of Laurence Stoney from the Boathouse does not deprive him of a property right or deny any benefits. Rather, he is entitled to fair compensation for his interest, which may be determined at court hearing.

Appellants argued to the Trial Court, and now argue to this Court, the impropriety of ordering dissociation based upon the fact that Laurence filed this derivative lawsuit. They now argue: “it would be nonsensical to require the expulsion of a Member simply for seeking a statutorily guaranteed right to redress the misconduct to the LLC’s Manager.” The argument borders on the disingenuous. It is not the filing of the lawsuit by Laurence that justifies dissociation in this case. Rather, it is the evidence of his underlying bad faith and dishonest misconduct that supports the Trial Court’s order of dissociation.

The statutory standard, enumerated in Code § 33-44-601(6)(iii) is whether the member “engaged in conduct relating to the company’s business which makes it not reasonably practicable to carry on the business with the other members”. The examples of Laurence Stoney’s misconduct in his dealings with the company and its members have been recounted in great detail in the previous sections of this Brief. One of the more telling circumstances, early in the relationship, relates to the reasons why Laurence was not invited to participate in other restaurant ventures after the Boathouse on East Bay experience. As Ted Stoney testified, Laurence was not invited to participate in any of the other restaurant ventures after Boathouse on East Bay because of his disruptive nature: “Due to the ongoing problems that he was causing for the restaurants with personnel, vendors, bankers, you name it, friends, general public, Richard did not want him to be involved in any other restaurants. (R.p. 377 Line 11 to R.p. 378 Line 2; R.p. 1007 Lines 8-25).

But the most conclusive evidence to support the Trial Court’s finding that it is not reasonably practicable for the LLC to continue business with Laurence as a member is the direct testimony presented by Laurence, Ted, and Richard, themselves.

Laurence testified: "...I don't want to be in the restaurant business with Richard. Okay." (R.p. 702 Lines 24 and 25); and: "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: But not practicable? A. Not practicable, that would be a good term." (R.p. 703 Lines 10-16). (Note: the printed transcript at the question on R.p. 703 Line 10 correctly uses the term "practicable". The question as reported on Line 15 uses the term "practical", as does the answer on Line 16. The undersigned suggests that this is an error in transcription, and that the word "practicable" was used throughout. Nevertheless, the terms are synonymous in the context of the testimony.)

Ted Stoney testified: "As Richard stated earlier, his intention was to allow the original investigators (*sic*: "investors") to continue participating in the restaurants as he built his plan portfolio. Unfortunately, by the time the next restaurant which was the Lake Julian in Asheville, Laurence was already such an antagonistic and destructive member to the two existing LLC's that he was – he wanted to, but he was not invited to participate in Lake Julian. "Q: Do you believe that it is reasonably practicable to continue the operation of The Boathouse at Breach Inlet with Laurence Stoney as a Member? A: Absolutely not." (R.p. 1030 Lines 5-18).

Richard Stoney testified: "Q: Did you and Ted end up buying the building? A: We did. And as a result of Laurence interfering, Ted reminded me – or some notation, I forgot how much. We spent – we ended up \$100,000 to \$200,000 more for the building. Because the Drews said if you don't do it, they're going to buy it. And I think Bill Craig is the one that brought some sensibility to the two Drew brothers. Q: Richard do you believe that it is

reasonably practicable to continue the operation of the Boathouse at Breach Inlet with Laurence continuing as a Member.” (Objection Colloquy here not repeated.) Q: Do you believe it is reasonably practical (*sic*, practicable.) to continue the operation of The Boathouse at Breach Inlet with Laurence Stoney as a member? A: Forward in time, I absolutely do not. And Laurence obviously agreed yesterday. Q. Is it feasible to keep the LLC operating while he is a member? A: No.” (R.p. 1004 Lines 2-17; and R.p. 1005 Lines 12-19).

This unanimous consensus between the three Stoney cousins is a rarity in this case. There can be no more overwhelming evidence than their unified testimony, particularly from Laurence, that it is not reasonably practicable for the LLC to continue with him as a member.

The Trial Court’s Order of Dissociation must be affirmed.

B. Appellant’s argument that the Trial Court’s Ruling of Dissociation is in error because Laurence was not an individual party in the case, is not preserved for appeal.

At no place in the substantial Trial Record of this case did Appellant assert the issue he now argues, that he was not an individual party to the action, and therefore the Trial Court erred in granting the Motion to Dissociate against his individual interests.

Rather, that position by Appellant appears for the first time in a terse, single paragraph of his Motion to Alter or Amend filed July 16, 2020. A party may not use a post-trial motion to raise an issue that could be been raised at trial. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995); see also, *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 512 S.E.2D 123 (Ct. App.199).

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus (the Appellate Court) with a platform for meaningful appellate review. *S.C. Coastal Conservation League v. S.C. DHEC*, 380 S.C. 349, 669 S.E.2d. 899 (Ct.App.2008) citing *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). An issue cannot be raised for the first time on appeal. *South Carolina Coastal Conservation League v. South Carolina DHEC*, supra, internal citations omitted. The issue must have been raised to and ruled upon by the trial judge to be preserved for review. Id. An appellate court will not consider issues on appeal which have not been preserved for appellate review. To preserve as issue for appeal, it must be (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. Id. citing *Ulmer v. Ulmer*, 369 S.E. 486, 490, 632 S.E.2d.858, 861 (2006). *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2017) (citing Jean Hoefer Toal et al. Appellate Practice in South Carolina 57 (2d ed. 2002)). Without an initial ruling by the trial judge, a reviewing court would have no foundation on which evaluate whether an error has been committed. Id., internal citations omitted.

A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not raised. *S.C. Coastal Conservation League v. S.C. DHEC*, supra, citing *Fields v. Regional Medical Center of Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

Thus, it is crystal clear that the issue that Appellant now seeks to raise was not preserved in the Court below.

C. The issue of Richard’s “unclean hands” relating to the Motion for Dissociation is not preserved for Appeal.

Just as the Appellant’s argument that the Order of Dissociation was improper because he was not an individual party in the case was not preserved for appeal, neither is Appellant’s argument preserved that Richard’s unclean hands bar the Order of dissociation. Appellant’s first and only assertion to the Trial Judge that Richard’s unclean hands should bar the Order of dissociation appears in his Motion to Alter or Amend the Court’s Final Order.

As discussed above, a party cannot use a Rule 59(e) Motion to present an issue to the Court that could have been raised prior to judgment but was not raised. *S.C. Coastal Conservation League v. SCDHEC*, supra. As previously written, issue preservation rules are designed to give the Trial Court a fair opportunity to rule on the issues, and thus to provide the appellate court with a platform for meaningful appellate review. *S.C. Coastal Conservation League v. SCDHEC*, supra. Here, the Trial Court was not given that fair opportunity.

As was the case with Appellant’s lament that the Order of dissociation was improper because he was not an individual party, it is likewise clear that Appellant raised the issue of Richard’s “unclean hands” with respect to dissociation for the first time only in his Motion to Alter or Amend.

Respondent concedes that Richard’s “unclean hands” was argued at trial, but only with respect to Richard’s defense of *laches*. It is not sufficient that the argument about “unclean hands” was made generally or as to another issue in the case. As set forth above, to preserve an issue for appeal it must be (1) raised to and ruled upon by the Trial Court,

(2) raised by the Appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. *S.C. Coastal Conservation League v. SCDHEC*, supra (emphasis added).

Richard's "unclean hands" as a bar to the motion for dissociation was neither raised to nor ruled upon by the Trial Court, much less raised by the Appellant to the Trial Court in a timely manner, or raised with sufficient specificity.

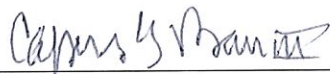
Accordingly, the Trial Judge's Order of Dissociation should be affirmed.

CONCLUSION

After a cumulative five days of trial over a span of two years, the trial judge was eminently qualified to evaluate and to assess the evidence and the credibility of the witnesses. In this Appellate, *de novo* review of the trial court's decision, Appellant has failed to sustain his burden of convincing this Court that the rulings of the Trial Court should be disturbed. The Trial Court's Order should be affirmed in all respects.

Respectfully,

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May 21, 2021

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May 21 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman,
Circuit Court Judge

Case No. 2015-CP-10-05463

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

vs.

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

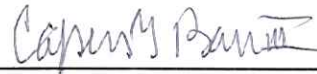
Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr.
and Gregory G. Holmes, Third-Party Intervenors,
of whom

Richard S. W. Stoney, individually and as Member-Manager of The
Boathouse at Breach Inlet, LLC is.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Respondent complies with Rule 211(b),
SCACR.

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May 21, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants
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, individually and as Member-manager of The
Boathouse at Breach Inlet, LLC is Respondent.

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ARGUMENTS IN REPLY¹

For the most part, the parties agree on the facts. The primary difference between the two briefs lies with where the focus is placed: Laurence looks to the management of the Company, the Boathouse at Breach Inlet, LLC, and Defendants look to Richard individually and all of his restaurant ventures. Richard, however, is not the Company, and those other ventures were different entities with different members and as such, it was improper for Defendants to use the Company, as a “blood donor” to support Richard’s other business ventures and himself personally.

While Richard’s strategy for managing his various businesses may have helped support Richard’s lifestyle and helped keep some of his other businesses afloat for a while, it did not serve the Company, which Defendants admitted suffered more than \$4,000,000 in losses as a result. Defendants have no intention of restoring those funds, even when advised that this practice was improper. A review of the Complaint and Amended Complaint show that this was not an action to recover distributions for Laurence, but was rather an effort to restore Company assets. (R. at 43-59, 151-73). Further, given the circumstances here, Laurence was the only member likely to seek to vindicate the Company’s rights.

I. Laurence had standing to bring this action as a class of one.

Rule 23(b)(1), SCRCP provides in part:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the

¹ Terms in this brief have the same meaning as in the Brief of Appellant.

shareholders or members similarly situated in enforcing the right of the corporation or association.

(emphasis added). Pursuant to Rule 43(k), SCRCF, the parties “stipulated that Laurence O. Stoney is not similarly situated to any other member of the Boathouse at Breach Inlet, LLC.” (R. at 207-08). Laurence was not similarly situated because he was the only member of the Company that did not benefit from Defendants’ improper use of Company funds. As the Complaint and Amended Complaint indicate, the action was not brought to force distributions, but rather to reclaim the monies Defendants had wrongfully taken from the Company. (R. at 43-59, 151-73).

For this reason and for purposes of Rule 23(b)(1), Laurence is only required to fairly and adequately represent his interests in enforcing the Company’s rights. The rule makes it clear that one member can assert a derivative action and that a party bringing a derivative action is only tasked with fairly and adequately representing the interests of “members similarly situated.” This language provides a procedural device for parties like Laurence, who find themselves in the position of being the only investor in a business entity with an incentive to address harm to that entity, with the ability to bring an action to enforce that entity’s rights.

Defendants rely heavily on *Davis v. Comed*, 619 F.2d 588 (6th Cir. 1980), but do not address the Company’s arguments that Laurence meets the eight part test set forth in that case. They instead focus entirely on what they characterize as “vindictiveness.” Defendants continue to point to incidents involving other restaurants in support of their argument that Laurence does not have standing here as to the Company. The Boathouse on East Bay, LLC is not the Company. Therefore, the pages devoted by Defendants in their brief to the Boathouse on East Bay and any conduct by Laurence relating to the Boathouse on East Bay are simply irrelevant to the issue at hand.

With respect to the testimony Laurence gave in Richard's divorce, there is no evidence that a change in management would have hurt the Company. It might have been harmful to Richard and his ability to "rob Peter to pay Paul," but it was not disloyal to the Company.² Nor is there evidence that transferring Richard's interest to Lori as part of the divorce would have been harmful to the Company. Again, it might have been harmful to Richard, but it was not disloyal to the Company.

Seeking to restore the Company's assets by way of this litigation was most certainly not negative conduct toward the company. Again, it may have negatively impacted Defendants, but the object was to protect the Company. Further, a derivative action is the only means of addressing harm to the Company. *Wilson v. Gandis*, 430 S.C. 282, 311, 844 S.E.2d 631, 647 (2020); *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).

Defendants do not address any of the cases cited by the Company that treat the rights of minority members of small, closely held companies to bring derivative actions, nor do they address that the trial court's order leaves the Company with no remedy. As noted by the Supreme Court of Texas in a case stemming from the efforts of one investor in a small corporation to bring a derivative action,

If a wrong has been done, it is the corporation which must be compensated for the wrong. Even if [the party bringing the action] has been harmed by the wrong, he may not recover personally. *Since no direct action by [the party bringing the action] is possible, the lawsuit is either derivative or nonexistent.*

² In reviewing Richard's divorce action, this Court noted that "[t]hroughout the trial, Husband [Richard] referred to 'robbing Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 70, 819 S.E.2d 201, 207, 214 (Ct. App. 2018) (noting that Breach Inlet was Richard's "only income-producing asset" "which he in turn used for personal expenses or to satisfy other obligations" as well as Richard's "evasive" "antics" and "contemptuous behavior" before the family court).

Eye Site, Inc. v. Blackburn, 796 S.W.2d 160, 161 (Tex. 1990) (citations omitted; emphasis added). In applying the Texas equivalent of Rule 23(b), SCRCP, the *Eye Site* court noted numerous federal court cases and recent trends in reaching the following holding, “[t]he literal terms of [the Rule] and the need to provide a remedy in instances of corporate misconduct convince us that we cannot preclude the sole dissenting shareholder in a close corporation from enforcing the right of the corporation.” *Id.* The same logic should apply in this case where it is stipulated that there are no other “similarly situated” members.

The analysis provided by the Virginia Supreme Court in *Cattano v. Bragg*, 727 S.E.2d 625 (Va. 2012) is helpful here. In that case, the minority member of a two-person lawfirm brought a derivative action to recover for harm to the business at the hands of its majority shareholder. The *Cattano* court cited a long list of cases where a class of one successfully sought to maintain a derivative action. *Id.* at 628. The Court then considered the *Davis* factors, noting that these factors are “not exclusive and must be considered in the totality of the circumstances found in each case.” *Id.* at 629 (quotation omitted).

The *Cattano* court then made the following ruling:

While the present case contains economic antagonism as well as apparent animosity between the Firm’s only two shareholders, we do not find this to be a determinative factor when evaluating a closely held corporation; nor do we find it determinative that the sole other shareholder does not support the derivative suit. To so hold would be to enact a de facto bar on derivative suits in two-shareholder corporations. Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations. Nevertheless, a single shareholder derivative claim is still possible, provided that the totality of the circumstances support a finding that the plaintiff’s personal interests do not preclude the shareholder from fairly and adequately representing the corporation. In closely held corporations, we 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.

Id. The Court ultimately found that the minority shareholder could maintain suit based on the totality of the circumstances and provided the following analysis of the *Davis* factors:

[T]he “totality of the circumstances” combine to show that Bragg “[f]airly and adequately represent[ed] the interests of the corporation” The remedy sought—the return of funds, misappropriated by an officer, to the corporation—is highly appropriate for a derivative claim. There is no evidence in the record of external parties motivating Bragg, and she is intimately familiar with the litigation. Bragg’s additional individual claims—breach of contract and judicial dissolution—do not reflect an inappropriate conflict of interest. Significantly, as a portion of the funds returned would go to her upon dissolution, Bragg’s personal interests are in line with those of the corporation, so that the return of assets to the Firm will clearly be vigorously litigated.

Id.

Similarly, in this case, it should not be disqualifying that Richard and Laurence do not get along. Especially where that disagreement, at least in part, flows from Laurence’s efforts to restore Company assets. If that were the case, no minority owner of a closely held business would ever be able to pursue recovery on behalf of the business. The type of conduct at issue here—among other things, taking over \$4,000,000 from the Company— will necessarily engender hard feelings on the part of the minority member.

For these reasons, the trial court erred in finding Laurence did not have standing to pursue this action on behalf of the Company.

II. The trial court erred in granting Defendant’s request for dissociation.

Defendants have not responded to the argument that the Company can and does function with Laurence as a member. Nor do they respond to the argument that he cannot receive the fair value of his investment unless the Company’s assets are restored. Instead, they focus once again on the relationship between Laurence and Richard. That is not the standard. The standard is as set forth in S.C. Code Ann. § 33-44-601(6)(iii), which requires that dissociation is not appropriate unless it is proven that the member in question has “engaged in conduct relating to the company’s

business which make it not reasonably practicable to carry on the business with the other member.” Here, there is no deadlock, and the Company remains in business with Laurence as a member just as it has since 1997.

Moreover, it was error to award Defendants the affirmative equitable relief of dissociation for two additional reasons: (1) Laurence was not a party to this action in an individual capacity, and (2) the Court did not consider whether Richard had clean hands in seeking this relief. Defendants respond to these arguments solely on error preservation grounds and do not address the merits. These issues, however, were raised to and ruled upon by the trial court. As an initial matter, this case was tried non-jury, so Rule 52, SCRCP is the applicable rule, not Rule 59, SCRCP. Under Rule 52(b), typical directed verdict type arguments may be made after trial. That said, in this case, the arguments in question were made early and often.

As set forth in his appellant’s brief, Laurence raised the issue of real party in interest during the trial and again in his post-trial motion. (R. at 489:3-4 (“And yes he is on behalf of the company maintaining this derivative lawsuit.”), 1090:18-21 (“[T]here are a lot of cases that say in derivative actions that Laurence Stoney is non-complainant. That the real party at interest here is the company.”³, 258-64). Further, a review of the caption and the Complaint and Amended Complaint, make Laurence’s role clear from the time this action was instituted. (R. at 43-59, 151-73). He brought this action on behalf of the Company to address wrongs done to the Company.

With respect to Richard’s unclean hands, the issue was raised in the pleadings and at the standing trial. In its preliminary order on standing, the trial court indicated that the evidence tended to show Richard’s unclean hands. (R. at 14). Laurence further argued that Richard’s conduct

³ The rough version of the transcript reads slightly differently, as follows: “And there are a lot of cases that say in derivative actions that Laurence Stoney is a nominal plaintiff. That the real party in interest here is the company.” (R. at 1108).

prevented dissociation at the hearing on the motion to dissociate, stating, “We’re talking about equity. The first question is is it equitable for a manager who is accused of looting the company to be able to kick out a minority member as soon as he brings a lawsuit against him?” (R. at 498:2-6, *see also* 491:6-10, 499:7-9). Defendants acknowledged the unclean hands argument in the same hearing on the motion to dissociate as follows: “And to the extent that counsel says that my client comes into the Court with unclean hands what about Laurence’s action of going behind Richard’s back trying to buy out East Bay from him?” (R. at 492:12-15). Finally, Laurence raised the issue again in his post-trial motion, and the trial court denied the motion with no discussion.

As such, these issues were raised to and ruled on in due course by the trial court.

CONCLUSION

For purposes of standing and dissociation, the inquiry is whether Laurence can represent the interests of the Company and whether the Company can run with Laurence as a member. The inquiry is not whether Laurence and Richard get along or whether Laurence might have interfered with Richard’s other businesses in the past. Richard admitted the Company has been successful with Laurence as a member, and he further admitted that success was expected to continue.

For all of these reasons, the trial court erred in finding that Laurence did not have standing to bring this action on behalf of the Company and in ordering the equitable relief of dissociation. This Court should reverse and remand for a determination on the merits based on the existing record in this case.

Respectfully submitted,

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May 24, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2020-001203

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 6056
Heard October 10, 2023 – Filed April 3, 2024

REVERSED AND REMANDED

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

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.

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.

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.

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

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)

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

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.

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, Intervenor) moved to intervene, asserting they opposed the derivative action. Laurence subsequently filed an amended complaint asserting Intervenor was 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 Intervenor 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 (SCRPC) 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

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.

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

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, SCRPC, 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

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

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.

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 entities¹⁰ 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

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."

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

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

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)).

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 derivative 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 Intervenor 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

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

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).

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, C.J., and HEWITT, J., concur.

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Apr 18 2024

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 December 13-14, 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 guesstimate 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.

Personal Motivations.

Judge Newman’s Order at R. p. 31 includes a section entitled “Personal Motivation” 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: *Because I don't want to be in the restaurant business with Richard. Okay.*

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: *But not practical (sic, "practicable")?*

A: *Not practical. That would be a good term.*

Q: *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?*

A: *I understand something to that effect. He mentioned it –*

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. The Opinion of this Court at Page 3: “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. The Opinion of this Court at Page 10: “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. The Opinion of this Court at Page 10: "Holmes and Cox benefited from Richard's malfeasance 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. The Opinion of this Court at Page 11: "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. The Opinion of this Court at Page 14: "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,

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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/ BACKGROUND

PROCEDURAL

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, Intervenor) moved to intervene, asserting they opposed the derivative action. Laurence subsequently filed an amended complaint asserting Intervenor was 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 Intervenor 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), SCRCF. 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 derivative 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 Intervenor 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.

RECEIVED

Apr 18 2024

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,

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April 18, 2024

Charleston, South Carolina

The South Carolina Court of Appeals

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

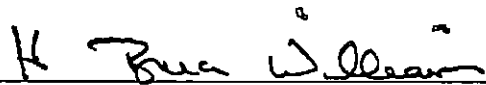
Theodore Stoney, Jr., individually as Trustee for Richard
Stoney, Jr. and Gregory G. Holmes, Third-Party
Intervenors,

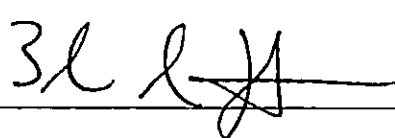
of whom Richard S. W. Stoney, individually and as
Member-manager of The Boathouse at Breach Inlet, LLC
is the Respondent.

Appellate Case No. 2020-001203

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ C.J.


_____ J.

Robert H. Verdin

J.

Columbia, South Carolina

cc:

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The Honorable Clifton Newman

FILED
Apr 29 2024