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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

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

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

v.

Donza H. Mattison, Defendant/Counterclaimant-Appellant,

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

v.

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

APPELLANT’S REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

David E. Rothstein, SC Bar No. 66295
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
drothstein@rothsteinlawfirm.com
(864) 232-5870
Attorney for Appellant

Pursuant to Rule 221(a), SCACR, Appellant, Donza H. Mattison (hereinafter “Ms. Mattison”), by and through her undersigned counsel, hereby files this Reply Brief in Support of Petition for Rehearing. Respondents’ Return is long on feigned indignation, but short on substantive legal discussion. In fact, Respondents’ six-plus-page Return does not contain a single citation to any case law other than to reference Appellant’s arguments regarding The Boathouse of Breach Inlet, LLC, by and through Stoney v. Stoney, 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024), Smith v. Ayres, 977 F.2d 946 (5th Cir. 1992), and Blum v. Morgan Guar. Tr. Co. of N.Y., 539 F.2d 1388 (5th Cir. 1976). Rather than discussing each issue as presented by Appellant, Respondents’ Return attempts to lump Appellant’s arguments into two categories: (1) five arguments that are allegedly inconsistent with the analysis and holding of Stoney; and (2) six arguments regarding factual information from the Record on Appeal.¹

(1) Appellant’s first argument involves the final factor of the test set forth in Davis v. Comed, Inc., 619 F. 2d 588 (6th Cir. 1980): “the degree of support plaintiff was receiving from the shareholders [s]he purported to represent.” Id. at 593-94 (emphasis added). The logical flaw in the panel’s opinion of considering the views of other minority members who expressed opposition to the derivative action, while the court analyzed the case under the “class of one” framework, is not a “recycled” argument as summarily asserted by Respondents. Obviously, if Ms. Mattison is pursuing a class-of-one derivative action, she is by definition the only similarly-situated member she

¹Respondents also attempt to resurrect two of their arguments that the Court previously rejected: (1) the release language in the Severance Agreement that Ms. Mattison signed upon the amicable resolution of her employment-related claims; and (2) the adequacy of Ms. Mattison’s original pre-suit demand as required by Rule 23(b)(1), SCRCF. Appellant has addressed these arguments at length in her prior briefs and at oral argument and does not believe it is necessary to repeat those arguments here.

is purporting to represent in seeking to vindicate the rights belonging to the LLC. Respondents do not address this problem at all, but instead try to lump it in with the inherent bias issue of Argument # 2. (See Return, at 3).

(2) Even if the court were logically permitted to consider the views of other minority owners who have expressed disagreement with a class-of-one derivative action, the Stoney holding requires the court to consider potential sources of bias of those minority owners because they might be placing their own personal interests or considerations, such as job security or fear of retaliation, above the best interests of the company. See Stoney, 442 S.C. at 647–48, 900 S.E.2d at 491. Respondents wrongly assert that the panel opinion considered and rejected this specific aspect of the Stoney case at pages 10-13 and 19 of the slip opinion. (Return, at 2). The panel opinion cites to the Stoney case three times in pages 10-13 of the slip opinion, but not for the potential concern that minority members who oppose the derivative action might themselves be biased against the best interests of the company or be pressured by the alleged wrong-doers into disavowing the case. Furthermore, page 19 of the panel’s slip opinion does not cite to the Stoney case at all, nor does it mention any of the holdings of Stoney. The fact that none of the six minority shareholders who were deposed admitted to being concerned about retaliation by MPS is not surprising. People who fear retaliation rarely admit that in front of their current employer or their employer’s legal counsel. Several minority members of MPS acknowledged in their depositions that Ms. Mattison could more freely challenge the actions of the Third-Party Defendants because she is no longer an employee of MPS. (Myers Depo., at 33, l. 24 to 34, l. 6 (R. pp. 460-61)); (Jacobs Depo., at 171, ll. 8-15) (R. P. 453)). The inherent bias of a witness is a factual determination for a jury, not for a court to decide on summary judgment.

(3) With respect to Appellant’s third argument in the Petition for Rehearing, Respondents argue that Appellant has “cherry-pick[ed] information from the Record and ignore[d] contrary evidence.” (Return, at 40). Of course, this appeal is from Respondents’ motion for summary judgment, when the evidence in the record must be viewed in the light most favorable to Appellant as the non-moving party. Appellant’s third argument relates to the deposition testimony of six minority members of MPS who did not support Appellant’s derivative action, as stated in their identical unsworn, written statements. All six of these minority members testified in their depositions that at the time they signed those unsworn statements, none of them had actually seen Ms. Mattison’s Third-Party Complaint setting forth the derivative action allegations against the individual Respondents. (Joslin Depo, p. 31, ll. 12-17 (R. p. 418); p. 173, ll. 17-25 (R. p. 430)); (Jacobs Depo., p. 8, ll. 6-15 (R. p. 432)); (Myers Depo., p. 98, ll. 1-12 (R. p. 472)); (Love Depo., p. 12, ll. 1-14 (R. p. 502); p. 79, l. 3 to 80, l. 2 (R. pp. 517-518); p. 121, ll. 10-14 (R. p. 533)); (Pitts Depo., p. 8, ll. 1-11 (R. p. 557)); (Ballard Depo., p. 8, ll. 6-9 (R. p. 594); p. 39, l. 11 to 40, l. 20 (R. pp. 608-609)). The fact that Respondents’ counsel asked these six witnesses essentially the same rote, self-serving, leading questions at the conclusion of their depositions is not sufficient to overcome the factual statements in Ms. Mattison’s verified pleadings and in her affidavit in opposition to Respondents’ motion for summary judgment. The written statements by the other minority members are based on their uninformed view of the merits of Ms. Mattison’s derivative claims. Several of the minority members who were deposed admitted that they had no information at all about Ms. Mattison’s allegations regarding the lease of the Spartanburg office.² (See Myers

²In fact, Respondents’ counsel instructed one of the witnesses, Paulette Myers, not to answer any further questions about the Spartanburg office lease after she testified that she did not know anything about it. (Myers Depo., at 146, ll. 2-9) (R. p. 483).

Depo., at 74, l. 2 to 76, l. 1 (R. pp. 465-67); at 174, ll. 8-16 (R. p. 497)); Pitts Depo., at 150, ll. 13-21 (R. p. 585)); and Ballard Depo., at 150, ll. 3-15 (R. p. 640)). As the panel opinion correctly recognized, at this preliminary stage in the case, the court is not supposed to consider the merits of the underlying allegations in the derivative action. (Slip Op., at 20) (citing Barrett v. Southern Conn. Gas Co., 374 A.2d 1051, 1059 (Conn. 1977)). Therefore, the court should not have considered other minority members' view of the merits of the case, especially when those minority members have been kept in the dark by those in charge of the company—here, the individual Third-Party Defendants.

(4) Respondents' Return completely ignores Appellant's fourth argument about the Stoney court's repeated expressions of concern about leaving a minority owner (such as Ms. Mattison) of an entity (such as MPS) without a potential legal remedy where majority members of a small company engage in self-dealing or breaches of fiduciary duties to enrich themselves at the expense of the company. See Stoney, 442 S.C. at 647, 900 S.E.2d at 490; id. at 651, 900 S.E.2d at 493; id. at 647, 651, 900 S.E.2d at 491, 493. Respondents' only mention of Argument # 4 is the brief mischaracterization of Appellant's argument as involving "whether Mattison's minority shareholder interest is unique." (Return, at 3). If the panel opinion affirming the dismissal of the derivative action is allowed to stand, no minority member of MPS could ever hold the majority members to account for the allegations Ms. Mattison has raised. Moreover, Ms Mattison could not pursue those allegations in her individual capacity because her damages would not be "separate and distinct" from those of the company. Stoney, 442 S.C. at 647, 900 S.E.2d at 490; see generally Cory Manning et al., "Dead on Arrival: The Perils of Litigating an Aggrieved Shareholder's Breach of Fiduciary Duty Claim," SC Lawyer 39, 40 (Mar. 2020).

(5) Respondents similarly disregard the fifth issue in the Petition for Rehearing,³ which is the fundamental purpose of the “fair and adequate” representative requirement in Rule 23(b)(1), SCRCF, and S.C. Code Ann. § 33-44-1101, as recognized by Stoney: ““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.”” Stoney, 442 S.C. at 648, 900 S.E.2d at 491 (emphasis added) (quoting Cattano v. Bragg, 727 S.E.2d 625, 629 (Va. 2012)). Like with other forms of class action also found in Rule 23, SCRCF, the “fair and adequate” representative requirement for derivative actions is meant to address the potential preclusive effect that the derivative action might have on absent putative class members, whose right to bring a derivative action for the same alleged misconduct could be eliminated under res judicata or collateral estoppel by the result in the case at issue. This concern is minimal (or perhaps non-existent) in a “class-of-one” derivative action, especially where all other minority members of the LLC have purportedly disavowed the proposed derivative action. Ms. Mattison’s Third-Party Complaint is the only potential game in town, since the statute of limitations has long run on the ability of any other minority member of the firm to bring a subsequent or competing derivative action claim based on the same allegations that Ms. Mattison has raised. The individual, Third-Party Defendants in the derivative action should not be able to use this factor as a shield to challenge Ms. Mattison’s standing as a derivative plaintiff. Furthermore, Respondents assert that Ms. Mattison is an improper representative in a derivative action “even a ‘class of one’—because her interests were economically *antagonistic* to MPS’ and its members,” (Return, at 3) (quoting Slip Op., at 15) (second emphasis added). The phrase “and its members” was

³Once again, Respondents misframe Argument # 5 as “whether she [Ms. Mattison] has vigorously pursued the derivative claim.” (Return, at 3).

added by Respondents and is not part of the Stoney test for a class-of-one case. Nor do Respondents qualify what members they are talking about or explain how such members would be harmed economically by the derivative action. Certainly the majority members who are the Third-Party Defendants in the derivative action would be financially harmed by a successful derivative action by Ms. Mattison, because they would have to pay MPS back for any ill-gotten gains they realized through their self-dealing transactions and breaches of fiduciary duty. With respect to the LLC itself, if Ms. Mattison were to prevail on the derivative action, the LLC would directly benefit from any judgment against the Third-Party Defendants (or the Pazdan Estate) individually. The potential benefit to the company of a successful derivative action by Ms. Mattison is self-evident. Any collateral, adverse consequences that might affect the firm's future are a matter of sheer speculation, with no support in the record, as discussed in Argument # 11 below.

(6) With respect to Argument # 6, Respondents continue to twist the record in this case to argue that Ms. Mattison is using the derivative action improperly as leverage to artificially “inflate” the price of her shares beyond fair market value. (Return, at 4). Respondents rather flippantly state, “The Court did not err by taking them [i.e., Ms. Mattison and her counsel] at their word.” (Id.). Ms. Mattison's only testimony in this case is contained in her affidavits in opposition to summary judgment motions or motions to dismiss, as well as in her verified pleadings. Ms. Mattison was never deposed in this case, and there was never any sworn witness testimony at any hearing. Ms. Mattison never “tried to claw back her prior statements” in any way; nor was there anything improper in her “mid-litigation affidavit.” (Id.). Although Respondents hyperbolically assert that “[t]he Record is replete with written and oral statements,” (id. (emphasis added)), all of the statements cited by Respondents at pages 16-19 of their Final Brief (June 16, 2021) were part of

the same colloquy between Appellant's undersigned counsel and the circuit judge during the first summary judgment hearing on May 12, 2020. (R. pp. 316, 322, 324, and 327). Anyone who has ever participated in, presided over, or even observed a jury trial is familiar with the standard admonishment the trial judge gives to a jury that "what the lawyers say is not evidence"; it is merely argument. Furthermore, no one knows what the undersigned counsel for Appellant meant by the language he used during the summary judgment hearing better than the undersigned counsel himself. Neither Appellant nor her counsel has ever conceded that the derivative action or the pre-litigation threat of a derivative action was ever used as leverage or extortion or to inflate what Ms. Mattison received for her shares beyond fair market value. In fact, Ms. Mattison plainly testified that she has never sought more than fair market value for her shares of MPS. The figure in the pre-mediation demand letter (discussed in more depth in Arguments # 7 and 8 below) was based on Appellant's expert's calculation of fair market value, with no consideration at all given for the potential additional value of a derivative action. Ms. Mattison has always been consistent on that fact, as confirmed in her Affidavit of May 14, 2020: "The monetary demand that my attorney made in his letter of January 14, 2019, was based on my expert's evaluation of the latest HDH Advisors' summary report, with adjustments made based on the limited information that we had at that time. I was not seeking any additional value or 'premium' on the value of my shares to 'purchase my silence' with respect to the possible derivative shareholder claim." (R. 1094, ¶ 15) (emphasis added). Respondents' suggested reading of the summary judgment transcript is a distorted interpretation of the Record, especially when all facts and inferences must be taken in the light most favorable to Appellant at this stage of the case.

(7) Respondents again inaccurately and unfairly use the phrase "inflated valuation" to

describe the pre-mediation demand letter of January 14, 2019, in responding to Argument # 7. The fact that the undersigned counsel for Appellant sent that letter in conjunction with a pre-suit mediation is not relevant to the issue of whether or not Ms. Mattison could fairly and adequately represent both the class-of-one's and the LLC's interests in the subsequently filed derivative action. Although Respondents do not include any case citations on this point, Respondents baldly assert that “[c]ase law clearly shows that a derivative plaintiff is not an adequate representative if she uses her derivative claim to gain leverage in pending litigation.” (Return, at 5). Respondents’ Return refers to pages 18-19 of their Final Brief for a collection of case citations on that point.⁴ Importantly, Respondents omit the adjective “other” from the fifth factor of the test from Davis v. Comed, Inc.,

⁴All five of the cases cited in Respondents’ Final Brief are easily distinguished from the facts presented here, because those cases involved clear situations where the parties were involved in other litigation wholly unrelated to the purported derivative action. See Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992) (“A catalog of the various lawsuits between these two parties and their affiliates would consume well over a full page.”); Zarowitz v. Bank of America, 866 F.2d 1164, 1165-66 (9th Cir. 1989) (rejecting appeal of settlement of a derivative action by objector who was motivated by the adverse impact the settlement would have on his wrongful termination claims against the bank); Recchion v. Kirby, 637 F. Supp. 1309, 1312-13, 1315 (W.D. Pa. 1986) (plaintiff had a pending wrongful discharge case against Westinghouse seeking compensatory and punitive damages, had purchased one share of stock in Westinghouse (out of almost 175 million shares issued and outstanding) several years after his termination, for the express purpose of bringing a derivative action, and personally participated in the alleged accounting misconduct at issue in the proposed derivative action); Palmer v. US Savings Bank, 553 A.2d 781, 786-87 (N.H. 1989) (proposed derivative plaintiff Lowell, who was the former president of the bank on whose behalf he was attempting to bring the derivative action, was a judgment creditor of the bank for \$1 million on his personal contract claim that was on appeal, and he also sought to be appointed the receiver of the bank’s assets); Khanna v. McMinn, No. CIV.A. 20545-NC, 2006 WL 1388744, at *43 (Del. Ch. May 9, 2006) (former general counsel of the company, who was fired amidst charges of sexual impropriety, could not bring a derivative action on behalf of his former employer because the alleged derivative claims were substantially related to legal work that he performed for the company and because of his on-going legal dispute with the company over his employment). The panel opinion here only mentions two of the cases cited by Respondents’ Final Brief (Smith v. Ayres and Palmer v. US Savings Bank. (Slip Op., at 11)). The Smith v. Ayres case is discussed in more detail in Argument # 11 below.

619 F.2d 588 (6th Cir. 1980): “other litigation pending between the plaintiff and the defendants.” (emphasis added). There is no other litigation between the parties here. Ms. Mattison amicably resolved all of her potential employment-related claims to her satisfaction in December 2017, and she was approved for long-term disability benefits based on her health conditions following her voluntary resignation from the firm in February 2018. The valuation portion of this case, which was originally brought as a declaratory judgment by MPS against Ms. Mattison, is not “other” litigation; it is all part of the same litigation initiated by MPS, not by Ms. Mattison. Perhaps more importantly, Ms. Mattison’s counterclaims against MPS in this case necessarily implicate the same underlying facts as the derivative action, because the court must consider those alleged transactions as part of the normalization process required for a fair market value determination. See Blackburn v. TKT & Assocs., Inc., 387 S.C. 589, 596, 693 S.E.2d 919, 922 (2010) (“[A]t a minimum, Petitioners showed Respondents’ salaries were excessive and some normalization adjustment was required.”). In other words, Ms. Mattison’s legal and factual positions in both the derivative action raised in the Third-Party Complaint and the valuation claims are identical.

(8) With respect to the amount of the initial demand set forth in the January 14 letter, Respondents falsely state that Appellant “tries to have her cake and eat it too.” (Return, at 5). There is nothing inherently inconsistent (much less something that “beggars belief” (id.)) with trying to shield the specific amount of the demand in the January 14 letter from consideration while still using that letter as satisfaction of the pre-suit demand requirement in Rule 23(b)(1), SCRCP, for a derivative action. The applicable evidentiary rule specifically contemplates a situation where a document containing inadmissible settlement negotiations could still be considered for other, limited purposes. See Rule 408, SCRE (“This rule also does not require exclusion when the evidence is

offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”). Satisfying the pre-suit demand requirement of Rule 23(b)(1), SCRCPP, is such a limited purpose. Furthermore, Rule 8(a) of the South Carolina ADR Rules also protects settlement offers as part of the mediation process from being disclosed outside of mediation. Rule 8(a), SCRADR. The letter of January 14 can serve two purposes at once, in two completely separate parts of the letter: (1) a pre-mediation, pre-litigation demand, and (2) the demand required as a pre-requisite to filing a derivative action under Rule 23(b)(1), SCRCPP. Defendant Mattison’s Memorandum of Law in Opposition to Plaintiff’s and Third-Party Defendants’ Motion to Dismiss (filed May 14, 2019), did not mention the amount of the settlement demand, but only quoted the portions of the January 14 letter in reference to the second purpose identified above. Significantly, that brief was not included in the Record on Appeal in this case and cannot even be considered by the appellate court. Rule 210(h), SCACR. Respondents themselves filed the January 14 letter as Exhibit H to their Motion for Summary Judgment on May 7, 2020, specifically pointing to the amount of the demand as evidence of alleged leverage on Ms. Mattison’s part. (R. pp. 844-847). Respondents do not address at all the obvious panel opinion’s confusion in misreading of Defendant’s Memorandum of Law in Opposition to Motion to Dismiss Amended Third-Party Complaint, where that brief clearly referred to second notice letter of June 18, 2019, which was not written in the context of settlement discussions or mediation, but merely as prerequisites to the filing of the Amended Answer, Counterclaims, and Third-Party Complaint. Nor do Respondents even bother to address the circuit court’s statement during the summary judgment hearing on May 12, 2020, that the large amount of the demand when compared to MPS’s original offer for her shares was “the biggest thing I’ve seen [with regard to]

whether or not Ms. Mattison could perform as a fiduciary [in the derivative action].” (R. 315) (emphasis added). Ms. Mattison never raised the prospect of settlement after the mediation in February 2019 failed and this lawsuit was filed against her by MPS approximately 10 minutes later. Accordingly, she has never tried to use the pending derivative action as leverage of any sort. Even if Ms. Mattison and MPS had reached a settlement as part of the pre-suit mediation, that settlement would not have prejudiced the rights of any other minority member to bring a derivative action on behalf of MPS for the same underlying misconduct, which is the primary concern of the “fair and adequate” representative requirement.

(9) Respondents attempt to counter Argument # 9 by pointing to a remedy Ms. Mattison has requested against MPS in her counterclaims that would allegedly be harmful to MPS and to other minority members of the firm, specifically two new members who would be “disenfranchised of their membership.” (Return, at 5). Respondents argue that Ms. Mattison’s affidavit in which she acknowledged offering to ratify those two members’ making partner at MPS even though the firm never submitted the question of their partnership to her, was “too little, too late.” (Id.). Respondents are confusing the derivative action with her counterclaim for declaratory judgment. Paragraph 90 of the Verified, Amended Answer, Counterclaims, and Third-Party Complaint, which is repeatedly cited by Respondents’ Return at page 6, is actually part of Appellant’s Fourth Counterclaim (for Declaratory Judgment), not part of the Third-Party Complaint where the derivative action is pleaded. (R. p. 134). Ms. Mattison’s allegations forming the derivative action start on Paragraph 92 of that document. (R. p. 135). The fact that Ms. Mattison is seeking in her counterclaim to have MPS and its members comply with the provisions of the only validly adopted Operating Agreement from September 2009 and the LLC statute does not demonstrate any antagonism towards MPS so as to

preclude her from serving as a fair and adequate derivative action plaintiff. The company, as “a legal entity distinct from its members,” (S.C. Code Ann. § 33-44-201), has an inherent interest in ensuring that its business is conducted in accordance with valid governance documents for the company and with the statutory requirements for all LLCs in South Carolina⁵; otherwise actions taken in violation of such constraints could be challenged as ultra vires. See Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016) (“A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto. A corporation’s actions taken within the scope of the powers granted it are considered intra vires acts; acts beyond the scope of its powers, however, are ultra vires acts.”); see also In re Kang, No. 15-2345, 664 F. App’x 336, 340 (4th Cir. Nov. 29, 2016) (“Although few courts appear to have spoken on the issue, the courts that have addressed it conclude that actions that violate an LLC’s operating agreement are null and void.”). Significantly, the two newest, minority members of MPS could have no possible interest in the derivative action in any event, because all of the allegations at issue in the Third-Party Complaint occurred prior to the anticipated effective date of Ms. Mattison’s dissociation from the firm, with the valuation date for her ownership interests being December 31, 2017. The two newest partners at MPS were offered partnership, or member units, in the architecture firm only after Ms. Mattison’s departure as an employee of the firm. (Mattison Aff., at 7-8, ¶ 26) (R. p. 1096-97). As Ms. Mattison testified in her affidavit, “I was never given notice of their proposed membership documents or an opportunity to vote on their admission

⁵By statute, the admission of a new member to an LLC requires the unanimous consent of all members of the LLC. S.C. Code Ann. § 33-44-404(c)(7). In addition, amendments to the operating agreement of an LLC require the unanimous consent of all members of the LLC. S.C. Code Ann. § 33-44-404(c)(1).

to the firm.” (Id. at 8, ¶ 26) (R. p. 1097). These two newest minority members would actually be precluded from serving as derivative action plaintiffs for the same allegations made by Ms. Mattison in her Third-Party Complaint, because they were not members of MPS at the time of the allegation challenged in her derivative action. See S.C. Code Ann. § 33-44-1102 (“In a derivative action for a limited liability company, the plaintiff must be a member of the company when the action is commenced; and . . . must have been a member at the time of the transaction of which the plaintiff complains.”) (emphasis added). Respondents’ repeated assertion that Ms. Mattison is trying to disenfranchise members of MPS is invalid as a matter of fact and law and is a complete red herring.

(10) Respondents lump Argument # 10 into the first group of arguments in which they allege that the panel’s opinion is consistent with the Stoney case or they contend that the arguments make no difference to the outcome of this case. (Return, at 3). Respondents’ only assertion with respect to Argument # 10 is that “[i]t doesn’t matter . . . whether one majority member is now deceased and another one is mostly retired (Petition argument 10).” (Return, at 3). Respondents do not respond at all to the panel opinion’s improper speculation about possible collateral effects an adverse ruling against one or more of the four individual Third-Party Defendants in the derivative action might have upon the continued operations of the firm. Nor do Respondents discuss the fact that MPS actually changed its management structure in November 2019 (8 months after Ms. Mattison filed her Third-Party Complaint) to be run by a new board of directors instead of solely by the Third-Party Defendants. Furthermore, Respondents do not address the Stoney Court’s accurate observations that “[c]harged emotions and economic antagonism are virtually endemic to disputes in closely held corporations,” and that such collateral concerns about the continued harmony within the company should not preclude a derivative action by one of the minority members from going

forward as a class-of-one derivative action. Stoney, 442 S.C. at 648, 900 S.E.2d at 491 (quoting Cattano v. Bragg, 727 S.E.2d 625, 629 (Va. 2012)).

(11) Finally, with respect to Argument # 11, Respondents again fail to address the main point of this portion of Appellant’s Petition for Rehearing. Whether or not the panel opinion uses the word “counterclaims” only three times to discuss the procedural history of the case (as asserted by Respondents (Return, at 6)), the court was unquestionably concerned that the allegations Ms. Mattison has raised in her compulsory counterclaims somehow put her at odds with her obligation to pursue the derivative action “fairly and adequately” and to advance the interests of MPS with “undivided loyalty.” (Slip Op., at 11, 14-15) (quoting Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992)). Respondents continue erroneously to include “the other members’ interests,” (Return, at 6), as a valid consideration. Because the case fits within the class-of-one type of derivative action, Ms. Mattison is not undertaking to represent the interests of any other minority members who are not similarly situated to her. Respondents’ passing comment that the cases of Smith v. Ayres and Blum v. Morgan Guar. Tr. Co. of N.Y., 539 F.2d 1388 (5th Cir. 1976), “are procedurally distinct in some points,” (Return, at 6), is a gross understatement. The facts of Smith and Blum could hardly be more dissimilar to the facts presented here, as summarized in footnote 4 above.⁶ Most importantly, as

⁶Respondents falsely state that “Mattison’s silence regarding the other cases cited by the Court is a tacit admission of the cases’ applicability.” (Return, at 6-7). Under Respondents’ flawed logic, Respondents would be deemed to have conceded that all of the case citations in Appellant’s Petition are valid, because Respondents do not cite to a single case in their Return. Appellant focused on those two cases because this court primarily relied on Smith and Blum in discussing the potential conflict of interest where the proposed plaintiff in a derivative action is also involved other, unrelated litigation against the same corporation that plaintiff is seeking to represent in the derivative action. (Slip Op., at 14-15). Many of the other cases cited by this court for that general proposition are discussed in footnote 4 above, which summarizes how those cases are readily distinguishable from the situation presented here.

discussed above in connection with Arguments # 7 and 9, Ms. Mattison is not involved in “other” litigation with MPS that would compromise her ability to bring a derivative action. Ms. Mattison is involved in only one case with MPS that has two components: the valuation issue (which was originally brought by MPS as a declaratory judgment), and the derivative action. Ms. Mattison’s legal positions and factual allegations are entirely consistent between the two components of this single case, and she has never tried to advance one at the expense of the other.

For all of the foregoing reasons and for the reasons previously stated in Appellant’s Petition for Rehearing, the Court should reverse the ruling by the circuit court dismissing the derivative action.

Respondents’ statement in argument heading I. that “*Boathouse* does not control this case” (Return, at 2), demonstrates that rehearing by the full Court of Appeals sitting en banc is appropriate pursuant to Rule 219, SCACR, to ensure consistency among the court’s published precedents on derivative actions by members of LLCs.

September 30, 2024

s/ David E. Rothstein
David E. Rothstein, SC Bar No. 66295
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870
Attorney for Appellant

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PROOF OF SERVICE

I certify that I have served Appellant’s Reply Brief in Support of Petition for Rehearing and Suggestion for Rehearing En Banc on Respondents, McMillan Pazdan Smith, LLC, Rondald G. Smith, Estate of Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins, by email on September 30, 2024, addressed to their following attorneys of record: Samuel W. Outten and Miles Coleman, Nelson Mullins Riley & Scarborough LLP, 2 W. Washington St., Suite 400, Greenville, SC 2960; Thomas H. Keim, Jr., Ford Harrison, 100 Dunbar St., Suite 300, Spartanburg, SC 29306; and A. Mattison Bogan, Nelson Mullins Riley & Scarborough, LLP, 1320 Main St., 17th Floor, Columbia, SC 29201.

[Signature of Counsel on Following Page]

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s/ David E. Rothstein
David E. Rothstein, SC Bar No. 66295
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
drothstein@rothsteinlawfirm.com
(864) 232-5870
Attorney for Appellant