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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2020-001645
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC,
Plaintiff/Counter-Defendant, Respondent,

v.

Donza H. Mattison,
Defendant/Counterclaimant, Appellant.

AND

Donza H. Mattison, in a Derivative Capacity
on Behalf of McMillan Pazdan Smith, LLC,
Third-Party Plaintiff, Appellant,

v.

Ronald G. Smith, Joseph M. Pazdan,
Brad B. Smith, and Chad C. Cousins,
Third-Party Defendants, Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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INTRODUCTION

Respondents McMillan Pazdan Smith, LLC (“MPS”) et al. submit this supplemental brief in response to the Court’s request that the parties address the relevance, if any, of the Court’s recent decision in *The Boathouse at Breach Inlet, LLC v. Richard Stoney*, Op. No. 6056 (Howard Adv. Sh. No. 13, at 41) (Ct. App., Apr. 3, 2024).¹ The two cases share one facial similarity—they both involve shareholder derivative claims. But that’s where the resemblance ends. As explained more fully below, *Boathouse* arose from a set of facts that are significantly and materially different than this case, and none of the holdings in *Boathouse* is relevant to, much less dispositive of, this appeal.

1. The *Boathouse* panel’s recognition of the so-called “class of one” theory makes no difference here. The viability or non-viability of that mechanism was not the basis for the trial court’s dismissal of Mattison’s derivative claim, nor does it change the fact that this Court should affirm. The trial court’s ruling was based on other plain defects in Mattison’s claim, including her inadequacy to represent a class and the fact that her interest is antagonistic to the company. Indeed, regardless of whether the “class of one” theory is recognized in South Carolina,² the Court need not reach Mattison’s derivative claim *at all* because she released that claim and any others she had against MPS’s officers or managers when she signed a Separation Agreement upon her departure from MPS. *See* Brief of Respondents at 27–29. In sum, even if *Boathouse* is correct that a one-person derivative claim is permissible in appropriate circumstances, the claim is not viable here.

2. The fact that the plaintiff in *Boathouse* was deemed an adequate representative in *that* case does not mean Mattison is an adequate representative in *this* case. The facts of this case differ significantly from those in *Boathouse*. Perhaps the most glaring problem for Mattison is that her

¹ The case was reported at 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024).

² A petition for certiorari was filed in *Boathouse* but is not yet fully briefed or decided.

interests are antagonistic to the corporation and the other members. For example, the relief she seeks in her derivative claim would divest other members of their ownership shares and would undo MPS's Operating Agreement and numerous decisions taken by the unanimous vote of MPS's other members. Furthermore, Mattison's derivative claim is motivated by a unique and individual interest. She threatened and then filed a derivative claim in response to MPS's refusal to pay the inflated amount she demanded for her shares, and she has admitted that the goal of the claim is to gain "leverage" in the determination of the buyout amount. Her individualized, self-serving motivation, and her adversity to the other members' interests are sufficient (and necessary) reasons to dismiss her claim.

Those aren't the only material factual difference between this case and *Boathouse*. In *Boathouse*, for example, at least one other member agreed with and supported the plaintiff's derivative action. Here, in contrast, MPS's members unanimously opposed Mattison's derivative claim. Another distinction is that in *Boathouse*, the majority owner admitted that he'd removed money from the corporation for improper personal purposes, and it was undisputed that he owed the company \$4 million to repay the funds he had taken. Here, MPS's majority members have neither engaged in nor admitted any improper action. Further, the majority owner in *Boathouse* had been warned by the company's comptroller that his actions were wrong, but he persisted anyway. Not so, here. MPS's majority members did nothing wrong and were never accused by anyone of wrongdoing (other than by Mattison in her bid to extort an inflated price for her shares).

3. The *Boathouse* Court's reversal of the trial court's order forcing the plaintiff in that case to disassociate from the company has no bearing on this case. Mattison voluntarily separated from MPS pursuant to a signed Separation Agreement that was extensively negotiated by her counsel and which she admitted in her Answer is a valid and enforceable contract.

ARGUMENT

For purposes of this supplemental brief, MPS presumes the reader’s familiarity with the facts and claims in *Boathouse*. In short, the company in *Boathouse* was a closely held family business (a restaurant) in which there were relatively few members, all of whom were related to one another in some way. It was undisputed that (a) the majority owner had removed \$4 million from the company for improper purposes, (b) the misappropriation had materially and tangibly harmed the company, (c) the majority owner owed the company \$4 million repayment, and (d) the relief sought by the single-member derivative suit was the repayment of those funds, which would, “[w]ithout a doubt,” benefit the company. *Boathouse*, 442 S.C. at 638–51, 900 S.E.2d at 486–93. The *Boathouse* opinion includes three holdings, each of which is discussed below. None of them control the outcome in this case and none of them change the fact that this Court should affirm.

I. The fact that a “class of one” is permissible in appropriate circumstances does not alter the analysis or the outcome in this appeal.

The first question addressed in *Boathouse* was a procedural one, namely whether a member of an LLC can ever, in appropriate circumstances, bring a derivative action as a single-member class. The *Boathouse* court examined the language of the relevant statute (S.C. Code Ann. § 33-44-1101) and rule (Rule 23(b)(1), SCRCF) and concluded that under “the statute and applicable rule, a single member of a limited liability company can bring a derivative action.” *Boathouse*, 442 S.C. at 644, 900 S.E.2d at 489. In the very next paragraph, however, the *Boathouse* Court hastened to clarify that a “class of one” claim is not permissible in *every* case. It’s permissible only when the plaintiff “fairly and adequately represents the interests of” the company and the other members. *Id.* (quoting Rule 23(b)(1), SCRCF); *see also id.* at 647, 900 S.E.2d at 490 (holding “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”) (emphasis added).

That holding—that a member may prosecute a derivative claim as a “class of one” in limited and “appropriate circumstances”—clarifies a procedural question that had not previously been addressed by South Carolina’s courts. It does not, however, alter the analysis or outcome of this appeal. That’s because the trial court’s dismissal of Mattison’s derivative claim was not based on the fact that it was a single-member claim. Rather, the trial court applied *the same eight-factor test* adopted by the *Boathouse* Court and concluded that that Mattison did not (and could not) fairly and adequately represent the interests of MPS or its other members. *See* Order at 6–7 (Sept. 30, 2020) (R. 60–61) (citing *Davis v. Comed, Inc.*, 619 F.2d 588, 593–94 (6th Cir. 1980); *Office of Strategic Services, Inc. v. Sadeghian*, 528 Fed. Appx. 336, 350 (4th Cir. 2013)); *id.* at 8–16 (R. 62–70) (analyzing Mattison’s adequacy to bring the claim).

In sum, the *Boathouse* Court’s recognition that a derivative “class of one” can, in appropriate circumstances, be permissible does not differ from the trial court’s ruling nor does it require reversal. Rather, it simply requires this Court to review the trial court’s conclusion that, under the facts of this case, Mattison cannot fairly and adequately represent the other members or the corporation—a topic that is addressed in the next section of this Supplemental Brief.

II. A derivative claimant’s adequacy is a fact-specific determination, and under the facts of this case Mattison is not an adequate representative.

The second question addressed in *Boathouse* was whether under the specific facts of that case the plaintiff could “fairly and adequately represent the interests of” a class of one and have standing to maintain a derivative action.” *Boathouse*, 442 S.C. at 647, 900 S.E.2d at 490. This is a fact-dependent analysis that requires consideration of the “totality of the circumstances.” *Id.* The *Boathouse* opinion articulates and applies the same test that the trial court used in this case and that MPS explained in its appellate brief. But *Boathouse* reaches a different conclusion than the trial

court reached here regarding the adequacy of the claimant. That's because *Boathouse* involved a very different set of facts than those presented here.

Start with the most obvious distinction—the fact that Mattison's derivative claim is motivated by an individual interest that is not shared by MPS and its members and, indeed, is *antagonistic to them*. This factor alone is a sufficient basis to distinguish *Boathouse*, and this factor alone is a sufficient basis on which to conclude that Mattison is not adequate to represent even a class of one. In *Boathouse*, it was undisputed that the majority owner had improperly taken \$4 million from the company for his own purposes and that the relief sought by the derivative claim would benefit the company by requiring the return of that money. The *Boathouse* Court noted, for example, that “[w]ithout a doubt, the return of over \$4 million would benefit *the Company*,” and that the “claims in this action involved losses to *the Company*, rather than to [plaintiff's] *own* membership interest.” *Id.* at 649–51, 900 S.E.2d at 492–93 (emphasis added).

Here, in contrast, the Record is replete with assertions and admissions that unmistakably demonstrate that the interest motivating Mattison's derivative claim is not the company's interest; it is exclusively her own. *See* Hearing Tr. (May 12, 2020) at 9:8–18, 15:6–10, 17:10–17, 20:23–24 (R. 316:8–18, R. 322:6–10, R. 324:10–17, R. 327:23–24) (admitting that Mattison's derivative claim was intended to give her “leverage” to “seek a higher payout” for her shares and to “increase what her buyout is”); Letter from Rothstein to Keim at 3 (Jan. 14, 2019) (R. 845–47) (threatening that if Mattison's demands for payment were not met, she would bring a derivative claim); *see also* Brief of Respondent at 15–22 (collecting and explaining evidence supporting this point).

Mattison's interest is not only different from the interest of MPS and its other members, *it is antagonistic to them*. This is another critical distinction from *Boathouse* where the relief sought by the derivative claim would have benefited the company and its members. *Boathouse*, 442 S.C. at

649–51, 900 S.E.2d at 492–93. Here, in contrast, the relief Mattison seeks in her derivative claim is contrary to the interests of the other members as it would effectively disenfranchise them by undoing agreements they voted unanimously (other than Mattison) to adopt and would oust other members from the firm by undoing the corporate transactions and agreements by which some of the current members *became* members. *See* Order at 14–15 (R. 68–69). For example, Mattison’s derivative claim seeks to divest two current members of their ownership interests by asking the trial court to find that the addition of any new members without unanimous consent be declared null and void. *See* Am. Third-Party Compl. ¶ 90 (R. 134). Further, her derivative claim seeks to invalidate MPS’s Operating Agreement (under which it began operating in 2015), the amendments thereto, and the 2019 Second Amended and Restated Operating Agreement. *Id.* at ¶¶ 48, 90 (R. 127, 134). The relief sought by Mattison’s derivative claim does not benefit the company and its members. Rather, it harms them.

The adversity of interest between Mattison and MPS and its members is a sufficient basis to distinguish *Boathouse* and is a sufficient (and necessary) basis to dismiss Mattison’s derivative claim. It is not, however, the only material factual distinction between *Boathouse* and this case. In *Boathouse*, for example, at least one other member agreed with and supported the plaintiff’s derivative action. *Boathouse*, 442 S.C. at 648, 900 S.E.2d at 491. Here, in contrast, MPS’s members unanimously opposed Mattison’s derivative claim. *See* Brief of Respondents at 19–22. Another distinction is that in *Boathouse*, the majority owner admitted that he’d removed money from the corporation for improper personal purposes, and it was undisputed that he owed the company \$4 million to repay the funds he had taken. *Boathouse*, 442 S.C. at 640, 649, 900 S.E.2d at 487, 492. Here, MPS’s majority members have neither engaged in nor admitted any improper action. Further, the majority owner in *Boathouse* had been warned by the company’s comptroller

that his actions were wrong, but he persisted anyway. *Boathouse*, 442 S.C. at 640–41, 900 S.E.2d at 487. Not so, here. MPS’s majority members did nothing wrong and were never accused by anyone of wrongdoing (other than by Mattison in her bid to extort an inflated price for her shares).

In sum, the *Boathouse* Court’s conclusion that the plaintiff in that case was adequate to serve as a “class of one” by seeking relief that would benefit the company and its other members was based on facts that were specific to that case and are not found in this case. Here, the trial court correctly determined that Mattison’s interest—and the relief she sought—were adverse to the interest of the company and the other members and were motivated solely by her self-interest. This Court should affirm.

III. Mattison voluntarily separated from MPS and has never alleged otherwise.

The third issue addressed in *Boathouse* was whether the trial court had erred by granting a motion to dissociate the plaintiff from the Company. The *Boathouse* Court’s analysis and conclusion on that point are not relevant here. Unlike in *Boathouse*, this case does not seek a judicially compelled separation. Rather, Mattison dissociated from MPS voluntarily, and the parties memorialized her separation with a Severance Agreement and General Release. *See* Severance Agreement (December 5, 2017) (R. 147). In the Severance Agreement, Mattison also released any claims she might have against MPS and its officers and managers in exchange for good and valuable consideration she received in the form of severance pay, FMLA leave, Paid Time Off, a 401(k) matching contribution, continued insurance benefits, and a \$15,000 bonus. *See* Severance Agreement at ¶¶ 2, 4–5 (R. 147–51). The release included “any and all known and unknown claims” against the company and its “managers, officers, directors, [and] employees,” and she expressly agreed not to file or initiate any suit or cause of action including “any class action” or to “serve in any representative capacity” in any action involving MPS. *Id.* at ¶¶ 4–5 (R. 149–51).

CONCLUSION

For the foregoing reasons, Respondents McMillan Pazdan Smith, LLC, Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins respectfully request this Court affirm the Orders of the Circuit Court granting summary judgment on Mattison's derivative claim and denying her Motion for Reconsideration of the same.

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PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the Supreme Court’s Order dated April 24, 2024, undersigned counsel hereby certifies I have served a copy of Respondents’ Supplemental Brief on counsel of record by electronic mail (see attached sent email):

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David — please find attached for electronic service upon you a copy of Respondents' Supplemental Brief, which will be filed with the Court of Appeals shortly.

Regards,

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