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Apr 10 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No.: 2016-CP-10-06265
App. Case No. 2022-000078

TONY A. BILLIPS, individually and as a derivative shareholder of Alex's Restaurants, Inc.,……………..*Plaintiff /Respondent*,

v.

CAROLYN A. BILLIPS, individually and as Trustee of the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex's Restaurants, Inc. and ALEX'S RESTAURANTS, INC.,…………………………………………………*Defendants/Appellants*.

APPELLANTS' PETITION FOR REHEARING

Defendant/Appellants Carolyn Billips and Alex's Restaurants, Inc. (collectively, "Ms. Billips" or "Appellants"), pursuant to Rule 221(a), S.C.A.C.R., hereby petition this Court for rehearing of its March 26, 2025 unpublished, *per curiam* Opinion affirming the Master ("the Opinion"). Appellants respectfully submit the Court overlooked or misapprehended the following:

A. With regard to numbered paragraphs 1 and 2 of the Opinion, that the case of *Lawson v. Rogers* is controlling with regard to the question of whether Respondent elected a remedy by pursuing his accounting cause of action to final adjudication;

B. With regard to numbered paragraphs 1 and 2 of the Opinion, that because Respondent *did* pursue his accounting cause of action to a final adjudication (as evidenced by, *inter alia*, this Court's jurisdiction), he has elected the accounting as a remedy;

C. With regard to numbered paragraph 2 of the Opinion, that an accounting, as a remedy and cause of action, is not solely for determining the value of an interest, but also for rendering a judgment for the amount found to be due;

D. With regard to numbered paragraph 2, that Respondent, in his Complaint and on the stand at trial, asked the Master to both value his interest and order that it be paid to him as part of his accounting cause of action;

E. With regard to numbered paragraph 3, that the trial court order referenced by the Opinion resolved a motion filed by *Respondent*, not Appellants, and that Appellants raised their arguments for sanctions to the trial court, obtained a ruling (one that was not immediately appealable), and once an appeal could lie, appealed that ruling, thus preserving the issue for appellate review;

F. With regard to numbered paragraph 3, that Appellants moved this Court to seal the portion of the transcript that had been sealed below (so that this Court *could* be provided with the full record while maintaining the protections ordered by the trial court), but this Court denied that Motion, preventing Appellants from providing the full record; and

G. That Respondent conceded Appellants' argument that his judicial admission that all his causes of action arise from the same facts and circumstances by failing to address the argument in his opposition brief; therefore, the factual findings by the Master in the accounting cause of action would bind Respondent with regard to all of his causes of action, as they are all based upon the same facts.

I. ARGUMENT

A. *Lawson v. Rogers* Is Controlling.

The Opinion holds that "there was no election of remedies because there was no final adjudication as the master's order . . . remanded the case back to the circuit court so that all remaining causes of action could be heard." Opinion at 1. Respectfully, this overlooks, *inter alia*, the decision of this State's Supreme Court in *Lawson v. Rogers*, 312 S.C. 492, 501, 435 S.E.2d 853, 858 (1993).

In *Lawson*, the case was bifurcated and all legal causes of action were stayed pending an accounting:

> The legal actions were stayed while the hearing on the accounting was held. After hearing the evidence presented by both sides related to the accounting action, Judge Lockemy issued a decree.

Lawson, 312 S.C. at 494-95, 435 S.E.2d at 855. The arguments in the accounting cause of action in *Lawson* centered on two types of alleged misappropriation (*id.* at 495, 435 S.E.2d at 855 ("Two separate types of misappropriation are alleged in this action.")). Like here (*see infra*, Part I.G), the same alleged misappropriation that formed the basis of the accounting cause of action was the basis for the legal causes of action (*id.* at 501, 435 S.E.2d at 858 ("The pleadings reflect all the claims arise out of the same set of facts and wrongdoing.")).

Accordingly, the Supreme Court held that:

> Lawson and Houck, having chosen to proceed in an accounting action, have made an election of remedies, and may not now proceed with alternative remedies for the same wrong.

Id.

The *Lawson* case is squarely on point and precludes a party from proceeding with additional causes of action based on the same alleged wrong after choosing to proceed to the conclusion of an accounting action.

B. Respondent Proceeded to a Final Decision With Respect to his Accounting Cause of Action.

The Opinion's holding that there was no final adjudication further overlooks the procedural posture of this case and this Court's prior ruling on appealability. This case was referred to the Master to "preside over the accounting requested by Plaintiff . . . ." **R. p. 0004**. The Master presided over the trial and entered a ruling with regard to the accounting, and (erroneously, Appellant contends) remanded the case to the circuit court for a determination of all causes of action *other than* the accounting. As to the accounting, there is nothing left to decide. Accordingly, the accounting cause of action was adjudicated to its conclusion by the Master.

There being no causes of action in Respondent's complaint based on different facts than his accounting cause of action (*infra* Part I.G), Respondent has elected his remedy pursuant to *Lawson v. Rogers* and is not permitted to pursue other causes of action based on those same facts.

That the ruling on the accounting finally resolved the claim is further evidenced by the payment of the amount identified by the Master as owing into Court pursuant to Rule 67, S.C.R.C.P. in order to halt post-judgment interest. **R. p. 0032**.

Finally, that the Master's ruling finally resolved the accounting claim is evidenced by this Court's jurisdiction to hear this appeal pursuant to S.C. Code § 14-3-330, which permits immediate appeal of orders that finally determine a cause of action, as this Court acknowledged by Order of March 11, 2022. **Ex. A**.

C. An Accounting, as a Remedy and a Cause of Action, Includes the Rendering of a Judgment in the Amount Found to be Due.

The Opinion holds that the Master "only had authority to complete an accounting for Tony's interest in Alex's and not order a payout based on that." Opinion at 2. Respectfully, this misapprehends the purpose of an accounting and runs contrary to the relief he requested both in his complaint and in his live testimony before the trial court.

An accounting is a cause of action by which a court determines a party's financial interest *and* enters a judgment thereupon. The South Carolina Supreme Court explained it thus:

> [T]he equitable remedy of "accounting" sought by the parties in the instant case . . . refers to "an adjustment of the accounts of the parties *and a rendering of a judgment for the balance ascertained to be due*."

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (citing 1 AM. JUR. 2d – *Accounts and Accounting* § 52 (2005)) (emphasis added). The Master was obligated not just to value Respondent's interest, but to order that it be paid to him.

D. Respondent Asked that Appellants Be Ordered to Pay Out the Value of his Interest Both in his Complaint and in his Trial Testimony.

Respondent expressly requested the trial court order that the value of his interest be paid out to him. The prayer for relief in Respondent's amended complaint requested:

> [A] judicial determination of Plaintiff's interest in Alex's Restaurants, Inc. and the distribution of that interest to Plaintiff.

R. p. 0093. During his live testimony at trial, Respondent testified:

> Q. And you're asking this Court to determine the value of that interest and cash you out on your interest, correct?
>
> A. Yeah, from the – what was given to me when it was given to me.
>
> Q. And that would be based on the value today of –
>
> A. Correct.
>
> Q. – the operations?
>
> A. Yes, sir.

R. p. 0511, lines 1–10. The Master's November 22, 2021 order granted this very relief, ordering that Respondent receive $44,143.08 in exchange for his interest:

> Accordingly, the Court finds the value of Mr. Billips' 18.3% interest to be $44,143.08. . . . IT IS FURTHER ORDERED that, upon tender of the sum of $44,143.08 to Mr. Billips, his shares shall be transferred back to the corporation for the benefit of Ms. Billips.

R. p. 0038. It was error to reverse the award on reconsideration and remand the case to circuit court so Respondent could have another bite at the apple.

E. The Opinion Misapprehends that Appellants' Request for Sanctions, and all Arguments Relating Thereto, Are Preserved for Appeal and Have Not Been Waived or Conceded.

The Opinion holds, with respect to Appellants' request for sanctions, that:

> [O]n *August 10, 2021*, the master issued a Form 4 order providing Appellants' motion to compel updated discovery was resolved, and Appellants failed to object or file a motion to reconsider this finding. Because Appellants did not take any actions following the Form 4 order, we find the issue conceded on appeal.

Opinion at 2 (emphasis added). The Opinion misapprehends that the motion noted as "resolved" in the Master's August 10, 2021 Order was a motion filed *by Respondent* on August 4, 2021. **R. p. 0029**. This Motion, and thus the Master's ruling on it, was entirely unrelated to Appellants' request for sanctions and cannot serve as the basis for this Court's determination that the issue is conceded.

Further, it is not clear what Appellants failed to do, having moved for sanctions, presented their arguments to the trial court, and obtained a ruling on those arguments. On October 4, 2018, Appellants moved the trial court to dismiss Respondent's complaint as a sanction for Respondent's non-compliance with multiple court orders and non-cooperation in discovery. *See* **R. p. 0131**. The motion was denied by the trial court by order dated December 28, 2018. **R. p. 0027**. The order was not immediately appealable.

Following the entry of the trial court's November 22, 2021 Order and Respondent's December 2, 2021 Motion for Reconsideration, Appellants filed an opposition to Respondent's Motion along with a Motion requesting, *inter alia*, relief on account of Respondent's non-compliance with further court orders. *See* **R. p. 0195**. On December 21, 2022, the trial court entered its order granting the Motion for Reconsideration in part and denying Appellants' requested sanction. **R. p. 0040** ("Defendant's remaining relief is respectfully DENIED.").

Accordingly, the question was presented to the trial court, was ruled on by the trial court, and was timely appealed. The Opinion misapprehends the Master's August 10, 2021 ruling and overlooks the fact the issue is preserved and has not been waived or conceded in any respect.

F. Appellants Moved to Seal Portions of the Record so that a Complete Record Could Be Presented to this Court, but the Motion Was Denied.

The Opinion states: "we hold Appellants' request for sanctions related to violations of the confidentiality order cannot be reviewed due to an insufficient record." Opinion at 3. Further, it

states "Appellants failed to provide those documents [that were sealed in the trial court] or any other relevant materials associated with Tony's alleged violations of those orders for this court to review." Opinion at 4.

However, the Opinion overlooks the fact that, on June 10, 2022, Appellants moved this Court for an order permitting them to file these very same documents under seal. **Ex. B.** This was necessary to protect the confidentiality of those materials, which the trial court had recognized in granting Appellants' December 17, 2021 motion to seal. **R. p. 0040**. This Court denied Appellants' motion on October 4, 2022. **Ex. C**.

Accordingly, Appellants were prevented from providing these materials to this Court, because it would remove the necessary protections granted by the trial court.

G. Respondent Did Not Address Appellants' Judicial Admission Argument and Therefore Has Conceded It

The Opinion overlooks that Respondent conceded that he is bound by his judicial admission that all of his causes of action relate to the same alleged malfeasance. Appellants argued this in their Opening Brief. **Opening Brief** at 7–9. Respondent failed to respond to this argument in his brief; therefore, he conceded it. *See* 5 AM. JUR. 2d – *Appellate Review* § 512 (2016) ("[i]f an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct"); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (citing the same), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

The gravamen of all of Respondent's claims was the allegation that Ms. Billips had comingled corporate and personal assets and/or siphoned money out of the corporation for personal

use.[1] *See* **R. pp. 0084–88 ¶¶ 33, 34, 38, 47, 64, 68**; **Appellants' Brief** at 7. Indeed, the accounting cause of action itself alleges:

> The amount due to Plaintiff from Defendant is not readily ascertainable because the amount of corporate assets siphoned out of the corporation to the Defendant in her personal capacity is unknown.

R. p. 0084 at ¶ 38. This allegation was placed squarely before the Master, who ruled as follows:

> The Court finds that the use of proceeds from the sale of assets of Alex's [the business at issue] in order to satisfy tax obligations for Flowertown [a separate business owned by Ms. Billips] requires an adjustment in the valuation of Alex's. Contemporary accounting records show that $170,277.57 of proceeds from those sales went to satisfying tax obligations for Flowertown.
>
> [. . .]
>
> However, contemporary accounting records also establish that Ms. Billips contributed $168,213.90 in personal assets for the benefit of Alex's during this same time period, as follows:
>
> [. . .]
>
> As the proceeds to Flowertown exceeded Ms. Billips' personal contributions by $2,063.67, the Court finds that Ms. Billips owes $2,063.67 to Alex's Inc., increasing the valuation of Alex's Inc. by that amount, for a total of $301,030.30.

R. pp. 0036–37.

Having conceded that he is bound by his judicial admission that his causes of action arise from the same facts and alleged wrongdoing,[2] Respondent is estopped from contending that his

---

[1] At trial, Respondent further sought to prove that Ms. Billips used her majority interest to deny Respondent a meaningful ability to influence the direction of the corporation, including the sale of certain locations of Alex's Restaurants as a result of financial hardships suffered by the company. *E.g.*, **R. p. 0437, line 8 – p. 0444, line 18**. This was likewise unsuccessful, the Master finding Ms. Billips' efforts, including making the difficult decision to close certain locations, were the only thing that kept the business afloat. **R. p. 0715, line 13 – p. 0716, line 9**.

[2] *See Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264–65 (4th Cir. 2004) ("Judicial admissions are not . . . limited to affirmative statements that a fact exists. They also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.").

other causes of action have a separate factual basis that was not presented to the Master as part of the accounting. *See, e.g.*, *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding."); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (the doctrine of collateral estoppel precludes parties "from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same"). The Master's determinations of fact are binding and determinative of all other causes of action.

And, having proceeded with his accounting cause of action to its conclusion, he has elected his remedy and is barred from pursuing additional remedies for that same alleged wrong. *Supra* Parts I.A-D. The Opinion overlooks this.

II. CONCLUSION

For the reasons stated herein, Appellants respectfully petition this Court for rehearing.

Respectfully submitted:

EPTING & RANNIK, LLC

This 10th day of April, 2025
Charleston, South Carolina

*/s/ Jaan Rannik*____________
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ATTORNEY FOR DEFENDANTS/APPELLANTS

EXHIBIT A

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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March 11, 2022

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Re: Tony Billips v. Carolyn Billips
Appellate Case No. 2022-000078

Dear Counsel:

Enclosed is a copy of this Court's order regarding the appealability of this case.

Please be advised that the appellant's initial brief and designation of matter are due to be served and filed within thirty (30) days from the date of this letter.

Very truly yours,

V Claire Allen

CLERK

The South Carolina Court of Appeals

Tony A. Billips, individually and as a derivative shareholder of Alex's Restaurants, Inc., Respondent,

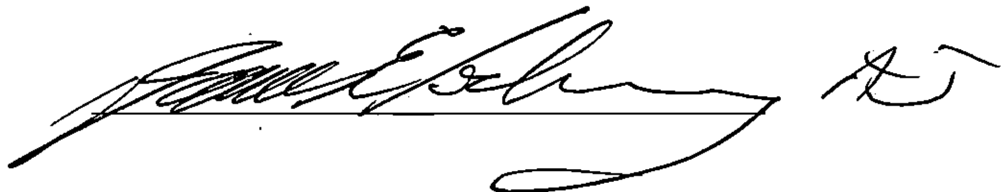
v.

Carolyn A. Billips, individually and as Trustee for the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex's Restaurants, Inc., and Alex's Restaurants, Inc., Appellants.

Appellate Case No. 2022-000078

ORDER

The parties consented to refer Respondent's accounting cause of action to a master-in-equity. Appellant now appeals the master-in-equity's orders valuing Respondent's shares in Alex's Restaurant, Inc. and remanding the remaining causes of action to the circuit court. After receiving the notice of appeal, the Court ordered the parties to serve and file memoranda addressing the appealability of the master's orders. After careful review and consideration of the parties' memoranda, we find the orders are immediately appealable. *See* S.C. Code Ann. § 14-3-330 (2017) (providing our appellate courts have jurisdiction to review interlocutory orders that "involve[] the merits" or "affect[] a substantial right made in an action when such order . . . in effect determines the action and prevents a judgment from which an appeal might be taken"); *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) ("To involve the merits, the order must 'finally determine some substantial matter forming the whole or part of some cause of action or defense . . . .'" (quoting Mid-State Distributors, Inc., v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993))). However, nothing in this order prevents the parties from addressing appealability in their briefs.



FOR THE COURT

Columbia, South Carolina

FILED
Mar 11 2022

cc:
Jaan Gunnar Rannik, Esquire
Michael W. Sautter, Esquire
O. Grady Query, Esquire
Michael Holland Ellis, Jr., Esquire

EXHIBIT B

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Jun 10 2022
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No.: 2016-CP-10-06265
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TONY A. BILLIPS, individually and as a derivative shareholder of Alex's Restaurants, Inc.,………...*Plaintiff /Respondent*,

v.

CAROLYN A. BILLIPS, individually and as Trustee of the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex's Restaurants, Inc. and ALEX'S RESTAURANTS, INC.,…………………………………………………*Defendants/Appellants*.

APPELLANTS' MOTION TO SEAL

Appellant Carolyn Billips moves this Court to seal limited portions of the briefing in this matter and limited items in the record on appeal.

The trial court granted Appellant's motion to seal portions of the record that relate to certain allegations. It will be necessary for this Court to have access to these materials in order to consider a portion of the relief Appellant seeks on appeal. However, Appellant does not wish to waive her entitlement to keep those materials sealed at the trial level, or render that protection moot, and so asks that this Court seal (i) the previously sealed materials to be included in the

record on appeal and (ii) Part IV Introductory Paragraph and § B of Appellant's Initial Brief discussing the same subject matter.

Appellant would also request that all future filings relating to this subject matter, including relevant portions of the briefing, be maintained under seal. This request is narrow in scope and applies only to a handful of documents, a small portion of Appellant's initial brief, and Appellee's response as to this limited subject matter.

Respectfully submitted:

June 10, 2022
Charleston, South Carolina

EPTING & RANNIK, LLC
*/s/ Jaan Rannik*___________
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ATTORNEY FOR DEFENDANTS/APPELLANTS

EXHIBIT C

The South Carolina Court of Appeals

Tony A. Billips, individually and as a derivative shareholder of Alex's Restaurants, Inc., Respondent,

v.

Carolyn A. Billips, individually and as Trustee for the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex's Restaurants, Inc., and Alex's Restaurants, Inc., Appellants.

Appellate Case No. 2022-000078

ORDER

Appellant has filed a motion to seal certain portions of the briefs and record on appeal in this matter. Although there is no provision in the South Carolina Appellate Court Rules for sealing records in the appellate court, the court has the power to control its own records. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006). Rule 41.1(b), SCRCP, requires a motion to seal to identify, with specificity, the documents or portions of documents for which sealing is considered necessary, to contain a non-confidential description of the documents, and to be accompanied by a separately sealed attachment labeled "Confidential Information to be submitted to Court in Connection with the Motion to Seal." The Rule also requires the moving party to state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

> (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the

> documents are not available to protect legitimate private interests; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

Id. When ruling on a motion to seal, the court may also consider the public interest in the proceeding; the private or public status of the litigants and case generally; whether release would enhance the public's understanding of an important historical event; whether the public already has access to information contained in the records; whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470.

After careful consideration, Appellant's motion to seal is denied. Appellant has failed to address any of the factors enumerated in Rule 41.1, SCRCP, and *Ex parte Capital U-Drive-It, Inc*.

FOR THE COURT

Columbia, South Carolina

FILED
Oct 04 2022

cc:
Jaan Gunnar Rannik, Esquire
Michael W. Sautter, Esquire
O. Grady Query, Esquire
Alexander Woods Tesoriero, Esquire

RECEIVED
Apr 10 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing on opposing counsel via e-mail on April 10, 2025, addressed to Respondent's counsel of record.

Michael W. Sautter, Esq. – mikewsautter147@aol.com
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*/s/ Gwyn L. Martin*________
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