THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC...Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.........................Respondents

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err, as a matter of law, in holding that the Operating Agreement's dissociation and dissolution standards subsume the standards for judicial dissolution contained in the LLC Act?

2. Did the circuit court err by stopping Emerald from introducing evidence bearing on Kriti's wrongful conduct and denying Emerald's claim for judicial dissolution?

3. Did the circuit court err by observing that the only equitable remedy in this case was to order the sale of the ARP-II property?

STATEMENT OF THE CASE

This is an appeal from the circuit court's denial of Appellant Emerald Investments, LLC's judicial dissolution claim against Ashley River Properties II, LLC ("ARP-II") and Kriti Ripley, LLC ("Kriti").

This action was commenced on January 30, 2009 with Emerald's filing a Summons and Complaint seeking (1) an order for judicial dissolution of ARP-II, as a member of ARP-II, pursuant to the South Carolina Uniform Limited Liability Company Act of 1996 (S.C. Code Ann. §§ 33-44-101 *et seq.*) (the "LLC Act") and (2) a declaratory judgment that Emerald is the 70 % member of ARP-II. (R. p. 0003) ARP-II and Kriti (the other member of ARP-II) defended by, among other things, claiming that the case should be submitted to arbitration per the ARP-II operating agreement (the "State Judicial Dissolution Action").

On April 16, 2010 a Consent Order was entered by the Honorable Deadra L. Jefferson (the "Consent Order"). The Consent Order, among other things, dismissed without prejudice the declaratory judgment claim so that it could be arbitrated in New York and stayed the judicial dissolution action. (R. p. 0004)

After the arbitration hearing was held, a non-jury trial was conducted on January 22-23, 2013 before Judge Jefferson. (R. p. 0002) By Order dated and filed on April 26, 2013, Judge Jefferson denied Emerald's judicial dissolution claim on the merits, having denied the motions for directed verdict made at trial. (R. pp. 0002-0015) On May 9, 2013, Emerald filed a Motion to Alter or Amend Judgment Under Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRCP") along with a memorandum of law in support of same. (R. pp. 0591-0613) By Order dated and filed on July 24, 2013, Judge

Jefferson denied Emerald's Motion. (R. p. 0585-0590) Counsel for Emerald received notice of this denial on August 9, 2013.

The Notice of Appeal was served on Counsel for ARP-II and Kriti on September 4, 2013. (R. pp. 0064-0065) By Order of the Court of Appeals filed December 5, 2013, the deadline for Emerald to file its Initial Brief was extended to January 13, 2014. (R. pp. 0021-0022)

STATEMENT OF THE FACTS

This case involves the development of a marina and mixed-use residential condominiums in Charleston, South Carolina, known as Ripley Light Yacht Club Marina & Condominiums (the "Project"), located alongside the Ashley River in Charleston, South Carolina. (R. p. 0004) Emerald and its principal Stuart Longman ("Longman") were the original developers of the Project though entities known as Ripley Light Development, LLC ("RLD") and Ripley Light Yacht Club, LLC ("RLYC"), and later as sole managing members of ARP-II and Ashley River Properties I, LLC ("ARP-I"). (R. p. 0004) In the fall of 2003, Emerald sought outside investors for ARP-Il, and on December 29, 2003, Emerald and Kriti entered into the Operating Agreement of ARP-II pursuant to the LLC Act (the "Operating Agreement"). (R. p. 0004) Under the Operating Agreement, Emerald became a 70% financial and voting member and Kriti became a 30% financial and voting member in ARP-II. (R. p. 0005)

In late 2004, Kriti accused Emerald of breaching the Operating Agreement. (R. p. 0005) These disputes were arbitrated in New York, and on October 30, 2005 an award was issued (the "2005 Award"). (R. p. 0005) Among other things, the 2005 Award stripped Emerald of its voting rights and awarded Kriti damages, but denied the remedy

of forfeiture instead authorizing Kriti to buy Emerald out. (R. p. 0005) After the 2005 Award, Kriti took the position that Emerald's interest had been diluted, while Emerald maintained it still owned 70% of ARP-II. Subsequently, a second arbitration was held over other monetary disputes. (R. p. 0005) Ultimately, both of the arbitration awards were confirmed, reduced to judgment, and enrolled in Charleston County against Emerald and Longman. (R. p. 0006)

As mentioned above, Emerald subsequently initiated the State Dissolution Action on January 30, 2009, seeking to confirm its 70% ownership interest and once and for all sever its business relationship with Kriti with whom it had been embroiled in litigation and disputes for several years. The Consent Order, as discussed, dismissed the declaratory judgment claim as to confirmation of Emerald's ownership interest in favor of arbitration while staying the judicial dissolution action. (R. p. 0004) Specifically, the Consent Order provides the State Dissolution Action "is hereby stayed pending the above-referenced arbitration proceeding to be conducted in New York" and "[t]he parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP-II)." (R. p. 0004)

Emerald then commenced another round of arbitration in New York, culminating in an award dated October 28, 2010 (the "2010 Award"). (R. pp. 0331-0338) Critically, the 2010 Award contained claims for, among other things, a confirmation of Emerald's 70% ownership interest in ARP-II, but it did not contain a claim for judicial dissolution or even dissolution under the terms of the Operating Agreement. (R. p. 0332) The 2010

Award acknowledges that the State Dissolution Action had been stayed to allow for "arbitration . . . on the issue of Emerald's membership interest." (R. p. 0332) Although the 2010 Award settled only those "claims and counterclaims submitted to this Arbitration," it made certain observations "to the extent that the Panel is empowered to opine on the request for . . . dissolution." (R. p. 0335)

The 2010 Award found that "the Capital Call, dated February 28, 2005 [and initiated by Kriti] was defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interests" and concluded that Emerald continues to own 70% of ARP-II. (R. p. 0332)

Although according to the Consent Order and the 2010 Award, Emerald's claim for dissolution was not part of the arbitration, the 2010 Award, found there to be no grounds for dissolution *under the Operating Agreement.* (R. pp. 0333-0335) However, the arbitrators observed, nonetheless, that "dissolution may be in the best interests of all parties." (R. p. 0007; p. 0333) The 2010 Award also found that the standards for dissociation under the Operating Agreement were not met, and that the parties did not breach various other provisions of the Operating Agreement. (R. pp. 0334-0335)

Prior to and at trial, Emerald argued that Kriti has acted for over a decade in an oppressive and prejudicial manner towards Emerald. (R. pp. 0031-0044; p. 0085, lines 11-13) Such behavior includes (1) issuing a facially invalid, bad-faith capital call in order to squeeze down Emerald's membership interest in ARP-II; (2) encouraging pre-construction investors to sue ARP-II so as to gain the upper hand against Emerald and seize voting rights; (3) underhandedly obtaining a default judgment against Ashley River Properties, I, LLC ("ARP-I"), which is another entity controlled by Longman, via a

purported assignment of rights from a pre-construction investor; and (4) consistently failing to provide Emerald financial information including land and marina appraisals and marina expansion permits so as to artificially devalue ARP-II from Emerald's perspective. However, the circuit court found that essentially all of these allegations were covered by the 2010 Award, even the conduct specifically impacting Emerald as opposed to ARP-II more generally. (R. p. 0123, lines 10-23) Moreover, the court found that the dissolution standards under the LLC Act "mirrors" the Operating Agreement. (R. p. 0124, line 16-p.0125, line 22) As such, the majority of Emerald's pre-marked exhibits relating to these claims was not admitted into evidence.

At trial, Longman testified that there have been continued fights between Kriti and Emerald (and other entities associated with Longman) for over a decade. (R. p. 0122, lines 13-17) The 2010 Award established the facial invalidity of Kriti's capital call, which had provided rationale for the claim it owned 70% of the company – not Emerald, and recognized that given the years of litigation and struggles amongst the members of ARP-II "dissolution may be in the best interests of all parties." (R. p. 0007; pp. 0332-0333)

By Order dated and filed on April 26, 2013 (the "Order"), Judge Jefferson denied Emerald's judicial dissolution action. The court found, among other things, that the 2010 Award established that Kriti committed no misconduct and "[t]hose factual findings are binding in this lawsuit." (R. p. 0011) Moreover, the Order found that "when Sections 9.1 and 10.5 [of the Operating Agreement] are read in conjunction with one another, they mirror the language of the LLC Act." (R. p. 0010) As such, the court concluded that Emerald failed to satisfy the requirements for judicial dissolution found in the LLC Act,

specifically S.C. Code Ann. § 33-44-801(4)(e). (R. p. 0012) Specifically, the court found that "because the operating agreement clearly provides grounds upon which dissolution may occur, and the arbitration panel found no factual support for dissociation or dissolution in the Third Award, statutory authority addressing dissolution need not be taken into account" because the operating agreement "basically mirror[s] S.C. Code Ann. § 33-44-801. (R. p. 0014)

However, in denying Emerald's claim for judicial dissolution, even the Order recognized "that these parties have a heightened degree of acrimony toward one another and a lack of trust." (R. p. 0012)

On May 9, 2013, Emerald filed a Motion to Alter or Amend Judgment Under Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRCP") along with a memorandum of law in support of same (the "Motion to Amend"). The Motion to Amend pointed out, among other things, that the grounds for dissolution under the LLC Act are much broader than those contained in the Operating Agreement, and that the circuit court erred by finding that the findings of the 2010 Award, ipso facto, resolved the judicial dissolution question. (R. pp. 0601-0610) The Motion to Amend also pointed out that certain conduct by Kriti occurring after the 2010 Award justified judicial dissolution. (R. p. 0605) By Order dated and filed on July 24, 2013, Judge Jefferson denied the Motion to Amend (R. p. 0585-0590).

ARGUMENT

I. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, WHEN IT HELD THAT THE OPERATING AGREEMENT'S DISSOCIATION AND DISSOLUTION STANDARDS SUBSUME, SO AS TO RENDER IRRELEVANT, THE LLC ACT'S STANDARDS FOR JUDICIAL DISSOLUTION.

A. The LLC Act's dissolution standards, as a matter of law, are broader than those contained in the Operating Agreement.

The Order incorrectly found that "when Sections 9.1 and 10.5 [of the Operating Agreement] are read in conjunction with one another, they mirror the language of the LLC Act" regarding dissolution. (R. p. 0010)

Although, an action for the dissolution of an LLC sounds in equity, *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005), this case involves interpretation of the LLC Act, which presents a question of law. *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998). A legal question in an equity case receives review as in law. *Gunter v. Fallaw*, 78 S.C. 457, 59 S.E. 70 (1907). Therefore, the standard of review as it pertains to interpretation of the LLC Act is whether the circuit court made an error of law in its interpretation and application. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

The circuit court erred as a matter of law by holding that the dissolution standards of the LLC Act mirror the dissolution and dissociation standards found in the Operating Agreement. The Operating Agreement provides *very limited* grounds for dissolution in Section 9.1 and it governs dissociation in Section 10.5. Section 9.1 of the Operating Agreement provides as follows:

> **Dissolution**. Except as otherwise provided herein, the Company shall dissolve, its affairs shall be wound up and the Company shall terminate only upon the happening of one or more of the following events:
>
> (a) The written consent of those Members who own the Required Interest of the Voting Rights in the Company;
>
> (b) Any event occurs that makes it unlawful for all or substantially all of the business of Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is

effective retroactively to the date of the event for purposes of this subsection;

(c) The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to the Act, unless the Company is reinstated in accordance with the Act;

(d) The expiration of the period fixed for the duration of the Company, as set forth in the Articles of Organization, unless those Members who own the Required Interest of the Voting Rights in the Company extend the term of the Company.

(R. pp. 0365-0366)

Emerald's judicial dissolution cause of action is based on S.C. Code Ann. § 33-44-801(4) of the LLC Act – not the Operating Agreement. The 2010 Award did not address these dissolution standards. The LLC Act provides that dissolution may occur either upon "an even specified in the operating agreement," S.C. Code Ann. § 33-44-801(1), or "on application by a member . . . upon entry of a judicial decree" if any of five (5) criteria are met. S.C. Code Ann. § 33-44-801(4). The last of these criteria authorizes 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***." S.C. Code Ann. § 33-44-801(4)(e) (emphasis added).[1]

[1] The South Carolina Supreme Court has offered guidance on what constitutes "oppressive," "fraudulent," and "unfairly prejudicial" in the closely held, business context. These happen to be same of the same terms found as grounds for dissolution found in S.C. Code Ann. § 33-44-801(4)(e). Recently, in *Ballard v. Roberson*, another case involving a complicated marina development, the Court summarized the law as follows:

> In establishing the proper considerations for finding oppression, we observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." ***We also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior."*** Although we declined to set out specific factors in Kiriakides, we observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders."

The language of Section 9.1 of the Operating Agreement and S.C. Code Ann. § 33-44-801(4)(e) are not the same. In fact, they are not even similar. Whereas, Section 9.1 of the Operating Agreement addresses very specific (and limited) procedural and administrative situations, the LLC Act contemplates a broad class of hostile acts committed by one member of an LLC against another. These sorts of acts by Kriti provided the basis for Emerald's judicial dissolution action.

Despite this clear and material distinction between the Operating Agreement and the LLC Act, the Order held that the 2010 Award nevertheless controlled the analysis of S.C. Code Ann. § 33-44-801(4) not as a result of the arbitrators' analysis of the dissolution grounds in the Operating Agreement but as a result of the arbitrators' analysis of the ***dissociation*** standards found in the Operating Agreement. Section 10.5 of the Operating Agreement provides as follows:

> **Wrongful Dissociation**. Notwithstanding anything herein to the contrary, if a Member Dissociates by reason of the occurrence of any of the following events, then such Dissociation shall be a wrongful Dissociation by such Member in contravention of this Agreement:
>
> . . .
>
> (b) On application by the Company or another Member, the Member's expulsion by judicial determination under Section 33-44-601(6) of the Act because the Member:
>
> > (i) Engaged in wrongful conduct that adversely and materially affected the Company's business; or

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399 S.C. 588, 733 S.E.2d 107 (2012) (citing *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001)) (internal citations omitted) (emphasis added). But perhaps most telling, "[t]he concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." *Id.* (citing *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267). This is commonly known as a "freeze out" in closely held business entities like ARP-II. All of these criteria are met in the present case.

> (ii) Willfully or persistently committed a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act; or
>
> (iii) Engaged in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member.
>
> . . .

(R. p. 0379)

Specifically, the Order found that "when Sections 9.1 and 10.5 [of the Operating Agreement] are read in conjunction with one another, they mirror the language of the LLC Act" (R. p. 0010) and that "these grounds basically mirror S.C. Code Ann. § 33-44-801." (R. p. 0014) Since the 2010 Award did not find a breach of either Section 9.1 and 10.5 of the Operating Agreement, this led the circuit court to conclude that there was no basis for judicial dissolution. This conclusion, however, was error as a matter of law.

There are several reasons why the above-quoted dissociation grounds do not "mirror" or even "basically mirror" the grounds for dissolution under the LLC Act. First, the dissolution standards contained in S.C. Code Ann. § 33-44-801(4)(e) *addresses **a wide array of negative conduct by one member against another member**, whereas the dissociation standards in the Operating Agreement that, among other things, reference* Section 33-44-409 of the LLC Act *address **negative conduct detrimental to the entity and only specific instances of misconduct against a co-member**.* Section 10.5 of the Operating Agreement mirrors S.C. Code Ann. § 33-44-601(6), which are the LLC Act's standards for dissociation. S.C. Code Ann. § 33-44-601(6)(b) deals with a member's duty of loyalty to the company and its other members. However, the language of that code section deals primarily with how one member's conduct impacts the company as a

whole. *See* S.C. Code Ann. § 33-44-601(6)(b)(1)-(3).[2] S.C. Code Ann. § 33-44-601(6)(c) deals with a member's duty of care to the company and its other members, specifically "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." These provisions are to be contrasted with S.C. Code Ann. § 33-44-801(4)(e), which provides *far more generally* that "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." Notably, this language is entirely distinct from that found in the act's dissociations provisions and the ARP-II Operating Agreement upon which the 2010 Award was based. At trial, the circuit court observed that "[t]here really is no material difference . . . wrongful conduct, oppressive conduct, it all falls into the same category." (R. p. 0126, lines 19-21) This, give the above analysis, constitutes a clear error of law – one which prevented the case from being properly tried. As recounted above in the Statement of the Facts, the court's mistaken belief that the 2010 Award was dispositive as to judicial dissolution prevented Emerald from presenting

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[2] S.C. Code Ann. § 33-44-601(6)

...

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

(1) to account to the **company** and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the **company's business** or derived from a use by the member of the **company's property**, including the appropriation of a **company's opportunity**;

(2) to refrain from dealing with the **company** in the conduct or winding up of the **company's business** as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the **company** in the conduct of the **company's business** before the dissolution of the **company**.

(Emphasis added)

the bulk of its case it had prepared to show specific instances of "oppression" and wrongful conduct under the LLC Act.

The issue before the lower court on Emerald's claim for judicial dissolution was not whether Kriti's conduct harmed ARP-II, but, rather, on the whole whether Kriti's conduct harmed Emerald and its principal, Longman above and beyond any damage to the company.[3] This distinction makes sense because dissociation and dissolution under the LLC Act are completely different remedies. Whereas dissolution results in the termination of the company altogether, dissociation means simply that one or more members are severed from the Company for conduct harmful to its operations. This difference accounts for why each has different grounds. Had the legislature intended the dissolution and dissociation standards to be the same, it could have easily done so. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 702 S.E.2d 246 (2010) ("Had the legislature intended [a meaning different from the unambiguous language in the statute], the statute would have been drafted accordingly.") However, by a plain reading of the above-quoted provisions, the legislature did not do this; therefore, it was error for this Court to not give the legislature's words their intended application.

Given the foregoing, the Order errs, as a matter of law, because it blurs the lines between the dissolution and dissociation grounds contained in the Operating Agreement and the LLC Act. A plain reading of the LLC Act and the Operating Agreement shows

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[3] Logically, a member's conduct may not be wrongful from the standpoint of the LLC, but the same conduct could be seen as oppressive to another member of the LLC in his or her personal capacity. For instance, say a managing member perceived an opportunity and succeeds in obtaining a substantial judgment against Company B through a technical oversight by the latter. This very well may be in the LLC's best interest. However, the same conduct would be wrongful and oppressive as to another member of the LLC if Company B happened to be wholly owned by that member. As it turns out, this example is essentially what occurred in the present case between Kriti and Emerald.

that their dissolution criteria do not "mirror" or even "basically mirror" one another. This, however, does not mean that the court should have dispensed with the findings of the 2010 Award in contravention of state policy. Rather, the court was certainly bound by the findings of the 2010 Award to the extent those findings addressed the dispositive provisions of the LLC Act, namely S.C. Code Ann. § 33-44-801(4)(e). However, Emerald's contention is simply that the scope of the 2010 Award did not (and could not have since it was restricted to interpreting the Operating Agreement) address these criteria, and the court erred by not discerning this distinction and preventing Emerald from fully arguing its case under the distinct criteria found in S.C. Code Ann. § 33-44-801(4)(e). For instance, the court stretched the purpose and effect of the 2010 by observing, among other things, that "I think that the arbitrator's purpose was to make all factual findings upon which the court could base its decision on dissolution." (R. p. 0156, lines 2-5) This statement overlooks the limited purpose of the 2010 arbitration as well as the Consent Order.

Therefore, Emerald respectfully requests that this Court remand this case so that Emerald's claim for judicial dissolution under S.C. Code Ann. § 33-44-801(4)(e) can be properly evaluated with guidance from, but not being wholly controlled by, the outcome of the 2010 Award.

B. An LLC's operating agreement cannot, as a matter of law, preempt or nullify certain provisions in the LLC Act concerning dissolution.

The Order correctly observes that, generally speaking, the terms of the Operating Agreement controls over inconsistent provisions of the LLC Act. However, the Order errs by concluding that "because the operating agreement clearly provides grounds upon which dissolution may occur, and the arbitration panel found no factual support for

dissociation or dissolution in the [2010 Award], *statutory authority addressing dissolution need not be taken into account.*" (R. p. 0014) (emphasis added).

This finding is erroneous, as a matter of law, because the LLC Act prohibits an operating agreement from restricting a member's right to pursue judicial dissolution under the LLC Act. S.C. Code Ann. § 33-44-103(b)(6) ("The operating agreement may not vary the requirement to wind up the limited liability company's business in a case specified in [Sections] 33-44-801(3) **or 33-44-801(4)**.") (emphasis added). As discussed above, the grounds for judicial dissolution are broader than those set forth in Section 9.1 of the Operating Agreement, and the lower court erred by finding that the dissociation provisions of the Operating Agreement, which the arbitrators did consider, "basically mirrored" S.C. Code Ann. § 33-44-801(4)(e).

The arbitration panel only considered matters relating to the Operating Agreement. It did not and could not have considered S.C. Code Ann. § 33-44-801(4)(e). That was the lower court's job, but unfortunately the Court did not analyze this code section properly. Should this case be remanded, the circuit court should consider evidence and make specific findings regarding S.C. Code Ann. § 33-44-801(4)(e).

II. THE CIRCUIT COURT'S DECISION THAT KRITI'S CONDUCT DOES NOT MERIT JUDICIAL DISSOLUTION IS NOT SUPPORTED BY THE EVIDENCE AND SHOULD BE REVERSED BY THIS COURT OR, IN THE ALTERNATIVE, REMANDED.

As mentioned above, an action for the dissolution of an LLC sounds in equity, *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). As such, this Court has the 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).

Unfortunately, the factual record on appeal is somewhat lacking. At trial, the court refused to allow the introduction of the vast majority of Emerald's pre-marked exhibits to substantiate Kriti's oppressive conduct against Emerald. (*See*, *e.g.*, R. p. 0123, lines 10-23) The court's rationale was that the 2010 Award resolved all issues regarding judicial dissolution so as to be essentially dispositive. (R. p. 0011) In an effort to avoid re-litigating the arbitration, the court actually prevented Emerald from pursuing its judicial dissolution action, which was never before the arbitrators and specifically stayed by the Consent Order. This, for the above-mentioned reasons, was error.

As discussed above, the dissociation and dissolution standards in the Operating Agreement do not mirror S.C. Code Ann. § 33-44-801(4)(e) of the LLC Act. Although the 2010 Award was binding on the lower court per the Consent Order and the policy favoring arbitration, the 2010 Award did not address and could not have addressed the latter type of conduct because it was outside the scope of the Operating Agreement. As such, the lower court should have considered additional evidence on the issue of Kriti's oppressive conduct towards Emerald, specifically in light of S.C. Code Ann. § 33-44-801(4)(e). It was improper to infer in conclusory fashion that the Operating Agreement mirrors the LLC Act.

Additional analysis should have been performed by the Court – not to revisit what was decided in the 2010 Award – but to complete the analysis called for in a judicial dissolution action per the LLC Act. Once more, the arbitration dealt only with allegations of Kriti misconduct against ARP-II, that is, dispute arising under the Operating Agreement. It did not deal with Kriti's oppressive conduct against Emerald above and beyond that involving the company's affairs themselves, which stands as the

hallmark of S.C. Code Ann. § 33-44-801(4)(e). As such, the 2010 Award's findings, although binding, are not on-point regarding S.C. Code Ann. § 33-44-801(4)(e). To be sure, many of the "episodes" of oppressive conduct as it relates to Emerald are the same as those presented at arbitration – but these were specifically presented therein in the context of wrongful conduct against ARP-II not Emerald. This distinction is significant because even if Kriti's conduct was not wrongful as to ARP-II, this does not logically mean it was not wrongful towards Emerald. Therein lies the fundamental flaw in the court's rationale that the 2010 Award wholly resolved all factual issues as to judicial dissolution. As such, the lower court should have taken additional evidence and testimony specifically on the issue of Kriti oppression towards Emerald. This it did not do, and this was error.

In any event, however, the factual record before this Court does contain evidence of wrongful conduct by Kriti against Emerald. For example, the arbitrators found that the capital call issued by Kriti was "defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interests." (R. p. 0332) Failure to meet the capital call was grounds for Kriti's claim that was rejected at arbitration that Emerald did not own 70% of the company. At trial, Emerald attempted to introduce additional evidence providing background into the driving forces behind this capital call, but was not allowed to do so. This materially prejudiced Emerald.

Moreover, the arbitrators "observe[d] that Kriti and Emerald cannot work together in any constructive manner." (R. p. 0334) Even the lower court itself found that "it is clear that these parties have a heightened degree of acrimony toward one another and a lack of trust." These findings are in the record despite only scratching the surface of

Kriti's wrongful conduct towards Emerald, but it is nonetheless sufficient to demonstrate the equity favors dissolution.

Moreover, specific other examples of oppressive conduct by Kriti towards Emerald and its Longman over the years were never presented at arbitration, yet the lower court would not allow them to proceed at trial. These include, for example, (A) Kriti and ARP-II's obtaining a purported assignment of Lunar Systems, Ltd.'s claim against ARP-II as leverage against Ashley River Properties I, LLC (an entity wholly owned by Longman, Emerald's principal) in *Lunar Systems, Ltd. v. Ashley River Properties One, LLC, et al.* (C/A NO.: 2005-CP-10-2434), (B) misconduct and underhanded dealings in obtaining a default judgment against ARP-I in said action, and (C) Kriti and ARP-II's coordinated refusal to release the Amended Lis Pendens on ARP-I's property for years in said action. Each of these claims were presented to the court. (R. p. 0604) However, none of these matters were presented at the arbitration as they are not reflected in the 2010 Award. Nevertheless, they are all relevant as to Kriti's conduct towards its partner Emerald for the purposes of judicial dissolution. In any event, the Order incorrectly found that all misconduct proffered by Emerald at the trial was proffered at Arbitration. (R. p. 0009). Counsel for Emerald made repeated attempts to argue these points, however, the court incorrectly found them to be covered by the 2010 Award.

Finally, Kriti's post-arbitration conduct continues its decade's long tradition of oppressive and prejudicial conduct towards Emerald and Longman. For example, Kriti has continuously failed to provide necessary and important financial information to Emerald. (R. p. 0166, lines 12-17; p. 0173, line 16-p.0174, line 11) On this point, the

circuit court erroneously found that Emerald's lack of voting rights meant Kriti did not have to provide it any of this information. (R. p. 0167, line 2-p.0170, line 18) Also, Kriti concealed for years ARP-II's efforts and ultimate success in obtaining environmental permits that would triple the capacity of the ARP-II marina and substantially increase its valuation. (R. p. 0186, lines 3-6; p. 0187, lines 5-15; p. 0233, line 21-p.0234, line 7) This materially prejudiced Emerald because for years it caused him to substantially undervalue ARP-II, of which he owned 70%, and allowed Kriti to take the false position at various points that the property was underwater (financially speaking). Finally, Kriti concealed the most recent appraisals on the ARP-II property, Emerald having to subpoena these materials essentially on the eve of trial. (R. p. 0181, lines 5-15) Perhaps it makes sense that these appraisals were concealed by Kriti because not surprisingly they showed that the ARP-II property value increased as a result of the marina expansion permits. (R. pp. 0473, 0495)

Given the foregoing, Emerald contends that a remand is necessary so that additional facts can be developed and applied to S.C. Code Ann. § 33-44-801(4)(e). This is necessary because having failed to gather the relevant facts, the Court's denial of Emerald's judicial dissolution claim is not supportable by the facts as a matter of law.

III. THE CIRCUIT COURT INCORRECTLY OBSERVED THAT A SALE OF THE ARP-II PROPERTY WAS THE ONLY REMEDY AVAILABLE SHOULD JUDICIAL DISSOLUTION HAVE BEEN AWARDED, AND THIS COURT HAS THE FLEXIBILITY TO FASHION A FLEXIBLE, EQUITABLE RESOLUTION OR REMAND THE CASE FOR SUCH AN ANALYSIS.

The Order observed that "in light of the decline in real estate values and depressed real estate market the Court cannot justify arbitrarily forcing the parties to place this valuable real estate on the market at what would most certainly result in a substantial loss

to the parties." (R. p. 0012) The court appears to have taken an unduly restrictive position in regards to its powers in shaping a judicial dissolution remedy based on the unique factors at issue in this case.

An action for the dissolution of an LLC sounds in equity. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). The operating agreement plays a significant role in structuring a resolution in dissolution cases. *See Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). However, since the LLC "grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009), a court need not look *exclusively* to the operating agreement. Rather, "in fashioning its solution to a complex problem," a court may "consider[] all circumstances" affecting the LLC, especially one "whose sole asset suffered from a depressed value due to a poor economy." *Park Regency, LLC v. R&D Development of the Carolinas, LLC*, Op. No. 5056, *9-10 (Ct. App. Filed November 28, 2012). In its appellate capacity, this Court has the authority to fashion a remedy favorable to both parties in light of the record.

As the above case law indicates, the court had wide discretion in fashioning a dissolution remedy. For example, the court could have ordered Kriti to buyout Emerald's membership interest in ARP-II in a manner fair to Kriti and ARP-II. Or, should a cash buyout not have been deemed appropriate by the court, it could have fashioned a remedy whereby Emerald's membership interest could be cashed out for a certain amount of dockominiums available as part of the planned and permitted expansion of the ARP-II marina property.

Contrary to the lower court's apparent assumption, the evidence in the record, particularly the 2012 appraisals, reveals substantial value in the ARP-II marina and upland property. The parties stipulated to the authenticity of these appraisals. (R. p. 0181, lines 9-21) The "as-is" value of the marina as of July 2012 was determined to be $7,205,000.00 and the value of the upland property as of July 2012 was determined to be $7,100,000.00. (R. pp. 0392, 0461) Moreover, on March 30, 2012, ARP-II received permit approval from the Army Corp of Engineers for a permit to expand the marina by adding an additional 11,510 linear feet of floating dock structure to accommodate 186 pleasure crafts for recreational boating in the Charleston Harbor area. (R, p. 0473) The value of a linear foot of dock structure in the Charleston market as of July 2012 was appraised at approximately $3,000.00. (R. p. 0495) Therefore, just the dock expansion itself represents value to the tune of $34,530,000.00.

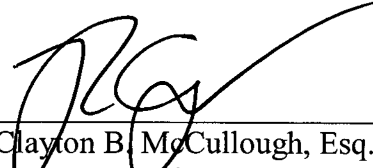
In any event, the court took too restrictive of a view of its authority in fashioning an equitable remedy, and this was error. Of course, the value of real property, by its very nature, carries with it some degree of uncertainty. However, based on the record there is no question that the ARP-II property has substantial value, which can be utilized in a variety of ways in shaping a remedy to sever Emerald and Kriti's business relationship once and for all.

CONCLUSION

Given the foregoing, Emerald respectfully requests that this Court reverse the circuit court's denial of Emerald's judicial dissolution claim and order this cause of action remanded for a new trial consistent with this Court's guidance on the applicable law.

May _____, 2014

Respectfully submitted,



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In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC..Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.........................Respondents

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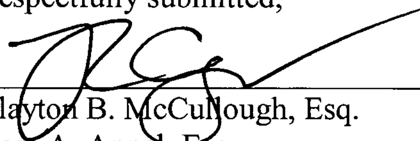
CERTIFICATE OF COUNSEL

Appellant hereby certifies that this Final Brief complies with Rule 211(b), SCAR, and the August 13, 2007 Order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Date Identifiers and Other Sensitive Information in Appellate Court Filings."

May _____, 2014

Respectfully submitted,



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PROOF OF SERVICE

I, the undersigned Paralegal of the law firm of McCullough Khan, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the **Final Brief of Appellant** by mailing a copy of same by United States Mail, postage prepaid, to the following addresses:

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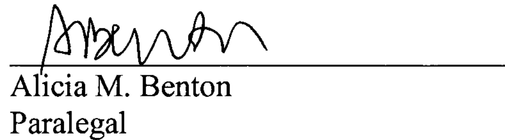

Alicia M. Benton
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May 8, 2014

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