ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W Miller, Circuit Court Judge

Case No 2008-CP-23-05739

Andrew P (Andy) Ballard, Respondent,

v

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc Appellants

FINAL REPLY BRIEF OF APPELLANTS

Joshua L Howard, S C Bar # 70260
HAYNSWORTH SINKLER BOYD, P A
75 Beattie Place
Two Liberty Square, Eleventh Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

Attorneys for Appellants

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This matter is before the Court on appeal from the Greenville County Court of Common Pleas Appellants filed their Initial Brief of Appellant on December 17, 2010 Respondent served its Initial Brief of Respondent on February 4, 2011 Appellants hereby submit the following Reply in support of their appeal

A The totality of circumstances cannot and do not support a finding of minority shareholder oppression

Respondent correctly provides in his response that in determining whether or not a finding of shareholder oppression is warranted, the court must view the facts in light of the totality of the circumstances While the trial court was certainly in a position to view the presentation of the evidence, a review of the briefs of the Appellants and the Respondent reveals that while there is disagreement as to some of the facts and as to the perception of the facts, there is general agreement with most of the facts The conflict rests on whether the set of factors recited by the trial court in its order evidence a general disagreement as to management and strategy among shareholders in a small company or, even assuming the accuracy of the matters set forth in the trial court's order, do the facts legally amount to minority shareholder oppression

It is not sufficient that the trial court, Respondent and Respondent's counsel are of the opinion that Respondent and the Appellants do not need to remain as "partners" in Warpath Development, Inc ("Warpath") The court should not and cannot legally or equitably interfere in the private business dealings of the shareholders of Warpath without sufficient justification In business, as in life, there are offenses that we must all endure that may anger or embarrass us, but do not amount to legally or equitably actionable grievances Oppression is a severe and limited remedy for a severe grievance See Kiriakides v Atlas Food Systems & Services, Inc , 343 S C 587, 603, 541 S E 2d 257, 266 (2001) To hold otherwise would be to permit an

invested shareholder with "cold feet" to petition the court in equity to "cash in" his shares and liquidate at the expense of his partners and the corporation In effect, the remaining partners would be ordered by the court to invest more in the corporation than was initially bargained for To allow this result under any circumstance but the most severe circumstance far exceeds the boundaries dictated by law and proper judicial restraint

As set forth in Appellant's Initial Brief, even assuming the truth of the factors set forth in the trial court's opinion, without revisiting the analysis, there is no correlation between the factors set out by the trial court in this matter with the factors giving rise to the findings of oppression in the Kiriakides matter The Supreme Court of South Carolina was quite clear that Kiriakides established the "classic" case of minority shareholder oppression The factors improperly used to justify a finding of oppression in this matter are nothing more than legitimate disagreements, non-events, and speculation

B In the alternative, if the Court is unable to agree that the facts and factors of the trial court's May 2, 2010 order, even assumed accurate, do not give rise to a claim of minority shareholder oppression, the trial court's decision is not built upon a sound set of factors supporting a finding of oppression

As set forth in Appellant's Initial Brief, taking each factor separately, the trial court's order drafted and now defended by the Respondent is overreaching and contains inaccuracies and overstatements Appellants brought these concerns to the attention of the trial court both before the order was final and upon subsequent Motion for Reconsideration (R pp 465-67) Respondent describes this effort by the Appellants as "second guessing" That assertion is without merit This appeal requires an examination with fresh eyes In reaching the conclusions, the Respondent's draft order adopted by the trial court chose to ignore and/or overstate evidence

and testimony It is for this court to decide independently what amount of weight to accord to the evidence and the individual factors

Examining numbers 1-10 of Respondent's brief under the heading "Oppression of the Minority Shareholder", Appellants reply as follows

1 Appellants' desire for Respondent to no longer remain a shareholder is not evidence of oppression

As set forth in Appellants' Initial Brief, it is undisputed that in an email dated October 28, 2007, there was a question raised by Rick Thoennes, III ("Thoennes, III") as to whether he, Tim Roberson ("Roberson") and Rick Thoennes, Sr ("Thoennes") wished to continue the development of Warpath Marina with Respondent as a partner in the development The evidence further shows that this evidence was never acted upon and there was never any agreement among themselves that they did not want to continue with Respondent as a partner In deposition and/or trial testimony, they each expressed that there was a time that they each desired not to remain in business with Respondent The evidence is clear that they were angry and upset at Respondent at that time [1] Certainly there is not a business partner in this world who has not at one time or another felt that he could get along better without one or more of his partners Disagreements, hurt feelings, and embarrassment in business are inevitable However, it was testified that this anger and initial reaction were fleeting and, as set forth in Appellants' Initial Brief, Respondent

[1] Since the dismissal of the counterclaims Respondent has taken the position that Appellants are estopped from expressing their beliefs that Respondent misled them simply because they chose not to pursue counterclaims This is faulty Just because a choice was made not to pursue a legal remedy does not mean that the fact or expression of a fact or belief cannot be stated The question is relevance In this case this objection was made and Judge Miller elected to allow the testimony of Rick Thoennes III and Rick Thoennes Sr after the dismissal Respondent has not cross appealed that decision Further Respondent introduced the testimony cited herein and in Appellant s Initial Brief in his case in chief Respondent cannot now object to testimony obtained in a deposition that he introduced in his case Ultimately a litigant or potential litigant always has a choice to pursue or not pursue a legal remedy The choice not to pursue a legal remedy does not mean that the facts or beliefs giving rise to the claim are non existent

admitted that no actions were taken to oust him from Warpath The internal anger and desires of these Appellants does not give rise to a claim for oppression

2 Authorization and issuance of additional stock of Warpath is not evidence of oppression

In Respondent's Brief, Respondent seeks to demonize the fact that shareholders in a company may want to increase their return on investment ("ROI") The point made in Appellants' Initial Brief is that there has been no proof that there was any nefarious motivation in trying to increase the number of authorized shares of Warpath Besides, an increase in the ROI is a benefit to all shareholders including Respondent Respondent has continually desired to single himself out from the group There is no testimony or any evidence that any action taken or contemplated by the shareholders or board of directors of Warpath would affect him disproportionately Respondent shared an equal ownership position to both Thoennes III and Thoennes All three shared an individual ownership position that was less than Roberson This is commonplace If new shares were issued, then their ownership positions would decrease proportionately If as a result the ROI increased, they would share proportionately in the increase of the ROI That would have been a positive The desire to provide the corporation flexibility to trade in stock as well as cash is no evidence of oppression

3 Respondent not being re-elected to the Warpath Development, Inc 's board of directors is not evidence of oppression

There is no dispute that Respondent was not re-elected a director at the first shareholder's meeting in May 2008 There is a dispute as to why he was not re-elected However, regardless of why, this factor in and of itself does not amount to a claim for oppression Respondent did not express any concern with his failure to be re-elected until his amended complaint (R pp 55-70)

and has, otherwise, not suffered in any way from the fact that he was not re-elected a director Moreover, a board meeting was noticed in the fall of 2009 and he was re-elected a director a little over a year later However, Respondent, wanting to see impropriety in every action of the Appellants, regardless of how it may benefit him, asserts this is also evidence of oppression

4 Roberson affirmed in testimony his obligation to provide long-term capital

Appellants refer to the Initial Brief and the Record for the evidence supporting the business justification for authorizing additional shares Respondent has not proffered and Court has not cited any evidence of impropriety in the decision to increase the number of authorized shares of Warpath In support of the trial court's order, Respondent's Initial Brief asserts that "the individual appellants sought to get around Roberson's clear contractual obligation to provide the necessary capital " (Respondent's Initial Brief at 18) However, as detailed on pages 11 and 12 of Appellants' Initial Brief, Roberson affirmed at trial that he had the contractual obligation to provide the necessary capital to obtain long term financing Apparently, Respondent disagrees with Roberson Respondent cannot ignore testimony in order to create issues to support the trial court's order There is no evidence to suggest that the decision to increase the number of authorized share, which is a legal action undertaken by the shareholders, was in any way unjustified As such, this is not evidence of oppression

5 If the number of issued shares of Warpath was increased from 100,000 to 1 million, then each shareholder's percentage holding would decrease proportionately This proportionate decrease is not evidence of oppression

Once again, Respondent wants to single himself out from the group of which he holds an equal ownership percentage with 3 out of the 4 total shareholders If his percentage of share ownership drops to 2% then so does the percentage of Thoennes and Thoennes III In addition, Roberson's would drop to 4% Once again, there is no evidence of disparate treatment on the part of the Appellants Respondent tries to again state that increasing the number of authorized shares was an attempt to "end around" Roberson's contractual obligation to provide more capital However, as set forth in item 4 above and in Appellants' Initial Brief, Roberson affirmed his obligation to contribute additional capital at trial Appellants fail to grasp how Respondent has been harmed or mistreated This is not evidence of oppression

6 Respondent closed himself off from free flowing information when he filed his lawsuit

Clearly recognizing the fallacy in the trial court's order, Respondent has shifted his assertion from the fact that he did not receive a free flow of information as a result of communications having to be directed through counsel due to his lawsuit, to now asserting that even if the lawsuit was not filed, the Appellants would have nevertheless excluded him This is pure, unsubstantiated speculation Respondent was entitled to any information that could be legally conveyed provided that he worked through counsel to obtain it Having to work through counsel to get information is not evidence of oppression

7 Respondent's re-election to the Board of Directors of Warpath was a benefit to Respondent and not evidence of oppression

As stated above, apparently seeing the impropriety in every action, Respondent is willing to try to twist the extension of an "olive branch" and a benefit to him to evidence his claim of oppression This, if nothing else, illustrates that Respondent has never wanted to be involved in Warpath long-term and has simply wanted to "flip" the project and "cash out" as quickly as possible, which has been his motivation from the moment he realized that Roberson had no plans to simply "flip" the development This is not evidence of oppression

8 The Warpath Marina only exists in concept, therefore it is "gross speculation" to suggest that Roberson intended on hiring family members in order to harm the interests of Respondent

Respondent clearly will take any opportunity to twist language to his benefit Appellants have never denied that Roberson considered hiring family members to help him run the operations of the development Frankly, Appellants fail to grasp how hiring family members would in any way be improper Small businesses often thrive on the commitment and support of family members However, as stated in Appellants' Initial Brief, it is "gross speculation" on the part of Respondent and the trial court to "imagine[] a future where Roberson's family profits richly off of Warpath, while he gets nothing "

Additionally, Roberson does not own a controlling interest in Warpath Respondent's speculation also fails to take into account that Thoennes and Thoennes III also have a say in the future of Warpath They are likewise motivated by future returns and it is inconceivable that they would stand for Roberson favoring family members to their financial detriment The consideration of hiring family members is not evidence of oppression

9 The failure to presently amend the articles of incorporation is not evidence of oppression

Respondent fails to grasp the legal distinction between authorizing the number of outstanding shares and issuing authorized shares Warpath's shareholders agreed to increase the number of authorized shares from 100,000 to 1 million However, the mechanical act of amending the articles of incorporation never occurred In order to issue more shares, the articles of incorporation must be amended However, no shares have been issued, therefore the lack of an amendment is inconsequential The fact that the amendment to the articles has not yet occurred does not prevent its future occurrence This is not evidence of oppression

10 Appellants acting on advice of counsel to dismiss their counterclaims at trial is no evidence of oppression

Once again, in an effort to hold together his claim of oppression in order to force his buy out, Respondent will take any opportunity, no matter how preposterous, to bolster his claim of oppression Appellants will not restate their entire argument from their Initial Brief However, Appellants will reiterate that there was evidence supporting and a good faith belief that Respondent misled them as to some aspects of the development While Appellants, in addition to negligent misrepresentation, plead fraud in their counterclaims, at trial, by choice, Appellants at no point presented any evidence to support fraud or made any allegation in open court that Respondent misled them intentionally [2] At the prompting of Respondent's counsel, 1 of the 3 Appellants decided that he would not speculate as to whether Respondent did or did not mislead them purposefully Ultimately, since the Appellants had agreed to pursue their defense as a

[2] On page 27 of Respondent s Initial Brief Respondent appears to suggest that Appellants assertion that fraud was not pursued is inaccurate In actuality, a review of the citations to the transcript support Appellants assertion The phrases cited by the Respondent could equally support negligent misrepresentation which was pursued Fraud was only mentioned by the Respondent

group and were not unanimous in their opinions as to Respondent's conduct, upon the advice of counsel, a decision was made to dismiss the counterclaims with prejudice and defend Respondent's equitable claims

As set forth in Appellants' Initial Brief, there was evidence presented at trial that suggested that Respondent had pertinent information that was not conveyed and, before entering into the Stock Purchase Agreement (R pp 915-17), he was aware of misapprehensions by the Appellants that were not corrected There was a legitimate disagreement that was actually put to the test by the Respondent's on summary judgment (Pl's Motion for Summary Judgment, R pp 109-12), Pl's Memo in Support of Summary Judgment (R pp 113-284), Def's Memo in Opposition to Pl's Motion for Summary Judgment (R pp 285-449)] This motion was ultimately denied by the trial court finding that questions of fact as to whether the allegations against the Respondent existed (December 10, 2009 Order denying Motions for Summary Judgment, R p 18) This finding, in and of itself should be conclusive Respondent has simply looked for every opportunity, no matter how preposterous, to support his claim This is merely another example This is no evidence of oppression

For all of these reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order should be reversed

C Trial court's order requiring the escrow of 60,000 shares is unsupported in the law and should be reversed

Respondent makes clear that its premise in opposition to Appellant's Initial Brief is that the law requires the escrow of shares that are issued in exchange for a contract for future services However, Respondent's contention is not at issue When the Respondent received $1

million in exchange for 80,000 shares, a present value for the shares was conveyed Therefore, even assuming Respondent's contention to be correct, there is no requirement to escrow shares

Despite Respondent's assertion to the contrary, the trial court's finding is erroneous for all of the reasons set forth in Appellants' Initial Brief In summary, the clear evidence is that Respondent received $1 million in exchange for 80,000 shares Roberson paid the $1 million for all of the 80,000 shares Once paid for, within legal bounds, Roberson could do anything he wanted with them Per their agreement, Roberson chose to presently convey 40,000 shares to Thoennes and Thoennes III who would then earn their 40,000 from Roberson by doing development work Respondent seeks to cast doubt on the evidence and arrangement by calling Appellants' assertion confusing Respondent's assertion evidences that he fails to understand a classic business arrangement

Respondent seeks to refer to the Agreement (R pp 915-17) to support his assertion However, the Agreement is unsupportive The Agreement merely states that Respondent will receive $1 million and he will give up 20,000 of his own personal shares and the corporation will issue the remaining 60 000 shares (R p 915) The Agreement also states, which as cited in Appellants' Initial Brief and confirmed by Respondent in testimony, that the agreement between the parties was that Appellants were to presently receive 80% of Warpath (R p 915)

In this case, the actions speak louder than words As set forth in Appellant's Initial Brief, Respondent was represented by counsel throughout the process Respondent was the only member of the Board of Directors until the annual meeting was held in May 2008 If Respondent did not believe that he received $1 million for 80,000 shares then he should have escrowed 60,000 shares This did not happen It was not until trial that Respondent invented an *ad hoc* explanation for his inactions Ultimately, his explanation is not supported by the

Agreement, is against common sense, and is unsupported by his testimony and actions For these reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order to escrow the 60,000 shares is erroneous and should be reversed

Conclusion

For these reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order should be reversed and the matter should be remanded for entry of judgment in favor of the Appellants

Respectfully submitted,

Joshua L Howard, S C Bar # 70260
HAYNSWORTH SINKLER BOYD, P A
75 Beattie Place
Two Liberty Square, Eleventh Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

ATTORNEYS FOR APPELLANT

April 20, 2011

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR

HAYNSWORTH SINKLER BOYD, P A

Joshua L Howard by CMS with permission

Joshua L Howard, S C Bar # 70260
HAYNSWORTH SINKLER BOYD, P A
75 Beattie Place
Two Liberty Square, Eleventh Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

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PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the FINAL REPLY BRIEF OF APPELLANTS was served upon all counsel of record on this the 20th day of April, 2011, by hand-delivering a copy of the same to the following

Frank S Holleman III
Hannah Rogers Metcalf
WYCHE BURGESS FREEMAN & PARHAM
44 East Camperdown Way
Greenville, South Carolina 29601

Joshua L Howard by ems with permission

Joshua L Howard, SC Bar #70260
Haynsworth Sinkler Boyd, P A
75 Beattie Place, Eleventh Floor (29601)
P O Box 2048
Greenville, SC 29602
Phone (864) 240-3223/Fax (864) 240-3300