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.

BRIEF OF APPELLANTS

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Keith M. Babcock
Ariail E. King
LEWIS, BABCOCK, & GRIFFIN, LLP
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Statement of the Case

This action was filed by the Respondent on December 22, 2008, in the Court of Common Pleas in Charleston County, alleging a cause of action for breach of contract/specific performance of a Settlement Agreement and in the alternative, if the court did not grant specific performance, a cause of action for dissolution of the LLC. (Complaint, R.p. 336). The Settlement Agreement at issue had been reached by both parties in a prior mediation, and provided two alternatives to resolve the dispute between the parties. One alternative would allow the parties to divide real property owned by the LLC and the other would not divide the property but required the parties to enter into agreements for the separate use, maintenance and control of certain parcels. (R.p. 517, Settlement Agreement).

On March 2, 2009, Appellants' answer was filed asserting appropriate defenses including, but not limited to, failure to join necessary party, and counterclaims for specific performance and set-off. (Answer, R.p. 367). Respondent filed his reply on April 27, 2009.

On October 7, 2011, Respondent filed a notice of withdrawal of request of the first cause of action so that he could proceed on dissolution only. (R.p 380). On October 24, 2011, Appellants filed a motion to dismiss pursuant to 12(b)(6), on the grounds that pursuant to Respondent's notice of withdrawal, the Complaint should be dismissed because it is no longer factually or legally sufficient and that venue is now improper. (Motion, R.p. 381). Respondent filed a return to Appellants's motion on October 25, 2011. (R.p. 59). Appellants' motion was heard and denied by the Honorable J.C. Nicholson, Jr. on October 25, 2011. The matter then

proceeded to a non-jury trial before Judge Nicholson on that same day.[1] (Transcript, R.p. 59).

On May 11, 2012, a Temporary Order was filed setting forth the trial court's intention to order the LLC to be dissolved as well as its intended rulings on various other trial issues. (R.p. 28). This Temporary Order also instructed the parties to present additional financial information to the trial court so it could conduct an accounting of money spent on behalf of Old Dominion, LLC by its members. Id. After the issuance of the trial court's temporary order, Appellants filed a motion for a new trial and/or to void judgment, continuing to object to venue, and a motion to alter or amend, pursuant to Rule 59(e), SCRCP on May 31, 2012. (R.pp. 383; 395). On June 21, 2012, the trial court declined to rule on the post-trial motions because the May 11, 2012 order was temporary. (R.p. 49). On July 26, 2012, Respondent filed a motion seeking an order requiring the parties to exchange financial information for the accounting in advance of any hearing on the matter. (R.p. 275). On September 7, 2012, Appellants filed a memorandum continuing to object to the trial court's venue, setting forth issues regarding the parties' attempts to agree to a method of sale in the event of a court order dissolving the LLC and mandating a sale, and an Affidavit of Appellant Alexander dated September 5, 2012, addressing certain matters pursuant to the instructions in the court's temporary order of May 11, 2012. (R.p. 615).

A hearing was held on September 7, 2012. On October 4, 2012, a consent order was entered setting forth an initial method of how the parties would attempt to sell the Property in the event that the LLC was ordered to be dissolved and a mandate was issued that required the

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[1]Appellants submitted excerpts at trial from the Respondent's deposition and both parties also proposed to submit excerpts from the depositions of Coy Johnston and A.K. Williams. However, although the Court admitted the excerpts from Respondent's deposition, it accepted the entire deposition transcripts with exhibits for Johnston and Williams into evidence. (R.pp. 186-189).

Property to be sold.[2] (R.p. 51). On October 11, 2012, Appellant Alexander submitted an affidavit pursuant to the temporary order setting forth various financial expenditures on behalf and/or for the improvement of the LLC.[3] (R.p. 615). Respondent then filed an affidavit on October 26, 2012, setting forth his financial expenditures on behalf and/or for the improvement of the LLC. (R.p. 667). On November 1, 2012, the parties appeared before the trial court for a hearing on the parties' financial expenditures. At that time, Appellants submitted a supplemental affidavit with supporting documentation. (R.p. 676). Both parties agreed that the other party spent the amounts alleged in their affidavits and did not contest that all submitted expenditures were made.

On March 1, 2013, instead of enforcing the Settlement Agreement, the trial court ordered dissolution of the LLC and that the Property of the LLC be sold by the method set forth in the consent order filed on October 1, 2012. (Order, R.p. 1). In the event that the Property does not sell in the manner and short time period set forth in the October 1, 2012 consent order, the trial court further ordered that either party may apply to the trial court for an order requiring the

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[2]The October 4, 2012 consent order makes clear that the Appellants strenuously object to dissolution and any court ordered mandate to sell the Property. However, Appellants submitted the proposed consent order pursuant to the trial court's instructions in its May 11, 2012 temporary order directing the parties to attempt to reach an agreement for a method of sale in the event of a court mandated sale. The parties could only reach an agreement to a sales method for an initial time period of six (6) months.

[3]The temporary order provided that the trial court would reopen the record to receive evidence by affidavit and/or financial records and if necessary, by testimony. Due to the passage of time and some flooding in Appellants's basement, he attested that he would continue to search for additional documentation for submission at the hearing on the matter. (R.p. 615).

Property to be sold at public auction under terms and conditions set by the trial court.[4] Id. The trial court denied Appellants' request for specific performance to enforce the settlement agreement. Id. From the proceeds of the sale of the Property, the trial court ordered that Respondent was entitled to $9,060.00 for his one-half interest in certain personal items and $67,000 for return of one payment made by the Respondent to the Appellants under the Settlement Agreement. Id. The trial court also found that from the proceeds of the sale of the Property, Respondent was entitled to be paid a credit of $149,747.58 and Appellant Alexander was entitled to be paid a credit of $475,612.48 for funds spent by each party for repairs and enhancing the value of Old Dominion Plantation, LLC. Id. Finally, the trial court ordered that after the distribution of the proceeds from the sale of the Property, the attorneys for the parties shall cooperate to secure the dissolution of Old Dominion Plantation, LLC. Id.

The Notice of Entry of the March 1, 2013 order was mailed to the Appellants on March 4, 2013, and received by the Appellants on March 8, 2013. On March 15, 2013, Appellants served by mail a motion for a new trial and/or to void judgment and a motion to alter or amend, pursuant to Rule 59(e), SCRCP on March 15, 2013.[5] (Motions, R.pp. 395; 398). On April 1, 2013, Respondent filed memoranda in opposition to Appellants' motions and filed a supplement on April 3, 2013 to his memorandum in opposition to Appellants' motion to alter or amend. (R.pp.

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[4]The significant value of the Property at issue is set forth in the Appraisal submitted at the November 1, 2012 financial hearing reflecting a value of over $10,000,000 in 2007. (R.p. 678). The financial affidavits by the parties also reflect the significant sums invested by the parties and the significant amount of time and labor invested by Appellants in the Property. (R.pp. 615; 667; 676; 893).

[5]These motions were filed on March 18, 2013.

420; 431). Appellants filed a reply memorandum on April 10, 2013[6] and Respondent filed a response to Appellants' reply on April 25, 2013. (R.pp. 436; 442).

On May 20, 2013, the trial court filed its order summarily denying Appellants' Motion for New Trial and the Motion to Alter or Amend, without a separate opinion. (R.p. 26). Appellants received written notice of entry of the order denying Appellants' Motion for New Trial and the Motion to Alter or Amend on May 27, 2013. Appellants notice of appeal served and dated June 19, 2013, was filed on June 21, 2013.

Statement of Facts

Respondent and Appellant Alexander (hereinafter "Appellant") had been family friends for years prior to forming Old Dominion Plantation, LLC ("Old Dominion" or "the LLC"). (R.pp. 97:10-16). At the time of the formation of Old Dominion, the parties entered a binding Operating Agreement dated March 1, 1995[7], stating their intention to be legally bound by the agreement and for the Operating Agreement to set forth their understanding regarding all matters which may be covered in an Operating Agreement. (R.p. 462). The LLC was formed for ownership and use of Property in Charleston County and for conservation purposes with Respondent and Appellant each having equal membership units (75 units each). (R.p. 458). In 1995, Respondent and Appellant purchased Old Dominion, a 647 acre plantation on Edisto Island in Charleston County. (R.p. 678). In 1999, the parties agreed to purchase an additional 78

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[6]Although the circuit court docket indicates that this memorandum was filed by Respondent, it was filed by Appellants.

[7]The parties subsequently entered a First Amendment to the Operating Agreement on September 1, 1998, which amended certain provisions of the original agreement. The Operating Agreement and First Amendment are collectively referred to herein as the "Operating Agreement." (R.p. 458).

acres from the Nature Conservacy. (R.p. 101). These two parcels are referred to jointly herein as the "Property." This suit concerns that Property and LLC.

Due to Respondent's desire for the Property to be legally divided, Respondent and Appellant, both sophisticated and well-educated individuals, entered into mediation. (R.pp. 96; 110-112; S.R. p. 2). Tom Wills served as the parties' mediator. (R.p. 111). Respondent and Appellant, both represented by counsel reached an agreement, and entered a written Settlement Agreement on September 10, 2007. (R.pp. 112-113).

The Settlement Agreement provides two alternatives for resolution. The first alternative [herein referred to as "Alternative One"] stated that, "[t]he parties will consult Ducks Unlimited to determine if the Property can be legally divided as depicted in Exhibit A." (R.pp. 517; 545). Ducks Unlimited's[8] permission as to any subdivision was required due to the Deed of Conservation Easement ("Conservation Easement") on Old Dominion which specifically provided that the Protected Property shall not be subdivided.[9] (R.pp. 805-806). However, Old Dominion also reserved certain rights under the Conservation Easement including, the right to subdivide the Property into not more than 10 tracts, each of which is not to exceed five acres

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[8]The Conservation Easement on the Property was entered with Wetlands American Trust, which is a subsidiary of Ducks Unlimited. (R.pp. 523; 607; 709; 792).

[9]Mr. Johnson was the regional director of Ducks Unlimited from 1979 to 1987. After 1987, he worked for Wetlands American Trust where he was involved with conservation easements and land procurement. (R.pp. 791-792). He was one of the originators of the Ashepoo-Combahee-Edisto ("ACE") basin where Old Dominion is located. (R.p. 792). Johnston has since retired, but continues to do consulting work. (R.p. 790). The parties hired Johnston because of his contacts with Ducks Unlimited and expertise with conservation easements.

each and of which may be owned by a different owner.[10] (R.pp. 100-101; 198; 709; 805). These "tracts" in the Conservation Easement are referred to by the parties as "home sites."

In an effort to attempt to persuade Ducks Unlimited to agree to a division of the whole Property, the Settlement Agreement included a provision for the parties to offer to relinquish *up to* two of the ten home sites provided for in the Conservation Agreement § 4.2. (R.p. 517). Specifically, the Settlement Agreement required that "[i]f Ducks Unlimited requires a reduction of home sites [aka the "Tracts"], then Bowman will give up the first home site and Alexander the second home site." Id.

Because the parties were well aware that Ducks Unlimited may not grant permission to divide the Property even with the relinquishment of two home sites due to the Conservation Easement, the Settlement Agreement specifically provided for an alternative resolution if the necessary permission from Ducks Unlimited could not be obtained.[11] (R.pp. 205; 517). Therefore, "[i]n the event Ducks Unlimited does not permit the legal separation of the Property, attorneys for the parties will draft agreements to accomplish the separate use, control, and responsibility of and for the property, it being the intent of the parties that each party be

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[10]While this looks contradictory on its face, Johnston testified that although the Conservation Easement prohibited the whole tract (over 700 acres) from being divided into separate ownership, the Conservation Easement allowed them to carve out 10 smaller five-acre tracts within the Property which could be each be owned by different individuals with these owners also subject to the terms of the Conservation Easement. (R.p. 806).

[11]Alternative Two was specifically put in the Settlement Agreement because counsel at the time believed that Alternative One may not be feasible under the Conservation Easement. (R.p. 205).

responsible for costs associated with his Property, and have exclusive use of such Property."[12] [Herein referred to as "Alternative Two".] (R.p. 517). Respondent consistently refused to follow through with Alternative Two.

However, despite no requirement in the Settlement Agreement for the parties to give up more than a total of two home sites, Respondent testified in his deposition that he believed that the Settlement Agreement required him and Appellant to give up as many home sites as necessary to accomplish the Alternative One under the Settlement Agreement, with the sites being given up on an alternating basis with Respondent giving up the first, Appellant giving up the second, Respondent giving up the third, and continuing on with each partner forfeiting a house site on a rotating basis to reach any number required by Ducks Unlimited. (R.pp. 879-880).[13] Up until the eve of trial, Respondent had tried to force Appellant to give up more home sites than what was required under Alternative One in the Settlement Agreement. (R.p. 85).

However, the Settlement Agreement only required that a total of up to two home sites be given up by the parties.[14] (R.p. 517). Respondent's misunderstanding of the requirement

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[12]Although the trial court's order states that the Mediator recommended a division of the Property, there is no evidence of this assertion in the record. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (S.C. 2006)["It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."]

[13]Appellants introduced certain excerpts from Respondent's deposition into evidence at trial.

[14]Respondent did not produce any evidence that Ducks Unlimited ever agreed, after the entry of the Settlement Agreement, to allow for subdivision of the Property with the parties only forfeiting a total of two or less home sites as set forth under Alternative One in the Settlement Agreement. (R.pp. 134; 166; 604; 609; 611-612). Johnston also opined that even if he had been employed shortly after the Settlement Agreement was entered that he would not have "gone for all of this". (R.p. 796). Therefore, the only evidence in the record is that Alternative One was only going to be possible if the parties agreed to give up more home sites than they were required

created, in large part, the entire controversy of him believing that Appellant was refusing to consummate Alternative One under the Settlement Agreement. In an effort to cooperate with Respondent's preference for Alternative One, even though not required to do so, Appellant did explore the possibility of giving up additional home sites. Coy Johnston was retained by the parties to give an opinion as to how many home sites Ducks Unlimited would require to be forfeited in order to agree for the Property to be legally divided. The Settlement Agreement also provided that the parties should have a management plan, and the parties agreed to use Mr. A.K. Williams to prepare the management plan.[15] Johnston agreed to a proposal that would allow legal division; however, each party would have to forfeit more than one home site and Respondent continued to assert that the parties would have to relinquish more than a total of the two home sites set forth in the Settlement Agreement. (R.pp 134; 173; S.R. pp. 6-7). Mr. Johnston changed his opinion as to the number of home sites that would have to be forfeited several times, with the amount varying between 3 and 4 home sites for each party. (R.pp. 604; 612). Thus, Appellant deposed Johnston and obtained an even more favorable recommendation which would allow each party to keep three of their five home sites. (R.pp. 263; 604; 608; 830-832; 852). Appellant then proposed to send this recommendation to Ducks Unlimited for their approval. (R.p. 613).

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to do under the Settlement Agreement.

[15]Initially, Williams insisted that his contract with the parties include an indemnification for him, to which Appellant would not agree. (R.pp. 149; 217; 254; 262). Respondent mischaracterized Appellant's refusal to sign an indemnification clause as a failure to cooperate. However, because of Appellant's efforts, Williams eventually agreed to and did prepare the management contract without the indemnification clause. (R.p. 217). Therefore, Appellant obtained a benefit for both parties while allowing Respondent to use his first and only choice of who would prepare the management agreement.

Respondent moved to dismiss his first cause of action and objected to Johnston's proposal being submitted.[16] The matter then proceeded to trial.

Although the Respondent apparently attempted to insert new legal theories into this case after the trial by way of the submission of his *ex parte* trial brief and a proposed order[17], this case only involves a sole cause of action based on a single ground in which Respondent alleges that, in the event that the Court does not order specific performance of the parties' Settlement Agreement, a deadlock will exist between the shareholders and owners of Old Dominion and the LLC should be dissolved because of that alleged deadlock. (R.p. 343). The Complaint is completely void of any other grounds for dissolution.

ARGUMENT

Scope of Review

In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Associates Ltd. v. City of Greenville, 266 S.C. 81, 221, S.E.2d 773 (1976). An action for corporate dissolution, as present here, is an action in equity. Ward v. Ward Farms, Inc. ,283 S.C. 568, 324 S.E.2d 63 (1984).

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[16]Respondent argued subsequent to trial that he did not dismiss his first cause of action in *toto*. However, the record is clear that Respondent dismissed, abandoned, and/or waived his first cause of action and it is discussed fully herein. See discussion, infra.

[17](R.pp. 268-270; 383).

1. **The judgment is void because the lower court improperly refused to change venue to the proper county.**

Under S.C. Code § 33-14-310, "[v]enue 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." It is undisputed that in this case, Old Dominion's principal office is in Richland County. (R.pp. 68, 448).

Prior to trial, Respondent withdrew their first cause of action for specific performance/breach of contract, leaving only a cause of action to dissolve the corporation under S.C. Code §33-14-310.[18] Accordingly, after Respondent dropped his first cause of action, Appellants moved that venue in Charleston County was improper.[19]

After hearing Appellant's motion, the lower court stated:

> Well, Mr. Glenn, my inclination is to grant the change of venue; however, since everybody is here I'd be glad to hear you on a motion to keep venue in Charleston for convenience of the witnesses.

(R.p. 75).

Respondent's only response was that since the parties were present, the venue should remain in Charleston County because "it would be more convenient to go ahead and get it done today." (R.p. 76). A change of venue for convenience of the witnesses cannot be based on the

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[18]Post-trial, Respondent tried to claim that only part of this first cause of action-- specific performance-- was withdrawn. However, despite several discussions referencing Respondent's dropped or withdrawn cause of action, Respondent never argued that any part of the first cause of action was still at issue, rather he only argued that the second cause of action for dissolution was "in there the whole time." (R.pp. 60; 67-70; 74; 80).

[19]On October 7, 2011, Respondent withdrew his first cause of action. Upon withdrawal of his first cause of action, Respondent's only remaining one was for dissolution. Appellants filed a motion that venue was improper on October 24, 2011. The bench trial was held on October 25, 2011.

mere fact that the parties were present at that moment.[20] Respondent was required to demonstrate both the convenience of the witnesses and that the ends of justice would be promoted by venue in Charleston County. See, e.g. Guardian Fid. Corp. v. U. S. Fid. & Guar. Co., 266 S.C. 595, 597, 225 S.E.2d 655, 655 (1976)("It is not only necessary that the convenience of witnesses be promoted but equally essential that the 'ends of justice' be promoted before the court is justified in granting the motion. The burden of proving both of these conditions is necessarily on the moving party."). Respondent did not argue that the necessary element that the "ends of justice" would be promoted by keeping venue in Charleston County in direct contravention to the statute requiring venue in Richland County.

Therefore, the trial court had no right to render a decision because venue was improper, and Appellants did not consent (and in fact, strenuously objected) to venue. Dove v. Gold Kist, Inc., 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994)(A court sitting where venue is improper may only render judgment "provided the party who possesses the venue right consents, either expressly or impliedly.") A judgment rendered in improper venue is void. See Woodside v. Rizzo, 772 S.W.2d 20, 21 (Mo.App. 1989)(failure to file in the proper venue leaves the trial court's judgment void); Comm'n on Ethics v. Lancaster, 421 So.2d 711, 712 (Fla. 1st DCA 1982)(When the trial court improperly denies a motion for change of venue, all subsequent proceedings are void); Musolino v. Checker Taxi Co., 110 Ill. App.2d 42, 46-47, 249 N.E.2d

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[20]With regard to the convenience of witnesses, only Respondent and Appellant (neither of whom reside in Charleston) submitted live testimony at trial. Furthermore, the parties have already been required to travel to Charleston for two subsequent hearings regarding financial issues and the trial court has also left open for the parties to petition it in the event that a further order is required concerning issues relating the a sales price and a potential petition for a public sale of the Property. Therefore, Appellants continue, to date, to suffer prejudice by the improper venue of this action and remain subject to continued potential prejudice in the future.

150, 152 (Ill.App.Ct. 1969)(if the court erroneously denies the petition for a change of venue and judgment is entered against the party seeking the change of venue, the court, upon motion made by the party, must set the judgment aside and will hold it void).

As set forth above, venue was required to be in Richland County under S.C. Code § 33-14-310 and Respondents failed to meet the standard to change venue for the convenience of the witnesses and that the ends of justice were met. Therefore, Appellants request that this Court void the judgment in its entirety and order a new trial be conducted in Richland County.

2. The lower court erred in ruling on Respondent's equitable claim for dissolution when Respondent had a legal claim that he voluntarily withdrew only days before trial.

As noted above, after Respondent voluntarily withdrew his first cause of action -- for breach of contract/specific performance -- a trial took place on his claim for dissolution. However, equity is "*only* available when a party is *without* an adequate remedy at law. EllisDon Construction, Inc. v. Clemson University, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011)[emphasis added](citing Key Corp. Capital, Inc. v. County of Beaufort, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007)). It is clear under South Carolina law that an action for corporate dissolution is an action in **equity**. Mazloom v. Mazloom, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct.App. 2009); Kiriakides v. Atlas Food Systems & Service, Inc., 338 S.C. 580-581, 527 S.E.2d 371, 375-379 (Ct. App. 2001), modified on other grounds, 343 S.C. 587, 541 S.E.2d 257 (2001). Thus, the lower court should not have considered or ruled upon Respondent's equitable claim because he could have pursued his legal claim.

In this case, Respondent had a legal remedy under the Settlement Agreement (which Respondent actually pursued until the eve of trial). (R.pp. 60; 67-70; 74. 80; 336; 338). See also

discussion, infra. A settlement agreement is a contract between the parties. Harris-Jenkins and Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 178, 557 S.E.2d 708, 711 (2001)(citing Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001)[holding the enforcement of the terms of a settlement agreement is a contract and is viewed as an action at law]). "A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy." EllisDon Construction, Inc. v Clemson University, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). Here, Respondent actively pursued legal action to enforce the Settlement Agreement for almost three years until the eve of trial. Respondent cannot just voluntarily drop his legal remedy and obligations in order to attempt to obtain a remedy in equity.[21]

3. The lower court failed to recognize and follow the Settlement Agreement to which the parties had agreed.

A settlement agreement is binding on the parties who entered into it. See, Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241-242, 672 S.E.2d 799, 802-803 (Ct.App. 2009), cert. denied, (June 9, 2009)[settlement agreements are viewed as contracts]; Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001)[holding the enforcement of the terms of a settlement agreement is a contract action]. Here, Appellant and Respondent both entered into a Settlement Agreement, with two alternatives. The second alternative, to which Respondent expressly consented, was still valid and enforceable, yet the lower court refused to enforce the Agreement and require Respondent to honor his duties under

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[21]Even more disturbing is that after Respondent dropped his pursuit of his legal remedies, he apparently submitted a proposed *ex parte* order including new equitable grounds for dissolution which were not plead and of which Appellants had no notice. (R.pp. 268-270; 383). See also discussion, infra [regarding other grounds for dissolution not plead].

that agreement.

As noted previously, the Settlement Agreement provides two alternatives for resolution. Alternative One "[t]he parties will consult Ducks Unlimited to determine if the Property can be legally divided as depicted in Exhibit A." (R.pp. 517; 545). However, the LLC also reserved certain rights under the Conservation Easement including, the right to subdivide the Property into not more than 10 home sites. The Settlement Agreement included a provision for the parties to offer to relinquish *up to* two of the ten home sites provided for in the Conservation Agreement § 4.2. (R.p. 517). Specifically, the Settlement Agreement required that "[i]f Ducks Unlimited requires a reduction of home sites [aka the "Tracts"], then Bowman will give up the first home site and Alexander the second home site." Id.

The Settlement Agreement did not require either party to give up more than two home sites in order to gain Ducks Unlimited's approval. Instead, Alternative Two was inserted into the Settlement Agreement as an explicit alternative in case Ducks Unlimited refused to grant permission for the subdivision: "In the event Ducks Unlimited does not permit the legal separation of the Property, attorneys for the parties will draft agreements to accomplish the separate use, control, and responsibility of and for the property, it being the intent of the parties that each party be responsible for costs associated with his Property, and have exclusive use of such Property." (R.p 517). Respondent consistently refused to follow through with Alternative Two.

Both parties sought specific performance. While Respondent withdrew his claim for specific performance days before trial, Appellant has consistently claimed that Alternative Two was still a viable option. The testimony at trial indicated that if the parties followed the wildlife

management plan of Mr. Williams, the biological integrity of the Property would be maintained. (R.pp. 523; 780-782). The management plan could be instituted under Alternative Two, as the parties could remove a spillway box and each manage the impoundments on their own tracts, without any participation by the other. (R.p. 780-782). In other words, there was a way for the parties to each keep all their home sites, have separate use of their tracts, and enter into a management agreement as required by the Settlement Agreement to which all parties had voluntarily entered after the 2007 mediation. The trial court simply threw out the Settlement Agreement, ignoring its enforceability, and allowed Respondent to refrain from following Alternative Two. The Settlement Agreement can and should be enforced to resolve and end the matter, and the lower court erred in failing to so rule.

4. The Order relies on the wrong statute, misconstrues the testimony and facts, and wrongly concludes that dissolution is warranted.

The lower court relied upon the wrong statute for its finding that dissolution was appropriate. In his Complaint, Respondent only asserted deadlock as grounds for dissolution, 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 shareholder 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.

Therefore, the governing statute is § 33-14-300 and the only issue is whether there was a deadlock, so the trial court should not have applied Section 33-44-801 or considered whether there was "unfair prejudice" to Respondent.

Under S.C. Code § 33-14-300, a court may only grant judicial dissolution to a shareholder if it is established that:

> (i) 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. (Emphasis Added).

Here, the trial court ignored the fact that the parties already had a Settlement Agreement to resolve any alleged "deadlock." The Settlement Agreement can and should be enforced to resolve the "deadlock" and end the matter. Furthermore, in order to dissolve a corporation under allegations of deadlock, as Respondent alleged under S.C. Code § 33-13-300, the court must consider the actual benefit and injury to all shareholders resulting from dissolution. 19 *Am. Jur.2d Corporations* § 2385, 2387. Here, dissolution and a sale of the Property will cause irreparable injury. The appraised value of Old Dominion exceeded $10,000,000 in 2007. (R.p. 678). Since the real estate market has declined, a forced liquidation of the assets of the corporation in the current economy would result in a devastating decrease in the valuation of Old Dominion, in addition to losses related to Appellant's hours of manual labor and costs involved in improving the Property. (R.pp. 92; 208; 615; 676; 893).

The record does not support a finding that there was irreparable injury to the corporation or that the business can no longer be conducted to the advantage of the corporation. In fact, the parties in reality have already effectively divided the Property for their respective use as set forth in Alternative Two and have done so for the last approximately 6 years since the Settlement Agreement was entered on September 10, 2007. (R.pp. 144-147; 158; 893-1096). Both parties have made significant investments exceeding a half million dollars total on their respective tracts

since the entry of the Settlement Agreement.[22] (R.pp. 144-147; 152-153; 158; 893-1096). The parties have participated in joint timber cuts and both burned on their respective tracts. (R.pp. 146-147; 235-237). The wildlife management plan from Mr. Williams indicated that it was valid whether the Property was owned together or separately, as long as the parties followed his management plan. Johnston also testified that Respondent would not be dependent on Appellant and vice versa, and that Ducks Unlimited's permission would not be required. (R.p. 812). Respondent has offered speculation and conjecture as to why he thinks problems *could* develop over Alternative Two.[23] However, since conjecture does not invalidate the clause, Respondent cannot establish a deadlock since Alternative Two is available.

Instead of enforcing the Settlement Agreement or relying on the correct statute, the lower court cited to two subsections, S.C. Code § 33-44-801(4)(c) and (e) for the finding that dissolution was appropriate because:

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[22]Although Respondent tries to argue that Appellant somehow acted improperly by improving his portion of the Property without Respondent's permission, Respondent had to admit at trial that he had also made improvements to his Property and performed dike work costing over $100,000. (R.pp. 144-147). Respondent's Affidavit filed on October 26, 2012. Respondent did not seek Appellant's permission for improvements for the same reason that Appellant made improvements on his tract. They both were proceeding and continue to do so as if the tracts were separated for their usage as proposed under Alternative Two in the Settlement Agreement.

[23]Since this law suit was filed in December 2008, Respondent has not offered one incident where Appellant has been on his portion of the Property. In fact, Respondent only offered two specific incidents where he alleges that Appellant was on his portion of the Property shortly after the entry of the Settlement Agreement. (R.pp. 151; 153; 194-196). These two isolated incidents prior to this law suit are the only incidents in the evidence where Appellant was even on the portion designated for Respondent's use. Respondent has offered not one single incident in the past over four and half years where Appellant has been on his portion of the Property or interfered in any manner with Respondent's use of his portion of the Property.

> (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; . . . (e) the managers or members *in control* of the company have acted, are acting, or will act in a manner that is . . . oppressive . . . or unfairly prejudicial to the petitioner....

S.C. Code § 33-44-801(4)(c) and (e) [emphasis added]. As noted above, Respondent only asserted deadlock as grounds for dissolution. Furthermore, section 801(4)(e) only allows for dissolution where "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." (Emphasis Added). Here neither Respondent nor Appellant are "in control" of the LLC and therefore, this statute, by its own language, does not apply. As is clear from the evidence, Respondent and Appellant are equal members and owners of the LLC. (R.p. 472) ["Each membership Unit: (I) has equal governance rights with every other Membership Unit . . ."]; (R.p. 479) ["The Company will be managed by its Members."]; (R.p. 456) [Reflecting Respondent has 75 units and Appellant has 75 units].

Therefore, there is no manager or member in control of the LLC to activate the provisions of § 33-44-801(4)(e) even if Respondent had timely plead a claim for dissolution. The South Carolina Supreme Court clearly held that a substantially similar provision in S.C. Code § 33-14-300(2)(ii)[which permits dissolution if it is established by a shareholder that "the directors or those in control of a corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder"] was based on a "trend toward protecting minority shareholders from abuses by those in the majority." See Kiriakides v. Atlas Food Systems & Service, Inc., 343 S.C. 587, 597, 541 S.E.2d

257, 263 (2001). Respondent is an equal partner, not a minority shareholder.[24]

Furthermore, in addition to applying the wrong statute, the lower court misconstrued the facts and evidence. The Settlement Agreement contained two Alternatives. Alternative Two of the Settlement Agreement requires the parties to enter into agreements for the separate use, control and responsibility of the Property. Alternative Two was designed to ensure that the 2007 mediation could be implemented; it resolved any dispute and provided equally viable alternatives.[25] (R.p. 205).

The trial court's order states that Appellant refused to follow Johnston's March 2, 2011[26] proposal and implies that Appellant's submission of Johnston's later proposal (which would give Respondent and Appellant each an additional home site than his previous proposals) to Ducks Unlimited was improper. (R.pp. 10-11). The trial court also finds that the disputes between the shareholders result in the business no longer being conducted to the advantage of the shareholders. (R.p. 16). The trial order then concludes that "it is not reasonably practical to carry on the Old Dominion Plantation, LLC's business in conformity with the Articles of

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[24]Even if § 33-44-801 applied, the record shows that the company's assets – i.e. the Property – has been improved and has more wildlife than any time previously, and the parties have worked together even during the pendency of this lawsuit to conduct timber removal and burns. (R.pp. 146-147). Thus, there is no evidence that it is not reasonable practicable to carry on the company's business and Section 801(4)(c) also does not apply.

[25]The trial court ignored the fact that the mediation and Settlement Agreement resolved any dispute, and simply made its own determination based on the wrong facts. Furthermore, 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 share or withdrawing from the LLC.

[26]This proposal (as did all earlier proposals) required Appellant to give up more home sites than the Settlement Agreement required.

Organization and the Operating Agreement" and that Appellant's actions were "unfairly prejudicial" to Respondent under S.C. Code § 33-44-801(c) and (e). Id. The trial order fails to state the full story and relies in part on the incorrect statute.[27]

Mr. Johnston was retained to give an opinion as to how many home sites Ducks Unlimited would require to be forfeited. Johnston changed his opinion as to the number of home sites to be forfeited several times, with the amount varying between 3 and 4 home sites for each party. (R.pp. 604; 612). In an effort to clarify Mr. Johnston's opinion, Appellant noticed Mr. Johnston's deposition.[28] (R.pp. 167; 226-211). In his deposition, Mr. Johnston agreed that the Property should be able to be divided in fee simple, with each party being able to retain three approximately 5-acre home sites located in the most southern part of the Property, with no adverse affect on the wildlife. (R.pp. 830-831; 852). Mr. Johnston had obtained a wildlife management plan from Mr. Williams which indicated that it was valid whether the Property was owned together or separately, as long as the parties followed his

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[27]In the trial court's temporary order, which was initially drafted by Respondent's counsel (but not served on Appellants), language was apparently inserted to attempt to provide for dissolution under a statute, S.C. Code Ann. § 33-44-801(4)(c) and (e), which was never pled by Respondent. See Complaint; (R.pp. 268-270; 336-353). Respondent's Complaint only asserted deadlock under § 33-44-300. South Carolina law does not allow for trial by ambush in order to help parties correct deficiencies in their pleadings. See Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App. 2003)["The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party."] Had Appellants had notice by way of an amended pleading, they could have conducted discovery and introduced evidence including, but not limited to, Respondent's unfairly prejudicial conduct.

[28]The trial court took judicial notice of this fact. (R.p. 225).

management plan[29], the biological integrity of the Property would be maintained. (R.pp. 180; 523; 780-782; 812). The solution proposed by Mr. Johnston and Mr. Williams[30] (hereinafter the "Johnston/Williams proposal") is one that both parties, at different times agreed could be submitted to Ducks Unlimited.[31]

After receiving this opinion from Mr. Johnston, Appellants wrote to Ducks Unlimited shortly thereafter to determine if they would approve the division as proposed by Mr. Johnston and Mr. Williams. (R.p. 613). The trial court implies that Appellants' actions were somehow improper. However, in order to determine the feasibility of Johnston's proposal, Ducks Unlimited had to be provided with the proposal itself. Even though the proposal allowed for additional home sites to by retained by the parties than in Johnston's earlier recommendation (which Respondent had agreed to submit to Ducks Unlimited), Respondent sent a letter to Ducks Unlimited directing that they not even consider the proposal. 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. (R.pp 226-227; 229; 613). Appellant also testified that he would abide by Alternative Two in the Settlement

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[29]Under Mr. Williams' plan, the parties could remove a spillway box and each manage the impoundments on their own tracts, without any participation by the other. (R.pp. 780-782). In other words, there was a way for the parties to each keep all their home sites, have separate use of their tracts, and enter into a management agreement as required by the Settlement Agreement.

[30]Williams was the management specialist preferred by Respondent.

[31]Respondent testified in his deposition that he was willing to give up how ever many home sites that Appellant would also give up in order for Ducks Unlimited's permission for subdivision to be obtained. (S.R. pp. 6-7). Respondent also testified at trial that he had agreed to Johnston's proposal several months earlier which required even more home sites to be forfeited. (R.pp.134; 173).

Agreement.[32] (R.pp. 206-207; 229-230). Alternative Two was designed to ensure that the 2007 mediation could be implemented; it resolved any dispute, and it provided equally viable alternatives.[33]

According to Respondent's testimony, even though he previously agreed to a proposal requiring him to give up 3-4 home sites,[34] he now does not want to follow the Settlement Agreement. He does not want to submit the Johnston/Williams proposal to Ducks Unlimited in order to gain approval to divide the property, not does he want to adopt agreements for "the separate use, control and responsibility of the property." Thus, contrary to the trial court's finding, the record shows that it is *Respondent's* actions that are unfairly prejudicial to Appellants and the sale of the Property will irreparable injury to the LLC, rendering dissolution improper.

Finally, Respondent cannot create an expectation not set forth in the Operating Agreement and then declare that Appellant acted unfairly or oppressive by not meeting that expectation. In order to avoid any expectations not set forth in the Operating Agreement, Respondent and Appellant specifically contracted for and declared that any expectation not

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[32]The trial court order wrongly states that Appellant denied Respondent's right to specific performance of the Settlement Agreement. However, Appellant only denied the right to divide the Property because, at the time Respondent filed, Ducks Unlimited had denied the request to divide. Accordingly, it would have been illegal at that point to divide the Property. (R.pp. 205; 369; 609; 611; 805). The trial court ignores that Appellant was willing to enter into the necessary agreements under Alternative Two, and that it was Respondent who refused to follow the Settlement Agreement when division was not going to be possible.

[33]Recognizing that Alternative One required a third party's approval, the Settlement Agreement specifically included Alternative Two in order for it to remain viable if the necessary approval could not be obtained for Alternative One.

[34]See Respondent Deposition, (S.R. pp. 6-7; R.pp. 134; 173).

included in their Operating Agreement could not be used to "gain advantage through litigation". (R.pp. 458; 469)[35] The Operating Agreement specifically prevents Respondent from attempting to unilaterally create such expectations and seek legal relief on that basis. See Clary & Tug Properties, LLC Clary & Tug Properties, LLC v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct.App. 2012)["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."]; also Park Regency, LLC, v. R&D Development of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct.App. 2012)[Same].[36]

Furthermore, the record does not support findings of unfair and oppressive conduct by Appellant or that he engaged in conduct relating to the company's business that makes it not reasonably practical to carry on the company's business with him. The lower court seems to imply that Appellant should be penalized for not agreeing to give up more home sites than the Settlement Agreement required. If that is considered oppressive conduct, Respondent's refusal to follow Alternative Two should also be interpreted as oppressive. In fact, the record shows

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[35]It is "unreasonable to have or rely on an expectation that is not reflected in this Agreement . . . . the failure of a Member who has or develops an expectation contrary to or in addition to the contents of this Agreement as provided in Section 3.8(b)(ii) **is evidence that the expectation was not reasonable and estops** that Member from asserting that expectation as a basis for any claim against the Company or any other Member." [Emphasis Added].

[36]Even assuming arguendo that any reasonable expectation existed, the South Carolina Supreme Court has held that "we do not believe the Legislature intended a court to judicially order a corporate dissolution **solely** upon the basis that a party's 'reasonable expectations' have been frustrated by majority shareholders." See Kiriakides, 343 S.C. at 593, 541 S.E.2d at 261 [Emphasis Added].

that: 1) Appellant expended time and money to increase the value of the property;[37] 2) Appellant attempted to work with Respondent to provide Respondent with exclusive use of the Property, even though there was no right to exclusive use;[38] and 3) Appellant obtained a more favorable recommendation on subdividing the property. None of these actions are indicative of someone acting in a harsh or oppressive manner.

Furthermore, as already noted, § 33-44-801(4)(c) and (e) were not raised in the pleadings, and thus Appellant was not able to obtain discovery, introduce evidence on those issues, and plead other appropriate defenses. The unreasonableness of Respondent's actions is further highlighted by his requests for the Court to ignore the Operating Agreement and its provisions along with the Settlement Agreement and its provisions.

In addition, the Settlement Agreement also provides an exit provision for either party if they wish to sell their portion of the Property. (R.p. 518). 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

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[37](R.pp. 108; 209; 213; 247-248). In addition, Appellant pays the property taxes and Respondent repays him at his convenience sometimes years later.

[38]At trial, the court allowed, over Appellants' strenuous objections, testimony regarding Respondent's complaints about shared usage of the Property prior to the entry of the Settlement Agreement. (R.pp. 89-90; 103-104; 244-245). These stale allegations (some even dating 10 years earlier), which were not part of the allegations in the Complaint before the trial court, do not deal with any reasonable expectations of the parties under the Operating Agreement. Rather, Respondent tries to create some type of argument that Old Dominion Plantation containing over 700 acres with its wildlife and hunting attributes was a type of time share with him desiring a right to separate, exclusive use of the massive tract at certain times. However, the Operating Agreement provides no such right.

dissolution of the LLC.[39] See In Re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002).

5. The trial court's holding that the Property can be sold at public auction has no basis.

Even if the lower court properly granted dissolution of the LLC, 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."]. Appellant and Respondent contracted in the Operating Agreement to maximize the proceeds of a sale in the event of a dissolution. Specifically, Section 14.2 (Winding Up of the Company) as states:

> (a) Sale of business by liquidator - During the winding up process, the liquidator shall be required to offer the business of the Company for sale as a whole, as a going business. The offer for sale of the business as a going concern shall be conducted in a manner **customary for the sale of the business of the type engaged in by the Company**, on such terms and conditions as the liquidator deems appropriate in order **to maximize the proceeds of such sale**. Any member may bid and purchase the business, provided that the liquidator and purchasing member (or former member) must be able to demonstrate that the purchase price and terms so offered or paid are equal or superior to, the terms if the business had been sold to an independent third party. In evaluating such sale price, it shall be assumed that all remaining members will continue on with the business in their former capacities and that any leases or other contractual relationships between a member(s) and the Company, beneficial to the Company, shall remain in full

[39]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.

> force and effect. The written appraisal of a qualified appraiser shall be evidence of the equality of the terms of a member offer or purchase, but there shall be o[sic] obligation to obtain such an appraisal. [Emphasis Added].

(R.p. 491).

Accordingly, the Operating Agreement ensures that a fair price will be received for the Property. Section 4.1 of the Operating Agreement sets forth the relationship between the Operating Agreement and the LLC Act as follows:

> Section 4.1 Relationship of This Agreement to the Default Rules Provided by the LLC Act. Regardless of whether this agreement specifically refers to particular default rules:
> (a) if any provision of this Agreement conflicts with a default rule, the provision of this Agreement controls and the default rule is modified or negated accordingly; and
> (b) if it is necessary to construe a default rule as modified or negated in order to effectuate any provision in this Agreement, the default rule is modified or negated accordingly.

(R.p. 471).

Thus, the Operating Agreement trumps the statutory provisions on judicial sale and the Court's order should reflect that. The parties' intent that a fair, market value price would be received for the Property is made even clearer by their inclusion in the Operating Agreement for provisions that even in the event that a member is wrongfully dissociated under Sections 13.5 and 13.10, the wrongfully dissociated member would receive value for his portion of the Property determined by "one or more appraisals satisfactory to the Members . . ." (R.p. 453). A dissolution due to deadlock should not punish a member by allowing for a substantially lower price than a wrongfully dissociated member would receive.

However, the trial court's order provides if a sale of the Property is not accomplished

within the short time period set forth in the court's consent order filed on October 1, 2012, either party can apply to the trial court for an order requiring the Property to be sold at a public auction. There is absolutely no evidence of any type of imminent harm to the Property which would necessitate a quick sale of the Property. Rather, the evidence at trial was the Property is in good shape and the wildlife population continues to improve. (R.pp. 159; 230-231; 144-147; 152-153; 893). Appellant and Respondent both testified as to participating in joint timber cuts and burns, and to the good condition of the Property. (R.pp. 146-147; 235-237).

Appellant and Respondent contracted in the Operating Agreement to maximize the proceeds of a sale in the event of a dissolution. The trial court's order improperly ignores those contractual rights. See Clary & Tug Properties, LLC, 727 S.E.2d at 778; also Park Regency, LLC, 402 S.C. at 412, 741 S.E.2d at 534. At trial, testimony referred to the most recent appraisal of the Property reflecting a value of $10,672,000. (R.p. 678).[40] A sale of the Property at a courthouse auction would create the potential for irreparable harm to the LLC and its members. Such a sale could allow one of the members or anyone else to purchase the Property for any amount, regardless of the Property's value, if they can outbid the other member. For example, one member could bid one dollar if the other member did not have the means to make a bid and walk away with the Property.[41] This creates a scenario in which one of the members may accomplish that which was not contracted for and provided for in the Operating Agreement, such

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[40]Appellant recognizes that the appraisal was dated the year prior to this lawsuit, and realizes the value of the Property has changed, but the appraisal still indicates the significance of the asset involved in this potential sale.

[41]Respondent testified at the trial that he does not want a reserve on the Property. (R.p. 141).

as a forced buyout of the equal member and owner, who does not have the means to purchase the Property regardless of the unreasonableness of the highest bid.[42]

The method of sale on the Property that Respondent seeks in this case contravenes South Carolina Limited Liability Corporation law. In this case, Respondent and Appellant, well-educated parties, represented by counsel entered the Operating Agreement to control their rights in the LLC. Section 3.7 of the Operating Agreement provides in the relevant section,

> Intent of this Agreement.
> (a) The parties to this Agreement have reached an understanding concerning various aspects of (i) their business relationship with each other and (ii) the organization and operation of the Company and its business. They wish to use rights created by statute to record and bind themselves to that understanding.
>
> (b) The parties intend this Agreement to control, to the extent stated or fairly implied, the business and affairs of the Company, including the Company's governance structure and the Company's *dissolution*, winding up, and termination as well as the relations among the Company's Members and persons who have signed Contribution Agreements and Contribution Allowance Agreements. [Emphasis Added].

(R.p. 469).

As the records show, Appellant has invested thousands of manual labor hours in the Property and well in excess of a million dollars in the purchase of the land, interest, equipment, improvements, maintenance, and repairs of the Property. (R.pp. 208-209; 247-248; 615; 676; 679; 893). Appellant has also foregone and lost other real estate and business opportunities because of his significant investment in Old Dominion Plantation, LLC.[43] Id. Despite

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[42]This scenario also provides the potential for a third party to purchase the Property at an unreasonable bid.

[43]Appellant testified at trial as to his affection for this Property and its meaning to him, a loss that cannot be measured in dollars. (R.p. 209).

Appellant's reliance on the Operating Agreement and its protections for his investment, he could lose everything at a courthouse auction of the Property. Any sale of the property must be subject to the agreed upon method by the parties in the Operating Agreement.

Furthermore, the inclusion in the trial court's order for a public auction of the Property completely defeats the ability of the parties to solicit the highest price for the Property during the initial agreed upon sales period in the consent order. If buyers can wait and purchase the Property at a public auction, the entire marketing of the Property pursuant to the consent order is at risk. This procedure again would directly conflict with the provisions of the Operating Agreement.

6. The trial court's order is internally inconsistent and awards damages on a withdrawn cause of action.

The trial court refused to enforce provisions of the Settlement Agreement regarding division of the property or agreements for separate use and maintenance, yet at the same time, enforced provisions of the Settlement Agreement as to division of requirement. The court must enforce all of the Settlement Agreement or none, but it cannot select random provisions to enforce. Beasley v. Swinton, 46 S.C. 426, 24 S.E. 313, 323 (1896)[A court cannot ignore certain provisions of a contract; it's duty is "first to decide what the contract, as made by the parties thereto, is, and then to enforce it."]. As a valid contract between the parties, the Settlement Agreement is subject to the rules of contract construction. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241-242, 672 S.E.2d 799, 802-803 (Ct.App. 2009), cert. denied, (June 9, 2009)[settlement agreements are viewed as contracts]; Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001)[holding the enforcement of the terms of a settlement agreement is a contract action]. In determining whether to order

specific performance, the Court cannot "make a new contract for the parties, or supply any material stipulation of the contract, but **must enforce the contract according to its terms or not at all.**"] 71 *Am.Jur.2d Specific Performance* § 35 (emphasis added); Beasley v. Swinton, *supra.*

Here, the Settlement Agreement provided for either the division of the Property or "separate use, control and responsibility of and for the Property." The Settlement Agreement required Respondent to make payments to Appellant under a Promissory Note and for Appellant to pay Respondent $9,060.00 for equipment. The trial court found that the Settlement Agreement would not be enforced as to the division of the real Property or the adoption of agreements for "separate use, control and responsibility of and for the Property." However, the trial court then tried to enforce the provision regarding the division of equipment and ordered Appellant to pay Respondent $9,060.00, but refused to require Respondent to pay Appellant any of the monies due under the promissory note.[44] The Settlement Agreement cannot be selectively enforced. Either the entire Settlement Agreement is enforced, allowing the parties to draft agreements to accomplish the "separate use, control and responsibility of and for the Property" as well as follow the financial obligations set forth therein, or none of the Settlement Agreement should be enforced.

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[44]Furthermore, just prior to trial, Respondent withdrew his cause of action for specific performance/breach of contract. The trial court also awarded Respondent an additional $67,000 under this withdrawn cause of action. There is no basis for the damages. If the Respondent had pursued his first cause of action including a claim for damages to recover $67,000, Appellant could have shown that Respondent has received use of Tract Two, a parcel worth $1,800,000 more than Appellant's. (R.pp. 115; 210; 737; 747; 751-752). Therefore, Respondent gets a windfall by having exclusive use of a more valuable tract for approximately five years without any compensation to the Appellant.

7. The trial court failed to correct an uncontested amount of reimbursement to which Appellant is entitled.

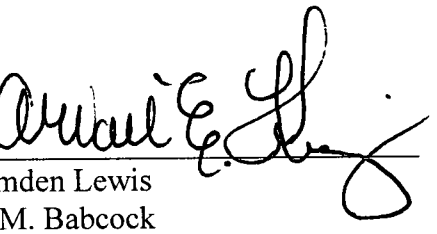
In the trial court's temporary May 11, 2012 order, the trial court ordered the parties to submit information to the trial court by affidavit and/or financial records, and agreed to take testimony regarding the parties' contributions if necessary. The trial court also stated in that temporary order that if either party wants to offer testimony, then the trial court will set a hearing. Appellants requested a hearing on the matter. The March 1, 2013 trial court order states that Appellant is entitled to $475,612.48 (which matches the total of expenditures submitted in Defendant's Affidavit filed on October 11, 2012). (R.p. 620). In that same affidavit, Appellant attested that "due to the passage of time and flooding in [Appellant's] basement, some receipts and checks may have been lost or destroyed. Affiant will continue to search for additional documentation for submission at the hearing on the matter." (R.p. 615). At the subsequent hearing for the financial accounting on November 1, 2012, Appellant presented expenditures and supporting documentation for a total of $499,632.19. (R.pp. 676; 893-1096). Respondent did not contest that Appellant had made those expenditures. In Respondent's memorandum in opposition to Appellants' motion to alter or amend, Respondent specifically stated that they did not oppose the trial court correcting this amount. However, the trial court failed to do so in its order denying Appellant's motion to alter or amend. Appellants respectfully request that this Court adjust Appellant's entitlement to a credit to $499,632.19 to reflect the expenditures presented on November 1, 2012.

Conclusion

In this case, the parties had entered into a Settlement Agreement with two Alternatives which resolved any dispute or deadlock between the parties. Despite Respondent signing the Settlement Agreement which required only a total of two home sites to be relinquished, he was dissatisfied with Appellants for not agreeing to relinquish however many were necessary to accomplish Alternative One. Respondent refused to proceed with Alternative Two-- the adoption of agreements for the separate use, control and responsibility of the property. When Appellant was able obtain a more favorable recommendation as to the division of the property, thereby allowing the retention of more home sites, Respondent directed Ducks Unlimited not to consider the recommendation and continued to trial on the claim for dissolution. Because the Settlement Agreement was a valid and enforceable contract, with Alternative Two being enforceable when Alternative One could not be accomplished, the lower court should have enforced the agreement.

The lower court's ruling in this matter is erroneous in several ways. First, the lower court erred in refusing to change venue, and the entire judgment is void. Furthermore, the lower court should not have considered Respondent's equitable claim for dissolution since Respondent had a legal claim that he withdrew just days before trial. In ruling on dissolution, the lower court relied on an improper statute and misconstrued facts and testimony. In addition, the lower court's holding that the property can be sold at public auction contravenes South Carolina law on limited liability companies and will impose irreparable harm on the LLC and its members. Finally, the lower court's award of damages is improper as it awards damages on withdrawn cause of action

and fails to correct the amount of reimbursement to which Appellants are entitled. Appellants respectfully submit that the judgment of the lower court must be reversed.



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April 3, 2014

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In the Court of Appeals

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SC 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

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Columbia, South Carolina
April 3, 2014

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APPELLANTS.

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 Brief of Appellants and 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:

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Connie W. Grugan

This 3rd day of April, 2014.