STATE OF SOUTH CAROLINA
In the Court of Appeals

On Appeal from Charleston County
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.

Case No. 08-CP-10-7245

Larry S. Bowman.

RESPONDENT,

v.

M. Donald Alexander and Old Dominion, LLC

APPELLANTS.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

1. Under the law, venue in a dissolution case must be in the location of the company's principal or registered office. (Reply to Respondent's Argument #1)

Section 33-14-310(a) states:

> Venue for a proceeding to dissolve a corporation lies in the county where a corporation's principal office (or, if none in this State, its registered office) is or was last located.

Respondent argues that this statute applies to corporations only and does not specifically provide for venue requirements for actions seeking the dissolution of a Limited Liability Company.[1] However, S.C. Code § 33-14-300 is, as the trial court acknowledged [see Trial Tr., pp. 18, 21], the most analogous statute. Cf. In the Matter of Dissolution of Supplier Distribution Concepts, Inc. and MDR Custom Components, LLC, 80 A.D. 869, 915 N.Y.S.2d 671 (N.Y.A.D. 3 Dept. Jan. 6, 2011)[County in which limited liability company (LLC)'s office was located was proper venue to bring action for judicial dissolution of company)(citing McKinney's Limited Liability Company Law, § 702). As discussed in Appellant's brief, it is undisputed that the LLC's registered office is in Richland County where Alexander resides. Therefore, venue in Charleston County was and remains improper pursuant to arguments previously presented to the Court. See Appellants' Brief (Section 1).[2]

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[1] Based on Respondent's argument, an action for dissolution of a LLC could be filed any county in the State since there is no controlling statute.

[2]Respondent also complains about the timing of the filing of the improper venue motion. However, the timing resulted from Respondent waiting until right before the trial to withdraw his first cause of action, which made this issue ripe and allowed the Appellants to timely file the motion. The timing was the result of the Respondent's actions rather than the Appellants.

Respondent argues that Appellants waived the motion to change venue. However, Respondent's complaint contained a cause of action for breach of contract/specific performance in which the venue was in Charleston County. However, just before trial, Respondent withdrew that cause of action, leaving only a claim for dissolution, and, as argued before the lower court, providing Appellants with the basis for the change of venue motion. (Trial Tr., p. 15). In other words, Appellants moved for the change of venue when the issue became ripe; there was no waiver of this issue and the lower court erred in denying the motion.

2. Respondent clearly withdrew his first cause of action and is now trying to recharacterize that withdrawal. (Reply to Respondent's Argument #2 and #6)

Respondent argues that he only withdrew part of his first cause of action. Respondent's belated attempt, in an proposed order, to revive a part of his first cause of action was another effort to attempt a trial by ambush. The trial court record makes clear that Respondent, Appellants, and the Court were on no notice that Respondent was pursuing any part of his first cause of action at trial of this matter. The record is replete with references from both counsel and the Court to the first cause of action no longer being pursued. See Trial Tr., pp. 13:24-14:2; p. 15:1-13; p. 15:22 - p. 16:2-17; p. 20:7-19; p. 26:15-16. During arguments on the motion to change venue that the venue issue only became ripe when Respondent dropped his first cause of action, Respondent never even argued that he had not dropped part of his first cause of action. Rather, he responded to the Court and Appellate counsel's arguments by only stating that "the second cause of action for [dissolution] has been in there the whole time." See Trial Tr., p. 15:1-13. Even if Respondent wants to belatedly argue that he didn't drop his entire first cause of action prior to trial, he certainly dropped it at trial and his representations to the Court and

Appellants support that he waived any right to pursue any part of his first cause of action and that he is estopped from doing so now. When the Court repeatedly stated throughout the proceedings that Respondent had dropped his first cause of action, he sat in silence and never even mentioned his alleged hidden intent to try to pursue a part of that first cause of action. One selected colloquy is as follows:

> The Court: All right. Mr. Glenn, basically, he's saying the change of venue was not relevant until you dropped the first cause of action; therefore, he couldn't do it by 12(b) or by the pleadings, responsive pleadings until that time, which he has done now in his 12(b)(6) motion.
>
> Mr. Glenn: The statute he raised about dissolution being in the county where the registered agent is was there all along and so was the cause of action. He could have raised it on a 12(b)(6) motion before he filed his answer.
>
> The Court: Well, what was your first cause of action?
>
> Mr. Glenn: It was for specific performance of an agreement.

See Trial Tr., pp. 15:22-16:11.

Even when the Court repeatedly addressed Respondent's counsel concerning the issue, he never informed that Court that a part of his first cause of action was being pursued.

The Court: All right. Mr. Glenn, let me just ask you a question. I understand your position is that he should have raised it in his answer or by 12(b) motion earlier before you dropped the first cause of action. However, you stated your first cause of action could have been tried in Richland County or Charleston County; therefore, I don't think it was probably – at least the defendant's position was that he didn't think it was appropriate to make the motion until that cause of action which actually gave venue in Charleston County was dismissed . . . .

See Trial Tr., pp. 17:17-18:2.

If Respondent still intended to pursue a breach of contract claim, he would have had to inform the Court that he was pursuing it and could have argued that the contract was formed in Charleston County which would have addressed the Court's questions and concerns regarding venue. Instead in his written response to the motion and his oral argument in Court, Respondent's counsel only referred to and made arguments concerning his second cause of action as the basis of the law suit.

The Court raised the issue yet again with Respondent's counsel as follows:

> The Court: That's the main thrust of your argument. He could have done it irregardless [sic] second cause of action.
>
> Mr. Glenn: He had an obligation to do it as to the second cause of action, if he wanted to do it, and he had the obligation to do it before the pleadings were filed or at the same time. He could have raised it in his pleadings or 12(b) motion.
>
> The Court: Well, it really wasn't an issue until you **dropped your first cause of action**. [Emphasis Added].
>
> Mr. Glenn: It was always an issue. I also said if the Court doesn't grant specific performance then we want it dissolved. It was always there.
>
> The Court: I'm talking about the venue issue wasn't there under the statute until you dropped the first cause of action.
>
> Mr. Glenn: And that's where I'm disagreeing.
>
> The Court: I see you disagree.
>
> See Trial Tr., p. 20:4-21.

Respondent never informed the Court or Appellants that he was continuing to pursue any claim under his first cause of action. If he was attempting to secretly pursue such a claim, he waived it by not informing the Court and opposing counsel of his intent to do so. Even though a breach of contract claim on a contract formed in Charleston County would have kept the venue in

Charleston County, he never made that argument in his response to the motion or in Court. Simply put, until after the trial, Respondent only told the Court and Appellants that he was pursuing his claim for dissolution.

The issue continued to be discussed during the trial. See Trial Transcript, p. 26:15-16 ["See all the trouble you've caused by going away with the first cause of action, Mr. Glenn?"]. Even in counsel's opening argument, when he referred only to this second cause of action stating "that is needs to be dissolved and ended. That's what we're asking the Court to do." The Court: "Anything else?" Mr. Glenn: "That's all." See Trial Tr., pp. 32:24-33:2.

The trial record clearly reflects that the Court and Appellants were on no notice of Defendant's intent to secretly pursue some part of his first cause of action.[3] Because that action was withdrawn, the lower court should not have awarded any damages on that claim.

3. Prior to trial, Respondent only asserted deadlock, which is governed by S.C. Code § 33-14-300, but the order found dissolution was proper under S.C. Code § 33-44-801. (Reply to Respondent's Argument #4)

In his complaint, Respondent asserted that "a deadlock exists between the shareholders and owners of Old Dominion, LLC." [Cmpt. ¶26]. This is the only ground asserted as basis for the dissolution.

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[3]Appellants had numerous viable defenses to any breach of contract claim including, but not limited to, that Respondent has never produced any evidence that Ducks Unlimited would have accepted any proposal from the parties under Alternative One to divide the property with only relinquishing the 2 home sites required under that Alternative and that Respondent has refused to proceed with Alternative Two under the Settlement Agreement. However, because a breach of contract claim was not properly before the trial court, the Appellants did not had an opportunity to present evidence, defenses, and fully brief the issue.

The language concerning deadlock is found in S.C. Code § 33-14-300 which states that a court may dissolve a corporation if:

> the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock.

Respondent again claims that this section only applies to corporations, not limited liability companies, and claims that Section 33-44-801 is the applicable law. However, that section only applies to "events causing dissolution and winding up of a company's business" not judicial dissolution, which is expressly addressed by Section 33-14-300. Furthermore, even if that section could apply to a judicial dissolution, Respondent did not assert any of the available grounds under that section,[4] and instead claimed deadlock, which is clearly governed by § 33-14-300. Thus, the lower court's order wrongly applied the law and cannot be upheld.

Respondent also argues that since the Court invited him to submit the proposed order without service on Appellants that it was not an *ex parte* communication. However, even assuming arguendo that Appellants had notice[5] of the Court's instruction, either lack of notice *or* lack of argument from the adverse party can still make the communication *ex parte*. Black's Law

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[4]The lower court used S.C. Code § 33-44-801(4)(c) and (e), which list the following: as "events causing dissolution": 1) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; or 2) when the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner[.] Neither of these were pled by Respondent.

[5]Appellants contend that they did not have notice that arguments and legal theories not presented to and/or contrary to the representations made in the trial record and pleadings would be submitted in the proposed order.

Dictionary (9th ed. 2009)[*Ex parte* is defined as "[o]n or from one party only, usu. without notice to **or** argument from the adverse party."](Emphasis Added). While the trial court did allow the parties to submit proposed orders without service on opposing counsel, Appellants were not provided an opportunity to present arguments against the Respondent's proposed order[6] until after the Court issued its Temporary Order. This procedure highly prejudiced the Appellant because arguments based on legal theories and statutes not plead were inserted into the case by the nature of the submission.

Finally, the parties are not deadlocked, as Respondent initially claimed, because the Settlement Agreement provides an exit provision for either party if they wish to sell their portion of the Property. See Respondent's Trial Exhibit 3 (Settlement Agreement), ¶ 8. While they cannot sell their portion of the Property for less than what they offer to sell it for to the remaining partner, they are otherwise free to sell it to anyone at any price they desire. Id. Therefore, the Settlement Agreement clearly provides that there is no deadlock which would create the necessity of the drastic remedy of dissolution of the LLC. See In Re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002). To provide otherwise, the Court allows the Respondent not only to ignore his contractual obligations under the Settlement Agreement, but to also disregard his contractual obligations set forth in the Operating Agreement.[7]

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[6]The trial court clearly stated that while the findings of fact and conclusions of law were to be submitted to the court by each party without exchanging, "[o]nce I make a decision then I'll ask one of you to send a proposed order. Then I'll let you swap and you all can make comments." [Trial Tr. p. 216:14-22]. However, this procedure was not followed.

[7]Even if the Settlement Agreement could not be followed which Appellant disputes, Respondent would have to follow the provisions of the Operating Agreement in selling his shares or withdrawing from the company which would also prevent a dead lock.

4. Respondent's claim that the lower court properly refused to enforce the Settlement Agreement is based on factual allegations not supported in the record. (Reply to Respondent's Argument #3).

Respondent argues that the lower court property refused to enforce the Settlement Agreement because the Appellants had at all times attempted to prevent the implementation of the agreement. Respondent's brief contains incorrect factual assertions which are not supported by the trial record. However, since the Respondent's brief does not cite the record for support of the factual assertions contained therein, the Respondent cannot determine where the unsupported assertions are allegedly contained in the record and cannot appropriately respond.

For example, Respondent asserts "[t]hroughout the trial of the case and since that time, Appellant Alexander has consistently resisted the implementation of the Settlement Agreement."] See Respondent's Initial Brief, p. 10. In addition to the representation being inaccurate, Respondent obviously has no citations to any matters after the trial of the case which are not in the record. The testimony and evidence indicates that Appellant is ready and willing to divide under the Johnston/Williams proposal (retaining 3 home sites), should Ducks Unlimited approve such subdivision. See Trial Tr., p. 172, l. 8 - p. 173, l. 5; p. 175, ll. 18-22; Defendants' Exhibit 7. Appellant also testified that he would abide by Alternative Two in the Settlement Agreement. See Trial Tr., p. 152, l. 19 - p. 153, l. 6; p. 175, l. 23 - p. 176, l. 1. These representations continued throughout the post-trial filings and hearings.

Respondent also states "[i]t should be pointed out that for several years following the Settlement Agreement in 2007, Appellant Alexander refused to have any contact with Mr. Johnson or Mr. Williams and refused to participate in their efforts to make an environmental assessment of the possible division." See Respondent's Initial Brief, p. 20. Respondent provides

no citations in the record. However, Respondent admitted at trial that Appellant wrote the letter to Johnston which resulted in the management agreement being done. See Trial Tr, p. 109, ll. 9-22; see also Johnston Deposition, p. 29, ll. 8-12. Although Respondent alleged that he had contacted Johnston a year before, there is no evidence that Appellant ever refused to meet with Johnston at any time. Rather, Johnston testified that he only got one or two phone calls from Respondent. See Trial Tr., p. 57, ll. 11-13. In one phone call, Respondent only asked Johnston for the name of who could do the wetlands for him. See Trial Tr., p. 57, ll. 15-20. In the next phone call, Respondent was asking him for some advice, "just talking" and "the next thing I know, I got a letter from Don [Appellant]— Don called me and I get this letter." See Trial Tr., p. 57, ll. 22-24. There is no evidence in the record of Appellant ever refusing to meet with Johnston. Rather, Appellant is responsible for Johnston preparing the plan after Appellant contacted him to do so. See Trial Tr, p. 109, ll. 9-22; see also Johnston Deposition, p. 29, ll. 8-12. The only evidence in the record regarding Alexander not being agreeable to using Williams was when Williams was insisting on an indemnification clause. See Trial Tr., p. 200, ll. 18-25. Once Appellant got Williams to agree to remove the indemnification clause, there is no evidence that Appellant objected to Williams. Rather, he agreed to proceed with the management plan jointly prepared by Johnston and Williams. See Trial Tr., p. 172, l. 8 - p. 173, l. 5; p. 175, ll. 18-22.

5. The lower court's directive to sell the property at auction is an abuse of discretion. (Reply to Respondent's Argument #5)

An action for dissolution is one sounding in equity. Mazloom v. Mazloom, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (S.C. Ct. App. 2009) aff'd, 392 S.C. 403, 709 S.E.2d 661 (2011).

While a judge may have certain discretion, if the evidence in the record does not support the judge's ruling, the court has abused its discretion. Moreover, in a proceeding for judicial dissolution, a court can fashion the appropriate relief including alternatives to dissolution. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009). Courts settling a controversy between LLC members must first consult the operating agreement and statutory provisions are only needed to what was not covered within the agreement. Ellie J. Murphy, Kirksey v. Grohmann: LLC Dissolution Is Proper When Member Deadlock Leaves No Meaningful Way to Move Forward, 56 S.D. L. Rev. 380, 389-90 (2011) (citing Historic Charleston Holdings).

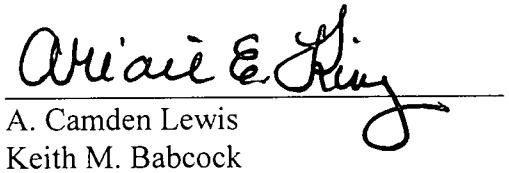
Here, Appellant and Respondent contracted in the Operating Agreement to maximize the proceeds of a sale in the event of a dissolution. The Operating Agreement must still control the method of sale. See Clary & Tug Properties, LLC, 727 S.E.2d at 778 ["The operating agreement of a limited liability company is a binding contract that governs relations among the members, managers, and the company."]; see also Park Regency, LLC, 402 S.C. at 412, 741 S.E.2d at 534 ["Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply."].

Therefore, even if the lower court was correct in ordering dissolution, the method of sale must be governed by the operating agreement. The evidence at trial indicated that the property was good shape and the wildlife population continues to improve. See Trial Tr., p. 105, ll. 20-21; p. 176, ll. 10-25; p. 177, ll.1-3; see also Trial Tr., p. 90, l. 4-8; p. 91, l.6 - p. 93, l.8, p. 98, l.2 - p. 99, l.3, 104, ll. 2-22. In other words, there was no imminent need to sell the property at

auction, and could actually result in a punitive effect on the parties. The Operating Agreement provided for either party receiving a fair market share for his interest, even if that member wrongfully dissociated under Sections 13.5 and 13.10. See Plaintiff's Trial Exhibit 2 (Operating Agreement), Section 13.5. Under the court's directive to sell the property at auction, a third-party bidder could obtain $10,672,000 property for a small fraction of that value, which not only punishes Appellant, but Respondent as well.[8] The court abused its discretion in ordering a judicial sale when the Operating Agreement provided a method by which each member would receive his fair market share.

Conclusion

As set forth fully in this in Appellants' Initial Brief and this Reply Brief, Appellants respectfully submit that the judgment of the lower court must be reversed.



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Columbia, SC
January 13, 2014

[8]The appraisal before the court valued the property at$10,672,000.

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PROOF OF SERVICE

I, Connie W. Grugan, employee of the law firm of Lewis, Babcock & Griffin, L.L.P., do hereby certify that I have served the Initial Reply Brief of Appellants upon opposing counsel by mailing a copy of same, first-class postage prepaid and return address clearly indicated, to said opposing counsel addressed as follows:

Michael D. Glenn, Esq.
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Connie W. Grugan

This 13th day of January, 2014.

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January 13, 2014

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Bowman vs. Alexander, et al., C/A 08-CP-10-7245
Appellate Case No. 2013-001431, Our File No. 09-103

Dear Ms. Kitchings:

Enclosed please find the Initial Reply Brief of Appellants in regard to the above-referenced matter for filing with your office. Please return a clocked copy in the envelope provided.

By copy of this letter, we are hereby serving a copy of same upon opposing counsel.

Sincerely,

LEWIS, BABCOCK & GRIFFIN, L.L.P.

Ariail E. King

Ariail E. King

AEK:cg
Enclosure
cc: Michael D. Glenn, Esquire

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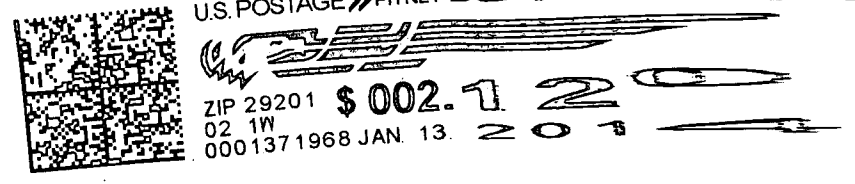

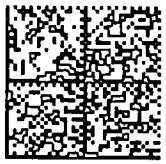

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