

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

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FEB 07 2014

SC Court of Appeals

Andrew P. (Andy) Ballard,Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc.,Appellants.

**RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE APPEAL
OR IN THE ALTERNATIVE
TO REQUIRE APPELLANTS TO POST AN APPEAL BOND**

Respondent respectfully submits this Reply in support of his motion to dismiss this appeal or in the alternative to require appellants to post an appeal bond.

Respondent will not rehash the arguments set forth in his motion. However, it is worth noting that appellants' return to the motion does not dispute the facts that the Order denying reconsideration was posted on the Circuit Court's website on November 8 or that that the Greenville Clerk of Court in fact mailed the Order to appellants' counsel on November 12. For the reasons advanced in respondent's motion, we submit that it is both

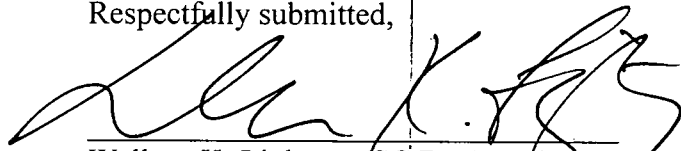
logical and fair to treat as untimely an appeal filed more than 35 days after the later of those two dates, as is the case here. It should not be left entirely to appellant's counsel to "establish[] the timing of the appeal," as appellants argue in their return. Return at 3. Rather, if a question is raised concerning the timeliness of the filing of the notice of appeal, and if the Circuit Court Clerk of Court establishes the date of mailing and date on which the order being appealed was publicly posted on the Court website, those objective facts should control the timeliness of the appeal.

Further, as to the matter of the appeal bond, appellants suggest that "the entire remedy is in issue in this appeal." Return at 6. This is simply not correct. The remedy ordered by the Circuit Court – a buyout of respondent's shares at fair value – was decided in Judge Miller's 2010 Order (Exhibit A to respondent's motion). If appellants had any issues with that remedy, they should have raised them in their previous appeal from the 2010 Order. Any attempt to do so now is a try for a second bite at the appellate apple, and is blatantly improper. As noted in respondent's motion, the only issue remaining in the case is the Circuit Court's determination of the amount of a fair value for respondent's stock shares, a factual determination that is supported by substantial evidence. Insofar as appellants admitted that \$1,000,000 was a minimum fair value,¹ there is no reason in the world that they should be allowed to pursue this appeal without posting bond for at least that amount, and their return to respondent's motion does not present any such reason.

¹ Testimony of appellant Tim W. Roberson, Transcript of August 6, 2013, Hearing, at p.45 lines 14-19; *id.* p.46 lines 2-4 (Exhibit A hereto); *see also id.* at p.64, lines 5-25 (testimony of appellant Rick Thoennes that company is currently worth \$6,000,000 "as is" and \$36.7 million in five years).

For the reasons stated above and in respondent's Motion, the Court should dismiss the appeal or, alternatively, require that appellants post an appeal for the full amount of the judgment in the Circuit Court, or at the very least for the \$1 million that appellants have conceded is a minimum fair value for Mr. Ballard's stock.

Respectfully submitted,



Wallace K. Lightsey (SC Bar No. 6476)

William M. Wilson (SC Bar No. 15808)

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Date: February 5, 2014
Greenville, South Carolina

Attorneys for Respondent

EXHIBIT A

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
) 2008-CP-23-5739
COUNTY OF GREENVILLE)

Andrew Ballard)
) TRANSCRIPT OF RECORD
)

-vs-

Tim Roberson, Warpath etal

August 6, 2013
Greenville, South Carolina

B E F O R E :

THE HONORABLE EDWARD W. MILLER, Judge.

A P P E A R A N C E S

Wallace Lighsey, Esquire
Attorney for the Plaintiff

Joshua E. Howard, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

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TESTIMONY OF TIM ROBERSON
Ballard vs. Warpath, et al

1 Q. When you entered into that stock purchase
2 agreement with Mr. Ballard, tell me what your opinion of
3 the project was at that time? Obviously you liked it.

4 A. We liked it. It was very interesting. I had,
5 like I said, had already done some things on the lake and
6 at the time I was looking for a really kind of a swan song
7 less to do really in my career. It was a presented to us
8 as a project presented to us to build cheap. I decided I
9 wanted to build it quality and keep it and rent it as a
10 lifestyle business. Earlier on there were a few things
11 right off the back that were a kicked in the stomach.

12 Q. Let me back up just a second, my intent here is
13 not to retry the case but I do want to ask you this
14 question, was it your state of mind, impression when you
15 paid the million dollars to Mr. Ballard that you were
16 paying a significant under value of what the value of the
17 company was at the time?

18 A. No, not at all. In fact, I thought it was a fair
19 value that we negotiated. At the time we paid that
20 million dollars, I thought we would be giving more revenue
21 than we thought we would be giving because it turned out
22 the slips wound up being one hundred instead of two
23 hundred that were performed.

24 MR. LIGHTSEY: Your Honor, I'm going to
25 object. This issue ---

TESTIMONY OF TIM ROBERSON
Ballard vs. Warpath, et al

1 THE COURT: Just go on to his ---

2 THE WITNESS: I had no reason at the time I
3 wrote that check to think that it was high or low. It was
4 fair and I did it of free will.

5 BY MR. HOWARD:

6 Q. Had you been involved in several deals before
7 where people had bought from you and also you purchased?

8 A. Sure. I bought and sold a few companies, my own
9 company, and as we grew our company we did some merges,
10 acquisitions, some sales.

11 Q. Have you ever been involved in a transaction
12 where either yourself was willing to sell or somebody was
13 willing to buy something for an amount that was
14 significantly below the value of what it was at the time?

15 MR. LIGHTSEY: Objection, Your Honor. I
16 don't see where that's relevant.

17 MR. HOWARD: It's his experience.

18 THE COURT: Go ahead.

19 THE WITNESS: Have I been involved in a
20 transaction ---

21 BY MR. HOWARD:

22 Q. Where somebody was willing to take from you money
23 that was significantly less than what was it was actually
24 valued?

25 MR. LIGHTSEY: Same objection.

TESTIMONY OF RICK THOMAS
Ballard vs. Warpath, et al

1 A. No.

2 Q. You believed that the project would generate
3 sufficient money to pay those loans off?

4 A. Yes.

5 Q. You testified you also believed, at least the
6 time of the First Ticonderoga application that about five
7 years out the company would have operating income
8 sufficient to generate a sale value of about 36.7 ---

9 A. Where are you getting that?

10 Q. The 36.7 million dollar ---

11 A. Tell me where that is and I'll look ---

12 Q. 4b.

13 A. Yes.

14 Q. You testified that was determined by your
15 calculations of then operating income about five years out
16 over the capitalization rate that you used at that time?

17 A. Yes.

18 Q. You represented this to a third-party ---

19 A. That's right.

20 Q. That's the value of the company would have at
21 that point?

22 A. Right.

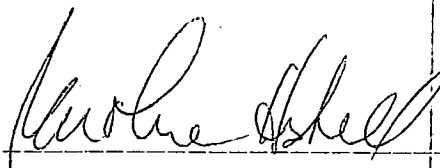
23 Q. And you also said that currently as is the
24 property was worth six million dollars; isn't that right?

25 A. Right.

Ballard vs. Warpath, et al

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2 I, the undersigned Caroline Hiskell, Official
3 Court Reporter for the Thirteenth Judicial Circuit of the
4 State of South Carolina, do hereby certify that the
5 foregoing is a true, accurate, and complete transcript of
6 record of all the proceedings had and evidence introduced
7 in the trial of the captioned case, relative to appeal, in
8 the Common Pleas Court of Greenville County, South
9 Carolina on the 26th day of August, 2013.

10 I do further certify that I am neither of
11 kin, counsel, nor interest to any party hereto.

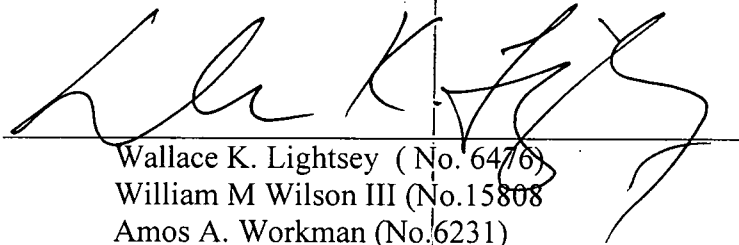
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15 Caroline Hiskell, Thirteen Circuit Court Reporter
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Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE TO REQUIRE APPELLANTS TO POST AN APPEAL BOND on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

Joshua L. Howard, Esq.
Haynsworth Sinkler & Boyd, P.A.
P. O. Box 2048
Greenville, SC 29602



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William M Wilson III (No. 15808)
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Wyche, P.A.
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Post Office Box 728
Greenville, SC 29602-0728

Date: February 5, 2014

Attorneys for Plaintiff

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SC Court of Appeals

W Y C H E

Attorneys at Law

February 5, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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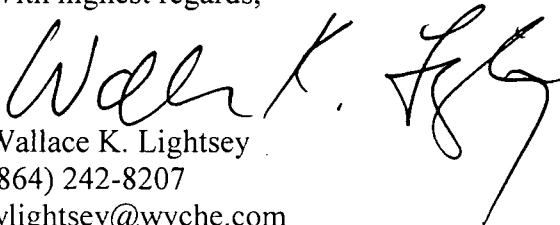
SC Court of Appeals

RE: *Ballard v. Roberson*
Case No. 2008-CP-23-05739

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Reply Memorandum in Support of Motion To Dismiss the Appeal or in the Alternative To Require Appellants To Post an Appeal Bond.

With highest regards,



Wallace K. Lightsey
(864) 242-8207
wlightsey@wyche.com

Enclosure

Cc with enclosure:

Joshua L. Howard, Esq.
Andy Ballard

W Y C H E
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