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S.C. SUPREME COURT

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.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

Introduction 1

Certificate of Counsel 1

Questions Presented 1

Statement of the Case 1

Arguments 6

I. The Court of Appeals opinion in this case contravenes established principles that an appellate court's *de novo* standard of review in equitable cases is tempered by two concepts: first, that the trial judge was in a superior position to make witness credibility determinations; and, secondly, that an appellant must demonstrate error in the trial court's findings of fact. 6

II. This Court Should Grant Certiorari to Review These Issues of First Impression: Under the Generally Accepted Standards for Standing Articulated in the Fifth Circuit Court of Appeals Cases of *Davis v. Comed*, and *Smith v. Ayres* a Purported Class Representative in a Shareholder Derivative Lawsuit May Lack Standing, Even in a "Class of One" Derivative Lawsuit, Where His Motives are Vindictive and For Personal Gain, Rather Than For the Benefit of the Company. 15

III. The Court of Appeals Erred in Rejecting the Trial Judge's Equitable Solution of a Fair Value Buyout, Which Was Invited by the Testimony of Laurence Stoney, Himself. 16

IV. The Court of Appeals Made Unnecessary and Extraneous Findings of Fact That Would Be Prejudicial to Petitioner if This Case Were to be Retried Before the Circuit Court; Such Findings Should Be Vacated by This Court. 19

Conclusion 25

TABLE OF AUTHORITIES

CASES: PAGE

Lewis v. Lewis ... 6
392 S.C. 381, 709 S.E.2d 650 (S.Ct. 2011)

Twitty v. Harrison ... 7
230 S.C. 174, 94 S.E.2d 879 (1956)

Blum v. Morgan Guaranty Trust Co. ... 14
539 F.2nd 1388, 1390 (5th Cir. 1976)

Halstead Video, Inc. v. Guttillo ... 14
115 F.R.D. 177, 180 (N.D. Ill. 1987)

Smith v. Ayres ... 14
977 F.2d 946, 949 (5th Cir. 1992)

Davis v. Comed ... 16
619 F2d 588 (5th Cir.)

Blanford v. Mauterer ... 19
252 S.C. 146, 159, 165 S.E.2d 633 (S.Ct. 1969)

PDK Laboratories, Inc., v. United States Drug Enforcement Administration ... 20
362 F.3d 786 (D.C. Ct. App., 2004)

Cain v. William J. Huff, II Revocable Trust Declaration ... 20
216 N.E.3d 456 (Indiana, 2023)

King v. Cuyahoga County Board of Elections ... 20
208 N.E.3d. 787 (Ohio 2022)

Cohen v. Board of Trustees of the University of the District of Columbia ... 20
819 F.3d 476 (Ct. App. D.C. 2016)

Blumenthal v. Trump ... 20
949 F.3d 14 (Ct. App. D.C. 2020)

Digiport, Inc., v. Foram Dev. BFC, LLC ... 20
314 So. 3d 550 (Ct. App. Fed 2020)

Parry v. Shaffer ... 20
656 S.W.3d 660 (Ct. App. TX 2022)v.

Sunbelt Plastic Extrusions v. Paguia ... 20
360 Ga. App. 894 (Ct. App. GA 2021)

INTRODUCTION

Pursuant to Rule 226, SCACR, Richard S.W. Stoney petitions this Court to issue a Writ of Certiorari to the Court of Appeals to review its decision rendered in the within matter, The Boathouse at Breach Inlet, LLC v. Richard S.W. Stoney, Op. No.: 6056, filed April 3, 2024.

CERTIFICATE OF COUNSEL

Counsel for Petitioner Richard S.W. Stoney certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 29, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in totally disregarding and reversing Judge Newman's findings of fact and credibility, where the Trial Judge had reached those findings as a result of hearing and observing the extensive testimony of the parties; and where Respondent failed to demonstrate error in the Trial Judge's findings?

II. Should this Court adopt the standards for "standing" in a shareholder derivative lawsuit from the 5th United States Circuit Court cases of *Davis v. Comed, Inc.,* and *Smith v. Ayres*, as cited by the Trial Court and the Court of Appeals?

III. Did the Court of Appeals err in rejecting the Trial Court's equitable remedy of dissociation, which was invited by Respondent's own testimony?

IV. Should the unnecessary and extraneous findings by the Court of Appeals be vacated by this Court?

STATEMENT OF THE CASE

This case was referred to the Hon. Clifton B. Newman as Business Court Judge by order dated December 9, 2016. Judge Newman presided over the administration of the case from the date of his appointment until its conclusion by final order filed August 10, 2020. Judge Newman's

administration of the case included two lengthy hearings at which extensive testimony was presented: the first was a preliminary hearing on the issue of Respondent's standing, heard on December 13 and 14, 2018. The second hearing was the trial on the merits, heard on March 9, 10, and 11, 2020, resulting in a final order filed July 7, 2020.

The case is a shareholder derivative lawsuit brought by Laurence Stoney, who holds a five-percent membership interest in a closely-held restaurant entity known as The Boathouse at Breach Inlet, LLC ("The Boathouse"). The Order of Judge Newman holds (1) that Laurence Stoney lacks the requisite standing to prosecute the derivative lawsuit because his motivations in bringing the action "are more vindictive and personal, than they are to vindicate a corporate wrong" (R. p. 33); and (2) for the reasons stated in his Order it is "not reasonable practicable" to carry on the business with him as a member, that his interest in the LLC must be dissociated, and that Laurence should be compensated at "fair value" in accordance with Code Section 33-44-601(6)(iii).

The Court of Appeals reversed Judge Newman's holdings and remanded the case for retrial. (Opinion Number 6056, April 3, 2024). As later argued, the opinion addresses numerous issues unrelated to Laurence's standing. After concluding that a "class of one" should be recognized by the laws of this State, the Court of Appeals discusses Judge Newman's conclusions that Laurence is disqualified because of his vindictive and personal motivations, in three relatively brief paragraphs, dismissing Laurence's motivations as mere "hostility". (See Argument III, below.)

The principal asset of the Boathouse is a family-oriented seafood restaurant located on Isle of Palms, South Carolina, known by the same name as the LLC, which has been in operation since 1997. (R. p. 24). The lawsuit is opposed by ninety-five percent of the LLC's current membership, which consists of seven members, five of whom are also members of the Stoney family. Current

ownership interests are held: Richard Stoney, sixty percent; Ted Stoney, Richard's brother, ten percent; Ted Stoney also holds a five percent interest in trust for Richard's son, Richard Stoney, Jr.; Croft Stoney, Richard's daughter, five percent; Gregory Holmes ten percent; Michael Cox five percent; and Laurence Stoney, Richard and Ted's first cousin, five percent.[1] (R. p. 25)

Through his testimony at trial, discussed below, Laurence revealed his true motivations for bringing the instant action: To obtain a judgment and to execute against Richard's interest in the Company as well as Richard's interest in the land on which the Boathouse sits. (R. pp. 700:15-21; 701:2-7; 701:25 to 702:9). As Judge Newman's Order, filed July 7, 2020, noted, "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." (R. pp. 31-32).

On December 13 and 14, 2018, a hearing was held at the request of both parties on the issue of the standing of Laurence Stoney to maintain the action. The trial judge preliminarily denied the relief sought by the Defendants without prejudice, thereby allowing the action to proceed. (R. p. 5).

In his subsequent trial testimony before the Court, Laurence candidly stated, "I don't want to be in the restaurant business with Richard"; 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

[1]At the time of trial, Richard's ex-wife, Lori Stoney, owned a five percent (5%) membership interest, individually, and held a five percent (5%) membership interest, in trust, for their adult daughter, Croft Stoney. Following the finalization of their divorce litigation, Lori's individual interest was transferred to Richard and Croft's interest was transferred directly to Croft.

term". (R. p. 702:22-25; 703:10-16). Richard and Ted also both 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. 745:21 to p. 746:6).

Laurence further testified that, although it was not his first choice, a buyout of his interest at "fair value" was a "viable solution", but that "It just hasn't happened". (R. p. 704:14-15). This is precisely the equitable solution that Judge Newman fashioned in his July 7, 2020 Order, who in rendering his decision stated, *inter alia,* "The Court assigns great weight to the positions of the parties who agree that it is not reasonably practicable to continue the business of the LLC with Laurence as a member." (R. p. 35, Emphasis added).

After conducting a three-day trial, in which Judge Newman had the opportunity to review the complete record, and to personally observe the testimony and the demeanor of the parties, the Court denied the relief sought by Laurence in his Complaint, and ordered that Laurence be dissociated from the LLC and compensated at "fair value" pursuant to Code Section 33-44-601(6)(iii). (R. pp. 21-37). The Court stated, "The Court preliminarily ruled that Laurence Stoney could adequately defend the vindication of a corporate interest as representative of the derivative shareholder suit and should be given the chance at trial to do so. Having now conducted the trial, 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. The preliminary ruling of the Court finding that Laurence Stoney has standing to bring this action is reversed based on the findings and conclusions contained in this Order. The Court further grants the relief seeking to dissociate Laurence Stoney from the Company." (R. p. 23).

The Circuit Court's findings were specifically based on his credibility determinations, where Judge Newman was in a better position to observe the testimony of the parties and their

demeanor. The Court specifically noted, “Upon consideration of all of 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). With regard to the centralized management system employed by the Boathouse, the Court noted, “Laurence was aware as early as 1999, that the cash generated by the Boathouse at Breach Inlet was being used to support other restaurants and made no complaint as long as he benefited.” Addressing Laurence’s misconduct, the court noted, “Laurence admittedly engaged in communications with food purveyors and Ted Stoney of the Boathouse at Breach Inlet restaurant in which he was critical of the credit standing of Boathouse to its purveyors causing strain to Boathouse with the purveyors.” (R. p. 29). Laurence had conceded, under oath, that his badmouthing an employer’s credit standing to its purveyors could be disloyal to the company. “Okay. Maybe it would be disloyal. I'll grant you that.” (See R. p. 715:23 to 716:14).

Further addressing the impracticability of continuing a business relationship with an antagonistic party, also discussed below, the Court noted Laurence’s history of acting against Richard and the Boathouse’s members, noting, “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 restaurant. 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. p. 30).

Having had an opportunity to personally observe the parties’ testimony and make credibility determinations based on those direct observations, the Circuit Court found that Laurence was motivated by personal gain and not the best interest of the Company: “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." (R. p. 32).

Judge Newman's Order took specific note of Laurence's vindictiveness toward Richard, noting, "At trial, more evidence of the animus of Laurence was presented through the testimony of Ted Stoney, which detailed threats and disloyal statements on multiple occasions. Memorably, Laurence told Ted shortly before this lawsuit was filed, "I'm going to get Richard. I'm going to turn his world upside down". (R. p. 32). It was also revealed that Laurence had written Lori, Richard's ex-wife, during the course of litigation, menacingly stating about Richard, "Dick is toast." (R. p. 322:6-23).

ARGUMENT

I. The Court of Appeals opinion in this case contravenes established principles that an appellate court's *de novo* standard of review in equitable cases is tempered by two concepts: first, that the trial judge was in a superior position to make witness credibility determinations; and, secondly, that an appellant must demonstrate error in the trial court's findings of fact.

The opinion of the Court of Appeals in this case is extraordinary, inasmuch as that Court rejected and reversed the careful and considered findings of fact based upon credibility, made by the highly respected and experienced Business Court Judge, who administered the case over a span of almost four years, and who filed his final order after hearing and observing, at extraordinary length, the testimonies of the principal protagonists, Laurence and Richard Stoney

In the seminal case of Lewis v. Lewis 392 S.C. 381, 709 S.E.2d 650 (S.Ct. 2011) this Court discussed extensively "*…two common features found in our earlier jurisprudence concerning*

appeals in equity cases. The primary one is the familiar mantra that the appellate court is not required to disregard the findings of the trial judge who was in a superior position to make credibility determinations. The second concept is the tenet that de novo standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact."

The above holding from *Lewis* cites a litany of supporting decisions which are not here enumerated in the interests of brevity. Of note, however, many of the authorities cited are from general civil cases in equity and not from Family Courts. For example, *Lewis* cites *Twitty v. Harrison, 230 S.C. 174, 94 S.E.2d 879 (1956),* a civil dispute arising from a mortgage foreclosure: *"Our duty in equity cases to review challenged findings of fact as well as matters of law does not require that we disregard the findings below or that we ignore the fact that the trial judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve appellant of the burden of convincing this court that the trial judge erred in his findings of fact."*

The opinion of the Court of Appeals here at issue accordingly requires further appellate scrutiny from the point of view of the two "common features" required of *de novo* review as discussed in *Lewis*: first, the trial judge's superior position to assess credibility of the witnesses; and, secondly, the burden imposed upon appellant, who is the Respondent here, to "demonstrate error in the Trial Court's findings of fact."

a. The First Prong: Credibility.

At the first, preliminary hearing on the issue of standing, on December 13th and 14th, 2018, Laurence presented testimony encompassing 90 pages of transcript (R. pp. 274-327; and R. pp. 330-368); and Richard presented testimony encompassing 58 pages. (R. pp. 393-451). In the trial on the merits on March 9-11, 2020, 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).

Assuming one page of transcript encompasses only one minute of the witness's time on the stand, (a conservative estimate, we submit), Judge Newman had the opportunity to hear, observe, and to evaluate the testimony and demeanor of Laurence and Richard Stoney, respectively, for more than two hours each, over the course of this case; a lengthy opportunity for Judge Newman to hear and observe the witnesses and to evaluate their credibility, that was not available to the Court of Appeals; and neither is it available to this Court. Nevertheless, the Court of Appeals and Judge Newman drew conflicting conclusions from the testimony, particularly from Laurence.

A clear and germane example of the conflict in credibility findings between Judge Newman and the Court of Appeals is presented in the Court of Appeals Opinion found at *Lexis* pages 18-19, discussing Laurence's vindictiveness: "*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…*". (See, also, Laurence's full testimony to this same effect at R.p. 291, lines 9-12.) In making this finding, which the Court of Appeals obviously accepts as a true and credible statement by Laurence of his motive and intent in prosecuting the case, the Court of Appeals could only read from the printed transcript.

Judge Newman, on the other hand, heard the identical testimony from Laurence, in-person, and thus observed Laurence as he testified to this point, as well as to other points over an extended period of time, as previously noted. Judge Newman's conclusions expressly reject the veracity of Laurence's above-quoted, professed reason for prosecuting this lawsuit, with these findings:

1. "*…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.)

2. And, at R.p. 29: "*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*". (Emphasis added.)

3. And, at *R. 32*: *"I conclude that Laurence is acting in pursuit of personal gain and not in the best interests 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.)

These contradictions between Judge Newman's findings and those of the Court of Appeals go to the central issue of standing decided by Judge Newman, and invite further scrutiny by this Court on *certiorari* review. They are central to the issue of standing, and to the question whether Laurence Stoney lacked the requisite standing to prosecute this action because of his ulterior motives for prosecuting the case.

Judge Newman expressly rejected, as lacking credibility, and as "clear to the court", Laurence's representations that he was prosecuting the case for the benefit of the company, and not vindictively or for personal gain or benefit. And for sound reasons further discussed below.

b. The Second Prong: Respondent's Burden to Demonstrate Error in the Trial Court's Findings of Fact.

In his final Order Judge Newman makes the following findings of fact:

1. Upon consideration of all of 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.)

2. Laurence was aware as early as 1999, that the cash generated by the Boathouse at Breach Inlet was being used to support other restaurants and made no complaint as long as he benefitted. (R.p. 29.)

3. *Laurence admittedly engaged in communications with food purveyors and Ted Stoney of the Boathouse at Breach Inlet in which he was critical of the credit standing of Boathouse to those purveyors causing strain to Boathouse with the purveyors* (R.pp. 29-30.)

4. 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 restaurant. (R.p. 30.)

5. 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.p. 30.)

6. 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. (R.pp. 31-32.)

7. In 2015 when Ted and Laurence were discussing a dispute relating to their adjoining properties in Berkeley County, (and shortly before this lawsuit was filed by Laurence) *Laurence told Ted that '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. 28.)

In his Brief to the Court of Appeals, Laurence does not much attempt to discredit Judge Newman's above findings of fact. Instead, he argues that those findings are "not directed against the Company", and therefore are not relevant to the case. The Court of Appeals seems to adopt this same view. See Opinion at Lexis pages 24-25.

Respectfully, the Court of Appeals misses the point. The factual findings made by Judge Newman, dismissed as "not relating to the company", go to the Trial Court's conclusion that Laurence's motivations for prosecuting this case are both for personal gain, and are motivated by his vindictiveness. See R.pp. 719 line 21 to 720 line 5, where Judge Newman overrules Laurence's objection to his cross examination about his misconduct relating to Boathouse at East Bay, that is, his surreptitious attempt to buy the land that was leased to the restaurant, knowing that Richard was attempting to buy it for the benefit of that LLC, which was then in heated dispute with the landlord. Judge Newman admitted the evidence as "circumstantial evidence to show a pattern…of disruptive behavior on the part of (Laurence), with respect to Boathouse at Breach Inlet, which relates to (Petitioner's) motion of (*sic*) dissociation and the impracticability of this business going forward with Laurence as a member." It is apparent from the record, therefore, that Judge Newman considered the evidence as relevant to Laurence's state of mind and his intent; which is to say, his vindictive motivations and his quest for personal benefit.

To further illustrate the point, Judge Newman further concluded that a driving force behind the case is Laurence's agenda "to squeeze out" Richard's majority interest in the company, altogether. The record supports the conclusion that, if Laurence were successful, Richard Stoney

would be unable to respond to a four-million-dollar judgment, and that his only significant asset is his interest in the Boathouse at Breach Inlet, and the land on which it sits.

The genesis for Judge Newman's 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, where Laurence testified as follows:

Laurence agreed that 95 percent of the members of the LLC oppose this lawsuit; that if he obtained judgment against Richard he would execute against Richard's "income assets"; that "to my knowledge, Richard has no assets" (Emphasis added); "That the only thing Richard has is his membership interest in this restaurant, that is correct". (Emphasis added.) (R. p. 701: 25 to R. p. 702: 1-9).

Laurence's own testimony thus supports the conclusion that, by executing against Richard's Membership interest, thereby redeeming or "absorbing" it into the LLC, the relative percentage interests of Laurence and the remaining members would be substantially increased. This is the "Personal Motivation" about which Judge Newman entered his finding, as follows: "*Rather than filing an individual action, which Laurence could have done under Code Section 33-44-410* (to recover his unpaid distributions*), 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."* R. pp. 31-32

In this context, it is significant that the very reason Laurence is stipulated to be "not similarly situated to any other member of Boathouse at Breach Inlet, LLC" is because, although there were at least two other five-percent members of the LLC, he did not receive distributions

when other members did. He agreed to the proposition that disproportionate distributions alone define his “class of one”, testifying, “*That is my stance*”. See Laurence’s testimony at R.p. 33 Line 11 to R.p. 334 Line 4. Thus, Laurence’s very status as a “class of one” is defined only by his complaint that he received disproportionate distributions; and not that other members are unable to bring this same action should they wish to do so. From the outset, and by Laurence’s own stipulation, this case has been only about his own distributions.

c. <u>The “Class of One” Issue, and Vindictive and Personal Motivations.</u>

Although the Court of Appeals makes extensive findings, concluding that a “class of one” may maintain a shareholder derivative lawsuit under the laws of South Carolina, Judge Newman’s order discusses little, if at all, that question; and neither of the parties briefed the issue to any great extent. Instead, Judge Newman’s order holds that, in a “class of one” derivative lawsuit, the single member may nevertheless be disqualified from prosecuting the action if the court finds that it is brought, not to vindicate a corporate wrong, but instead because of personal, vindictive motivations, or for personal gain and benefit.

Indeed, the motives and the intent of a putative class representative go to the very heart of any shareholder derivative lawsuit, in any context. Whether a “single member” class, or a multi-member class, a derivative lawsuit must be prosecuted on behalf of and for the benefit of the company, in the company’s interests, and not for the ulterior purposes of vindicating a putative member’s personal agenda or vindictive feelings, or for the member’s personal gain or benefit. “A plaintiff in a shareholder derivative action owes the corporation his undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda. Whether or not such a personal agenda exists is determined by the trial court, and (an appellate court) will not reverse its determination absent clear error. In deciding this question, the court may

properly consider the amount of the plaintiff's stake in the corporation as balanced against his interest and how the litigation may affect his external interests. *Blum v. Morgan Guaranty Trust Co.* 539 F.2nd 1388, 1390 (5th Cir. 1976); see also *Halstead Video, Inc. v. Guttillo* 115 F.R.D. 177, 180 (N.D. Ill. 1987)"; as cited in *Smith v. Ayres* 977 F.2d 946, 949 (5th Cir. 1992).

Smith v. Ayres was cited by Judge Newman in his final order at R.p. 31, noting the above quoted holding from *Blum* and from *Halstead Video*, and also adding, from the facts of *Smith v. Ayres:* "The Court may properly consider the plaintiff's vindictiveness toward the defendant, and whether his action is inspired by a personal agenda, in determining whether the plaintiff is an adequate representative of the stockholders." *Smith v. Ayres, supra*, 977 F2d at 949.

In the case before the Court, not only does the evidence of Laurence's vindictiveness consist of his aggressive and deceitful conduct by secretly trying to buy the land that was leased by Boathouse at East Bay, out from under Richard and Ted who were trying to buy it to protect the restaurant; but vindictiveness is also proved through Laurence's communications with food purveyors demeaning the credit standing of Boathouse at Breach Inlet; and it is proved through Laurence's testimony in Richard and Lori Stoney's divorce trial that Richard's ex-wife Lori should be awarded Richard's interest in Breach Inlet, and that Richard should be stripped of his managerial role.

But there was more. There was the direct evidence of Laurence's vindictive animus, his personal threat directed toward Richard, through Ted. Ted Stoney testified that about a month or six weeks before the filing of this case, during a conversation he had with Laurence at the Carolina Yacht Club, after discussing adjoining properties they, along with Richard, and another cousin Randell Stoney, owned in Berkeley County, Laurence put his finger to Ted's chest, and, from Ted's testimony: "I will never forget the words – those last few words to me were, 'I'm going to

get Richard. I'm going to turn his world upside down.' " (R.p. 1028, lines 15-19). Ted further testified "I remember that one quite vividly, because I was personally shaking after the confrontation." (R. p. 1023 lines 15-17). Soon thereafter, this lawsuit was filed by Laurence.

Notably, Laurence had the opportunity to rebut Ted's testimony, to deny that he uttered this threat against Richard, to Ted. He did not do so. Thus the evidence was uncontradicted.

The Court of Appeals does not significantly address, one way or the other, the direct and circumstantial evidence of Laurence's vindictive motivations. Instead, the Court concludes that "…this hostility is not fatal to Laurence maintaining the derivative actions"; apparently concluding that there was an animus on Laurence's part, but dismissing it as mere "hostility"; and instead attributing the "hostility" to "charged emotions and economic antagonisms (which are) virtually endemic to disputes in closely held corporations". Court of Appeals Opinion at Lexis pages 17-19.

Judge Newman obviously viewed Laurence's motivation as more than mere "hostility". Indeed Judge Newman, who observed the witnesses, their demeanor, their credibility, their attitudes, and accordingly their motivations, concluded that Laurence's conduct was "vindictive". There should be no question but that the distinction between mere "hostility", on the one hand, and "vindictiveness", on the other, can be better made by the same fact finder who all authorities acknowledge to be in a better position to decide credibility. There is arguably only a fine line between the human quality of credibility, and the human characteristic of vindictiveness. As factual determinations made in a trial at law, they are better made by a trial judge, who is in better positon to observe and hear the witness testimony. And this case was not decided by just any trial judge, but by a trial judge who is universally respected and admired.

II. <u>This Court Should Grant Certiorari to Review These Issues of First Impression:</u>

Under the Generally Accepted Standards for Standing Articulated in the Fifth Circuit Court of Appeals Cases of *Davis v. Comed*, and *Smith v. Ayres* a Purported Class Representative in a Shareholder Derivative Lawsuit May Lack Standing, Even in a "Class of One" Derivative Lawsuit, Where His Motives are Vindictive and For Personal Gain, Rather Than For the Benefit of the Company.

The Trial Court and the Court of Appeals applied the standards for standing articulated in the case of *Davis v. Comed*, 619 F2d 588 (5th Cir.). However, the two courts reached different conclusions. Respondent Laurence Stoney, on the other hand, sought to dismiss *Davis* as "an out of circuit decision" in his brief to the Court of Appeals.

At R. pp. 30-31 Judge Newman recognizes and enumerates the relevant factors by which to evaluate standing from *Davis v. Comed*, as well as from other authorities, acknowledging that, "Typically, the elements are intertwined and it is frequently a combination of factors which leads a court to conclude a plaintiff does not meet the requirements of Rule 23(b)(1)."

From Smith v. Ayres, *supra,* Judge Newman concluded that Laurence was motivated by a vindictive and personal *animus,* and that he "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…" R. p. 33.

As trial judge, Judge Newman occupied a superior position to evaluate Laurence's credibility and to reach better informed conclusions about his vindictive and personal animus. The relative magnitude of Laurence's personal interests, his vindictive animus, and his strategy to displace Richard from any ownership interest in the Boathouse at Breach Inlet disqualify him from prosecuting this case.

III. The Court of Appeals Erred in Rejecting the Trial Judge's Equitable Solution of a Fair Value Buyout, Which Was Invited by the Testimony of Laurence Stoney, Himself.

A summary of Laurence's testimony from R. p. 703: 10 to R.p. 705: 7 is as follows: He testified it would be the "the last thing I would like to do" to take Richard's ownership interest, "Because I don't want to be in the restaurant business with Richard, Okay?"; Q: because it's not practicable for you and Richard to continue together in the restaurant business, is it Laurence?" A: "Not practical. That would be a good term. (Emphasis added.). Laurence understood that Petitioner was asking Judge Newman to order that he be bought out at "fair value": As a solution, "I think it's a viable solution. It just hasn't happened". Laurence testified that if the Judge orders that, he has no problems with it, "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." (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).Under the evidence developed in this case, particularly the testimonial exchange recited above, the dissociation of Laurence, and his compensation at "fair value", taken in the context of Laurence's vindictive animus and his agenda for personal gain, was in every respect both an equitable, and an invited, remedy.

As a direct expression of Laurence's motivation and intent, his testimony that "*I don't want to be in the restaurant business with Richard*." (R. p. 702:24) is significant; and almost Freudian. To accomplish the result of "not being in the restaurant business with Richard, 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", 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 could 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 concessions that it was "not reasonably practicable" for them to continue together, and that a "fair value" buyout of his membership interest was a "viable solution" that "just hasn't happened". Laurence's trial testimony 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".

And Judge Newman further accounted for a factor that the Court of Appeals does not address, at all: that is, Laurence's expressed interest in a buyout from the company. This lawsuit was originally filed on October 9, 2015 after, as is required in a shareholder derivative suit, demand letters were sent to Richard, seeking relief on behalf of the company. Only nine months previous

to the filing of this case, on December 17, 2014, Laurence sent an email to Richard saying, *"Richard, I think the best way to go at this is for you to make your BEST offer up front. Keep in mind what you already owe me, plus interest and a cap rate on recast numbers. Try 10% per year compounded yearly on all past due and cap rate of 6% based on $25,000.00 per year. Standing by, L*" See R.p. 114. (Emphasis in original).

Laurence further wrote, in the same email chain: "*Richard, like I said make your best offer and we might not need all the pain*". As noted, in his testimony Laurence conceded that a buyout of his interest at "fair value" would be a "viable solution". "It just hasn't happened." R.p. 703 line 10 to p. 705 line 7).

As for the Court of Appeals observation that the "fair value" of Laurence's interest would be diminished by the reported loss on the books due to Crew Carolina's "due to/due from" accounting for loans to other entities, nothing would preclude Laurence from arguing in a "fair value" hearing before the circuit court, in an equitable proceeding, that the amount of such loss should be imputed to the calculation, in determining Laurence's "fair value" award.

IV. The Court of Appeals Made Unnecessary and Extraneous Findings of Fact That Would Be Prejudicial to Petitioner if This Case Were to be Retried Before the Circuit Court; Such Findings Should Be Vacated by This Court.

Although Judge Newman's Order, which the Court of Appeals 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, the Court of Appeals makes findings of fact and law unnecessary to the issue of Laurence's standing. The sweeping breadth in the findings of the Court of Appeals 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 his general citations to Corpus Juris Secundum and to American Jurisprudence, 2d. More recent case law invokes a phrase to describe the general rule of "judicial restraint", as follows: *"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.[2]

[2] A national legal research query of the phrase, "The cardinal principle of judicial restraint" produces numerous references to the same phrase as articulated by Justice Roberts. 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 *Blanford*, Justice Bussey further discusses the potential prejudice created by an 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.

Numerous findings and conclusions of the Court of Appeals in this case are unnecessary to the question of standing, and, although arguably *obiter dictum,* could present prejudice to Petitioner at a retrial, if that should be the outcome of this appeal, including the following:

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

To the extent that the Court of Appeals 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 the Court of Appeals points out in a different context, is separate from its members.

Furthermore, the Court of Appeals purports to find that 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, and that these expenses were cumulative, having been incurred over the course of more than a decade. (Hollerbach Testimony at R. p. 628:3-9, confirmed by Jamie Stabler at R. p. 673:14-20).

2. The Opinion of the Court of Appeals 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".

At trial, Jarvis testified that Laurence's attorneys, Haynsworth Sinkler Boyd, prepared his 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).

3. The Opinion of the Court of Appeals 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. There was also 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 R. p. 1155.

4. The Opinion of the Court of Appeals 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".

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.)

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

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 the Court Appeals at Page 11: "No one disputes Richard owes the Company over $4 million dollars".

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 to 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).

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; Circuit Court Order, R. p. 29).

7. The Opinion of the Court of Appeals 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."

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

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, the Court of Appeals reaches the opposite conclusion, without the benefit of physically observing the witness testimony and their demeanor

CONCLUSION

Certiorari should be granted to review the issues of credibility, standards for "standing", the invited equitable remedy, and to vacate the unnecessary findings of the Court of Appeals.

Respectfully submitted,

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