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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.

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

Respondents McMillan Pazdan Smith, LLC ("MPS") et al. submit this Return in defense of the Court's Opinion affirming the dismissal of Mattison's derivative claim. None of the arguments in Mattison's Petition for Rehearing identify any point of fact or law that the Court overlooked or misapprehended, and none of her arguments demonstrate that the Court erred. Accordingly, the Court should deny her Petition.

In addition, at an even more fundamental level, the Court should deny Mattison's Petition because it ignores the forest to focus instead on a few trees. As a result, her arguments aren't just wrong—they're irrelevant. That's because the trial court's Order granting summary judgment for MPS on Mattison's derivative claim was supported by several independent bases that are unaffected by the arguments in her Petition. Even if the arguments in her Petition had merit (which they don't), the trial court's Order and this Court's Opinion are still correct for the following reasons.

First, when Mattison voluntarily separated from MPS, she signed a Severance Agreement negotiated by her counsel that released "any and all known and unknown claims" against MPS, its "managers, officers, directors, [and] employees," and that expressly stated she would not bring any suit or cause of action, including "any class action," and would not "serve in any representative capacity" in any action involving MPS. *See* Severance Agreement ¶¶ 4–5 (R. 149–51). Mattison admits the Severance Agreement is a valid and enforceable contract. *See* Answer at ¶ 61 (R. 93).

Second, she conceded repeatedly in this litigation that she brought the derivative claim for the improper purpose of gaining leverage in her dispute with MPS about the value of her shares. That fact, standing alone, is a sufficient (and necessary) basis to dismiss her derivative claim.

Third, Mattison's derivative claim wasn't just opposed by every other member of MPS; it was *antagonistic* to their interests and the corporation's interests. For example, the relief she seeks

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. In other words, regardless of whether a "class of one" can, in some instances, bring a derivative claim, this is not one of those instances. Mattison cannot prosecute a derivative claim that is antagonistic to the interests of the corporation and the other members. The Court should deny her Petition.[1]

ARGUMENT

Mattison's Petition recycles 11 arguments in support of her request for rehearing. MPS has already rebutted them, and the Court has already rejected them. Nevertheless, MPS will respond to them again briefly below.

I. The Court did not overlook or misapprehend *The Boathouse at Breach Inlet,* and, in any event, *Boathouse* does not control this case.

Mattison's first, second, fourth, fifth, and tenth arguments assert that the Court's Opinion in this case is inconsistent with and controlled by the Court of Appeals' Opinion 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).[2] MPS has already explained how the two cases differ factually and why the holdings in *Boathouse* are not relevant to, much less dispositive of, this appeal. *See* MPS's Supplemental Brief (July 5, 2024). The Court already considered and rejected Mattison's arguments relating to *Boathouse*. *See* Slip. Op. at 10–13; *see also id*. at 19 (rejecting the same arguments Mattison has now raised in her Petition for Rehearing). The Court's Opinion in this case did not overlook or misapprehend *Boathouse*.

[1] An additional ground on which the Court could sustain the lower court's ruling is that Mattison did not make an adequate pre-suit demand as required by Rule 23(b)(1), SCRCP. *See* MPS's Brief (June 16, 2021) at 30–37. This Court's Opinion did not rely on that basis, but it provides an additional basis on which to reach the same conclusion.

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

Mattison's faulty reliance on *Boathouse* isn't the only problem with these five arguments. They fare no better on the merits. It is Mattison, not the Court, who misapprehends the Record evidence and engages in speculation. *Compare, e.g.*, Mattison's Petition at 2–3 (faulting the Court for allegedly failing to consider the fact that MPS's other minority members are still employed at MPS and—Mattison speculates—might be hesitant to support her suit for fear of retaliation) *with* Slip. Op. at 14 (expressly considering this argument and correctly concluding that "Mattison provided no evidence other than the fact of their continued employment to suggest this was their reason for their opposition"); *see also* Mattison's Petition at 9 (arguing incorrectly that the Court engaged in improper speculation when, in fact, all the Court did was correctly note that the Record was silent about whether and how the relief sought in Mattison's derivative claim would benefit the corporation).

More damning still, even if these arguments for rehearing were correct in principle (and they're not), they make no difference. It doesn't matter whether MPS's other members are biased or afraid of MPS's management (Petition arguments 1 and 2), whether Mattison's minority shareholder interest is unique (Petition argument 4), whether she has vigorously pursued the derivative claim (Petition argument 5), or whether one majority member is now deceased and another one is mostly retired (Petition argument 10). Even if those things were true, Mattison *still* could not represent a class—even a "class of one"—because her "interests were economically *antagonistic* to MPS" and its members. *See* Slip. Op. at 15 (emphasis added); *see also* MPS's Supplemental Brief (July 5, 2024) at 5–6. The Court did not err, overlook, or misapprehend any material points of fact or law. Mattison's Petition for Rehearing should be denied.

II. Mattison's other arguments are unsupported by or are contrary to Record evidence.

Mattison's third, sixth, seventh, eighth, ninth, and eleventh arguments cherry-pick information from the Record and ignore contrary evidence. Worse yet, in some instances, this selectivity could lead the reader to assume a conclusion that is contrary to the Record evidence. Each of these arguments is discussed briefly below. None of them provide a basis for rehearing.

Mattison's third argument is that the Court erred by overlooking the fact that MPS's other members were supposedly "in the dark" about the majority members' alleged self-dealing. But it is Mattison, not the Court, who has misapprehended the Record evidence. The deposed members specifically stated they *were* aware of her allegations, and Mattison's counsel specifically presented the deponents with information detailing the supposed self-dealing. *See* MPS's Brief (June 16, 2021) at 20–21 (gathering citations to the Record); *see also* Slip. Op. at 6–8, 13–14, and 16–17 (similar).

Mattison's sixth argument is that the Court allegedly misapprehended one statement by Mattison's counsel in a trial court hearing as a concession that Mattison's derivative claim was improperly motivated. According to Mattison, the Court also "ignored the only factual evidence" about her motivation, namely her mid-litigation affidavit in which she tried to claw back her prior statements by averring that her derivative claim was not intended to inflate the price of her shares. *See* Mattison's Petition at 5. Yet again, it's Mattison, not the Court, who has ignored the Record evidence. The Record is replete with written and oral statements in which Mattison and her counsel conceded the motivation for her derivative claim. *See* MPS's Brief (June 16, 2021) at 16–19 (gathering citations to the Record). The Court did not err by taking them at their word.

Mattison's seventh argument is that the Court "improperly focused" on her pre-suit demand letter to MPS in which she threatened to bring a derivative suit if her demands for an inflated valuation of her shares were unmet. Astonishingly, Mattison argues (without any citations to

authority) that this letter and its threat are irrelevant to whether she can serve as a fair and adequate representative in a derivative suit. *See* Mattison's Petition at 6. Not so. Case law clearly shows that a derivative plaintiff is not an adequate representative if she uses her derivative claim to gain leverage in pending litigation. *See* MPS's Brief (June 16, 2021) at 18–19 (collecting cases). The Court did not err by reaching a similar conclusion here.

Mattison's eighth argument is that the Court "improperly gave consideration" to a demand letter sent by Mattison, which she alleges was sent as part of mediation. Her argument suffers from at least two fatal defects. For one, she tries to have her cake and eat it too by relying on the January 14 letter as the mandatory pre-suit demand letter while simultaneously arguing it was a confidential settlement communication. It would be absurd to allow derivative Plaintiffs to insulate their pre-suit demand letters from judicial scrutiny merely by alleging the letter was sent during settlement negotiations. Furthermore, her argument that the January 14 letter was a confidential mediation statement on which the Court cannot rely beggars belief. She incorporated that letter by reference in her pleadings, quoted it in her arguments to the trial court, attached it to a filing in the trial court, cited it in her appellate brief, and included it in her Designation of Matter. *See* Answer ¶ 105 (R. 101); Mattison's Mem. in Opp. to Mot. to Dismiss at 1–2, 8, and Ex. A (May 14, 2019); Mattison's Brief at 27; Mattison's Designation of Matter.

Mattison's ninth argument is that the Court should pay no attention to her requests for relief that would have been deleterious to MPS and its other minority members, including two whom she would have disenfranchised of their membership. She argues that her antagonism to the corporation and its minority members was neutralized by her mid-litigation affidavit in which she offered to sign any necessary paperwork to ratify the memberships of those she had been seeking to disenfranchise. *See* Mattison's Petition at 8–9. Her argument is too little, too late. Mattison's derivative claim

asked 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). She seeks to undo votes and business decisions that every other member of MPS voted for and under which MPS has been operating for many years. She seeks a declaration that MPS's September 30, 2015 Operating Agreement is invalid, *id*. at ¶¶ 48, 90 (R. 127, 134), and she asks the Court to declare invalid any proposed amendments to MPS's Operating Agreement which were not adopted by unanimous consent, *id*. at ¶ 90 (R. 134). She cannot cure her antagonism to the corporation and its members by a grudging mid-litigation offer to relent from the most egregious example of her adversity toward the other minority members.

Mattison's eleventh argument is that the Court "incorrectly relied on Ms. Mattison's counterclaims" to conclude she was conflicted as a representative for a shareholder derivative suit. Yet again, her argument overlooks Record evidence and characterizes the Court's Opinion in a way that is not immediately apparent from the Opinion itself. She faults the Court for its reliance on her counterclaims, but the Opinion only mentions the word "counterclaims" three times, each of which is merely a passing acknowledgment of the case's procedural history. There's no indication that the Court relied on the fact that Mattison asserted compulsory counterclaims to conclude that she was not an adequate representative. If Mattison means that she thinks the Court erred by concluding that, under the specific facts of this case, her interest diverges from the corporation's and the other members' interests, then she should have said so. That argument has already been rebutted, and the Court did not err in concluding from the ample Record evidence that under the appropriate legal test and precedent, Mattison was not an adequate representative. The fact that two of the cases cited by the Court (*Smith* and *Blum*) are procedurally distinct in some points does not taint the Court's reliance on them, and Mattison's silence regarding the other cases

cited by the Court is a tacit admission of the cases' applicability. The Court did not err, overlook, or misapprehend any material points of fact or law. Mattison's Petition should be denied.

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 deny Mattison's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

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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' Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* on counsel of record by electronic mail (see attached sent email):

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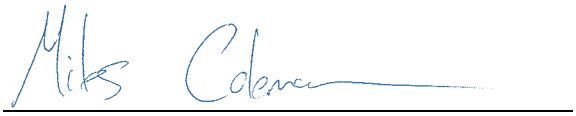
By: 
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From: Miles Coleman
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Subject: MPS v. Mattison (No. 2020-001645) -- Proof of Service of Return to Petition for Rehearing
Attachments: 2024.9.23 -- MPS v. Mattison -- MPS's Return to the Petition for Rehearing.pdf

David, please find attached for electronic service upon you a copy of Respondents' Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. We'll be filing a copy with the Court shortly.

Regards,

Miles Coleman

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