THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2013-002790

Andrew P. (Andy) Ballard, ...Respondent,

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Does law of the case preclude appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, because of appellants' failure to raise this issue in their previous appeal from the Circuit Court's 2010 Order and the Supreme Court's affirmance of this remedy in the previous appeal?

2. Does S.C. Code section 33-14-310 allow individual liability of majority shareholders for the buyout of a minority shareholder by explicitly giving the trial court the discretion to require the purchase of an oppressed minority shareholder's stock "by other shareholders"?

3. Did Judge Miller abuse his discretion in refusing to order dissolution and liquidation of the company in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits, which are the company's only significant assets?

4. Did Judge Miller abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and protracted the proceedings on remand by representing that they had the financial means to carry out the buyout?

5. Is Judge Miller's valuation of the company at $7.2 million supported by the evidence, which included appraisals ranging from $4.4 million to $20 million as well as representations by appellants to third parties that the company was worth from $6 million to $37 million?

6. Did Judge Miller err as a matter of law by refusing to give value to shares of stock issued to appellants by the company for which appellants have never paid?

STATEMENT OF THE CASE

This suit was filed in 2008 by a minority shareholder against the majority shareholders and the corporation. It has been pending for over six years and has already been through one appeal to the South Carolina Supreme Court from an interlocutory, though appealable, order. It is now on appeal from the Circuit Court's final judgment.

Through this action, the respondent has sought relief for oppression by the appellants and to require the escrow of shares issued by the company to the appellants for future services to the company that the appellants never provided. The present appeal challenges the valuation of the company and of respondent's ownership interest by the Circuit Court for purposes of a judicially ordered buyout of the respondent's shares by the appellants, a remedy that was decided upon in 2010 by the Circuit Court and affirmed in the 2012 decision of the Supreme Court.

The respondent, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc. ("Warpath"), and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through years of work by Mr. Ballard the company obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina. (R. p. 389, ¶ 1) Warpath obtained all necessary permits to construct and develop the marina and related properties by the summer of 2010. (R. p. 188, lines 1-10)

Under a Stock Purchase Agreement dated May 29, 2007 (the "Agreement"), appellant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard

for $1,000,000, and he and the other two individual appellants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. (R. pp. 369-70) Mr. Ballard retained ownership of 20,000 shares.

Over the course of the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, merely five months after signing the Agreement with Mr. Ballard, the appellants began discussions among themselves of how to force Ballard out of the company, and then proceeded to try to do so.[1]

Ballard filed suit on July 30, 2008. Following two years of discovery, Circuit Court Judge Edward Miller tried the case nonjury, and on May 4, 2010, entered an Order finding that the appellants had acted in a manner that was illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2)(ii). (R. pp. 1-14) Judge Miller ordered the appellants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d)(4) and set up a procedure for determining the value at a subsequent hearing. The 2010 Order specifically provides that the appellants' liability for buying out Mr. Ballard's shares is "joint and several" and states that "[t]his remedy is the appropriate one given the conduct of the defendants as found above." (R. p. 13, ¶ 15) Judge Miller also found that appellants had not provided the agreed upon consideration to pay for the 60,000 shares issued to them by the company, and ordered under S.C. Code § 33-6-210 that those shares be held in escrow. (R. pp. 8-9, ¶¶ 3-7)

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[1] *See, e.g.*, R. pp. 541-42. This fact was the subject of extensive evidence in the 2010 trial, the record of which was incorporated by reference into the record of the valuation proceedings. Judge Miller's findings to this effect in his 2010 Order were affirmed by the Supreme Court in its 2012 decision. *Ballard v. Roberson*, 399 S.C. 588, 595-97, 733 S.E.2d 107, 110-12 (2012).

Before the valuation hearing could be held, the appellants took an immediate appeal of the 2010 Order. In the appeal, the appellants contested the finding of oppression and the escrow of shares, but they did not assert any error in the buyout remedy, did not take issue with Judge Miller's requirement that they be jointly and severally liable for the buyout, and did not contend that Judge Miller should have ordered dissolution of the company in lieu of the buyout. (*See* R. pp. 599-600) In August of 2012, the South Carolina Supreme Court affirmed the 2010 Order. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The Supreme Court specifically affirmed the Circuit Court's remedy that <u>all of the appellants</u>, not just the company, be required to purchase Ballard's stock at fair value, and that appellants' 60,000 shares of Warpath stock be held in escrow. *Id.* at 598-99, 733 S.E.2d at 112-13.

Nearly a year later, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. Mr. Ballard testified that in his opinion the company was worth approximately $20 million. (R. p. 193, lines 2-8) Respondent's appraisal expert, Furman University economist Dr. Charles Alford, appraised the total company value between $9.3 million and $12 million. (R. p. 293, line 20, to p. 294, line 15;[2] R. pp. 586-87 ("Indicated value of equity $9,268,126 [discounted 8 years, or] $12,034,969 [discounted 6 years]")) The court-appointed appraiser, Dr. Perry Woodside, set the value at either $4.4 million or $7.2 million depending on the time period over which the present value was calculated. (R. p. 242, line 13; R. p. 243, lines 10-21; *see also* R. pp. 723-24)

[2] Page 125 of the hearing transcript (R. p. 294) has the wrong numbers for the higher valuation calculated by Dr. Alford. As his written report shows, the higher valuation he determined was slightly over $12 million. (*See* R. p. 587 ("Indicated value of equity $12,034,969"))

Notably, one of the individual appellants, Tim Roberson, testified that the $1,000,000 he paid for Ballard's 20,000 shares in 2007 was a fair value and that he accepted Dr. Woodside's appraisal. (R. p. 214, lines 14-19; R. p. 215, lines 2-4; R. p. 222, lines 10-11) Appellants' counsel also formally stipulated to Dr. Woodside's appraisal figures. (R. p. 156, lines 19-21; R. p. 157, lines 16-20; R. p. 163, lines 1-14) Another individual appellant who testified at the hearing, Rick Thoennes Sr., admitted that he had represented to one third party that Warpath was worth $6,000,000 "in its present condition" and that it had an appraised value of $36.7 million. (R. p. 233, lines 5-13, 23-25; *see also* R. pp. 476-77) Respondent also presented evidence that appellants had told other third parties that the company was worth $28 million to $36 million. (R. pp. 194-95, 462-502)

Finally, the appellants "threw themselves on the mercy of the court" and claimed that they were impoverished would be unable to pay <u>any amount</u> of money to Ballard, not even the $1,000,000 that appellant Roberson had testified was a fair price. (R. p. 176, lines 16-18) They asked Judge Miller to give them "several years" to buy out Mr. Ballard's interest. (R. p. 176, lines 19-21) This position was in direct contradiction of the position they had taken months earlier, while the parties were attempting to schedule the valuation hearing, when appellants' counsel represented to Judge Miller and to Ballard's counsel that the appellants had the financial means to go through with the buyout of Mr. Ballard's shares. (R. p. 177, lines 5-12; R. p. 309, lines 5-25)

On October 3, 2013, Judge Miller issued an Order finding that a fair value of the company was $7,178,594. This finding was not based on any particular testimony, methodology, or expert analysis, but instead was derived from weighing all of the

evidence and the parties' pre-hearing and post-hearing submissions. (R. p. 15) Judge Miller went on to hold that, because the appellants still had not provided the contractually agreed upon consideration for which they received the shares of stock held in escrow, those shares should not be counted in the valuation process. Not counting those shares, Ballard retained 20,000 of his original shares, and Roberson owned 20,000 purchased directly from Ballard in 2007. Accordingly, Judge Miller concluded that Ballard's ownership interest should be treated as 50% of the whole and ordered the appellants to purchase Ballard's shares at $3,589,297 (i.e., 50% of $7,178,594). He rejected appellants' request for a multi-year payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and the practical consideration that an extended period of structured payments would likely result in further litigation, and gave appellants 90 days to tender payment for Ballard's shares. (R. pp. 21-22)

Appellants moved for reconsideration. On November 8, 2013, the Circuit Court issued a Form 4 Order denying the motion for reconsideration. (R. p. 23) Appellants' Notice of Appeal was served on December 20. In January of 2014, after the 90 days for appellants to buy out Ballard's shares had passed with no attempt by appellants to satisfy the Order, respondent's counsel began efforts to execute on the judgment. Appellants moved for a stay of execution without bond, which Judge Miller denied on March 27, 2014. (R. pp. 25-28) On April 23, 2014, after hearing evidence suggesting that appellants were transferring large amounts of money and other assets in defraud of creditors, Judge Miller appointed a receiver to ascertain and secure the appellants' assets pending the appeal. (R. pp. 29-39, 298-364) In this Order and another entered the same day, Judge Miller specifically found that the appellants owned or controlled assets "at

risk of being wasted, secreted, or diverted while the defendants' appeal is pending." (R. p. 31, ¶ 9; *accord* R. p. 42) Appellants did not appeal those orders or that finding, although the orders were immediately appealable. S.C. Code § 14-3-330(4).

STANDARD OF REVIEW

In an action in equity, the appellant has the "burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 388, 544 S.E.2d 620, 623 (2001); *accord Ballard, supra*, 399 S.C. at 593, 733 S.E.2d at 109. Further, the appellate court does not "disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." *Pinckney, supra*, 344 S.C. at 387, 544 S.E.2d at 623; *accord Ballard, supra*, 399 S.C. at 593, 733 S.E.2d at 109; *Brenco v. South Carolina Department of Transportation*, 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved." *Department of Social Services v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). Appellant's burden is particularly heavy here, because Judge Miller has special expertise in corporate matters like this case from serving as one of three Business Court Judges in South Carolina. *Ballard, supra*, 399 S.C. at 592 n.3, 733 S.E.2d at 109 n.3.

Further, while this Court may find facts in accordance with its own view of the evidence, the corporate dissolution statute that is the basis for the remedy ordered by the Circuit Court grants the trial judge broad discretion in fashioning equitable relief to fit the unique circumstances of the corporation and facts of the case. S.C. Code § 33-14-310(d); *see* 2 F. O'NEAL & R. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 7.20, at 7-132 & n.1 (rev. 2d ed. 2005)

(recognizing S.C. statute as one that gives extraordinary discretion to the trial judge in fashioning a remedy for oppression). Thus, the appellants have the burden of convincing this Court that Judge Miller – who observed all the witnesses and saw all the evidence firsthand – abused his discretion or committed error of law in his weighing of the evidence to determine the fair value of the company.

The percentage of the total company value to be allocated to Mr. Ballard's shares of stock under the facts of this case (i.e., whether 20% or 50%) is purely a legal issue and thus is open to this Court's *de novo* review.

ARGUMENT

I. The law of the case doctrine bars appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, as this issue was decided in the Circuit Court's 2010 Order; it was not raised by appellants in their previous appeal from that Order; and the remedy was affirmed by the Supreme Court in the previous appeal.

Appellants' primary argument is that Judge Miller erred in entering a "personal judgment" against them for the buyout of Mr. Ballard's shares, and that the Judge should have dissolved the company instead. Because appellants did not raise this issue in their appeal from the Circuit Court's 2010 Order, when they could have done so, and the buyout remedy was affirmed by the Supreme Court in its 2012 decision, appellants are precluded from raising the issue now.

In his 2010 Order, Judge Miller expressly held that "the proper equitable remedy is to provide for the purchase of Ballard's shares at their fair value by the defendants, jointly and severally …." (R. p. 13, ¶ 15 (emphasis added)) Joint and several liability, of course, means that each party is personally responsible for payment of the total amount

due. "Thus, each liable party is individually responsible for the entire obligation." BLACK'S LAW DICTIONARY, *joint and several liability*, at 997 (9th ed. 2009).

Appellants took an immediate appeal from the 2010 Order, but at no time in that appeal did they raise any issue concerning the buyout remedy, Judge Miller's direction of appellants' joint and several liability for the buyout, or the decision to require a buyout of Ballard's shares in lieu of dissolution of the company. (*See* R. pp. 599-600) Consequently, the Supreme Court did not address those matters as contested issues in its 2012 opinion, and upon concluding that the evidence supported the Circuit Court's finding of oppression, the Supreme Court stated: "Based on the foregoing, we affirm the circuit court's order directing Appellants to purchase Ballard's stock for fair market value ...." *Ballard, supra,* 399 S.C. at 599, 733 S.E.2d at 112. The only issue left for remand was the determination of the amount constituting fair value.

Having failed to appeal the Circuit Court's buyout remedy in their previous appeal, appellants may not do so now. As the Supreme Court recently explained:

> "Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order. [A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal."

Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 119-20, 754 S.E.2d 486, 490 (2014) (emphasis added; citations omitted) (summarizing *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). This rule applies in the specific procedural context presented here, where one party failed to raise an issue decided by the lower court in a previous appeal but then attempts to raise the issue in a second appeal from a later order of the lower court.

> "[T]he law-of-the-case doctrine encompasses not only those issues decided on the first appeal, but also those issues decided by the trial court

> prior to the first appeal which were not presented for review at the first appeal. Thus, whether the prior appeal was decided correctly or not, under the law-of-the-case doctrine, the questions that were raised or could have been raised in that case ordinarily will not be reexamined on a subsequent appeal."

5 C.J.S. *Appeal and Error* § 991 (footnotes omitted); *see also Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."); *Worth v. Norton*, 56 S.C. 479, 35 S.E. 135 (1900) (question that could have been raised on a first appeal to the Supreme Court could not be raised on a second); *Ellis v. Sanders*, 34 S.C. 236, 13 S.E. 417 (1891) (exception to report of referee on a foreclosure of a mortgage that was not raised on the first appeal could not be raised on the second appeal); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 319-20, 594 S.E.2d 867, 878 (Ct. App. 2004) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.") (citing *Greenville Cty. v. Kenwood Enters., Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003)).

Because the buyout remedy and appellants' joint and several liability for it are law of the case, appellants cannot challenge this aspect of the 2013 Order in the present appeal.

II. Appellants' individual liability for the buyout is clearly authorized by S.C. Code section 33-14-310, which expressly allows the court "in its discretion" to grant relief, "including, without limitation," the purchase of an oppressed minority shareholder's stock "by other shareholders."

In addition to being precluded by law of the case, appellants' contention that individual liability for the buyout of Mr. Ballard's shares is not authorized by the

corporate dissolution statute, S.C. Code § 33-14-310, is flatly contradicted by the clear language and intent of the statute.

First, the statute gives the court broad discretion to "make such order or grant such relief, other than dissolution, as in its discretion, is appropriate, including, without limitation, an order [providing for certain types of relief set forth in the statute]." *Id.* § 33-14-310(d) (emphasis added). Thus, by its express terms, the statute's enumeration of certain potential forms of relief is "without limitation" to what the court may do in its discretion. In addition, the statute provides that a remedy for oppression may include "directing or prohibiting any act of the corporation or of shareholders." *Id.* § 33-14-310(d)(3) (emphasis added). The question, therefore, is not whether the statute specifically includes "entry of personal judgment" in its list of potential remedies, but whether it specifically precludes such a remedy. Because the statutory remedies include entry of an order "directing … any act … of shareholders," because the list is explicitly "without limitation," and because the statute does not prohibit entry of judgment for which a defendant shareholder is personally liable, it must be construed to authorize such relief as against other shareholders. *See also* F. O'NEAL & R. THOMPSON, *supra*, at 7-134 (courts have "inherent equity power [to] grant[] alternative remedies not mentioned in the [dissolution] statute").

Further, in its description of potential remedies, the statute specifically includes "providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders." *Id.* § 33-14-310(d)(4) (emphasis added). Appellants' argument that a buyout cannot be ordered or enforced against other shareholders personally, but only against the assets of the company, flies in the face of

this clear statutory language. If an order directing a buyout of a minority shareholder's stock by other shareholders could be satisfied only against the company or its assets, as appellants contend, then the statutory inclusion of the phrase "or by other shareholders" would be rendered meaningless. Under appellants' position, a court could order other shareholders to buy out a minority owner, but then the minority owner would be powerless to enforce it. The court itself, appellants contend, may only "provide" for a buyout against other shareholders but cannot make its remedy effective against them. To state the argument is to refute it. It makes no sense to think that the General Assembly would specifically set forth a remedy in the statute but not intend for the courts to be able to enforce it.

Finally, Judge Miller did not commit error by directing that the buyout remedy be entered as a judgment against the appellants. The Order clearly provides that Ballard must relinquish his shares of stock when he has received payment of the buyout price, and that this is part of the Court's judgment: "The Court orders defendants, jointly and severally, to pay plaintiff this amount [$3,589,297.00] within 90 days of the date on which this Order is entered, in exchange for which the plaintiff shall relinquish his shares of common stock of Warpath Development, Inc., <u>and hereby enters judgment to this effect</u>." (R. p. 15 (emphasis added)) In effect, therefore, the Order is the entry of an equitable decree requiring the appellants to pay a certain amount of money and requiring Ballard to give back his stock upon receipt of payment, similar to specific performance of a contract in which one party's contractual obligation is to make a payment. Judge Miller's use of the term "judgment" is perfectly correct, as this term merely signifies that an order finally determines the rights of a party, and the term specifically includes

equitable decrees. Rule 54(a), SCRCP; *see* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 2651, at 7-8 (1998) (discussing Rule 54(a), Fed. R. Civ. P.). Because the 2013 Order made such a final determination, it was appropriately characterized as an entry of judgment.

Labels aside, it is well established that an equitable decree requiring the payment of money may be enforced by execution, just like a money judgment for damages.

> "Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions."

S.C. Code § 15-39-30 (emphasis added). Similarly, judgment liens on real estate may be entered on the basis of "final judgments and decrees," *id.* § 15-35-810 (emphasis added), and the Uniform Enforcement of Foreign Judgments Act defines a "foreign judgment" for purposes of the act as "a judgment, decree or order of a court of the United States," *id.* § 15-35-910(1) (emphasis added). Likewise, the rate of interest that accumulates on both "money decrees" and judgments is set by statute. *Id.* § 34-31-20. In addition to this specific statutory authority, numerous cases from the South Carolina Supreme Court and Court of Appeals (and from other states) recognize the authority of the courts to enforce equitable decrees requiring the payment of money. *See, e.g., Finley v. Finley*, 299 S.C. 99, 100, 382 S.E.2d 890, 890 (1989); *Collins Music Co. v. IGT*, 365 S.C. 544, 550-51, 619 S.E.2d 1, 4 (Ct. App. 2005).

Whether the 2013 Order is called a "judgment" or something else, therefore, Code section 33-14-310 authorizes the courts to require other shareholders to buy out an oppressed minority shareholder, and under Code section 15-39-30, as well as the well

established statutory and case law discussed above, the remedy is enforceable by execution against their assets. There was no error in Judge Miller's entry of judgment.

III. Judge Miller did not abuse his discretion in refusing to order dissolution in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits (which are the only significant assets of the company), since dissolution without such agreement would wipe out the entire value of the company.

At the August 2013 valuation hearing, appellants asked the Court, for the first time, to dissolve Warpath and order a liquidation sale of its assets. Appellants now argue that dissolution would have been "less drastic" than the buyout remedy, and that Judge Miller committed reversible error by failing to order dissolution and liquidation.

As discussed above, this argument is barred by the law of the case and appellants' failure to challenge Judge Miller's decision to order a buyout in lieu of dissolution in their appeal from the 2010 Order. In addition, on the merits, their argument ignores the fact that dissolution would completely eviscerate the economic worth of the company's assets. Those assets consist entirely of the Duke Power lease and the Pickens County permits to construct the project. These assets cannot be auctioned off to the highest bidder in a liquidation sale; they are not freely assignable. Indeed, a dissolution sale without Duke Power's consent would cause the company to default under its lease (*see* (R. pp. 395-96, sec. 29), and as a result the company's assets would become worthless. This is not equity that appellants seek, but mutual self-destruction.

Clearly, it was well within Judge Miller's discretion not to enter an order that would have wiped out the entire value of Warpath's assets. At the very least, it was incumbent on appellants to present evidence that Duke Power and Pickens County would have consented to the assignment of the lease and permits pursuant to a liquidation sale

and judicial auction. Having failed to present a shred of evidence to this effect, appellants cannot now maintain that Judge Miller erred by not choosing this remedy.

Moreover, appellants' argument that dissolution would have been "less drastic" than the buyout is predicated upon fallacious logic, for it completely ignores the value of the company. If this Court upholds Judge Miller's determination of fair value, then the buyout affords appellants the opportunity to acquire 100% ownership of a business worth $7.2 million in exchange for payment to Ballard of $4.6 million (the initial $1 million paid in 2007 plus $3.6 million under the Circuit Court's Order) – a gain of $2.6 million. Even under the lowest valuation of the company – Dr. Woodside's $4.4 million figure, a number that appellants stipulated was fair – appellants would have the ability to acquire total ownership of a $4.4 million business for $3.2 million – a gain of $1.2 million. Thus, it is simply untrue that the buyout remedy is more drastic than dissolution, which would have destroyed all value of the company to all of the parties. Judge Miller was well within his discretion to reject this request.

IV. Judge Miller did not abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and protracted the proceedings on remand by representing that they had the financial means to go through with the buyout.

How much time the court should allow for a buyout in a shareholder oppression case is exactly the kind of detail that should be left to the discretion of the trial judge. Certainly, it would have been within Judge Miller's discretion to give more than 90 days to appellants had he deemed that appropriate, as the district court did in the case touted by appellants, *Kaplan v. First Hartford Corp.*, 671 F. Supp. 2d 187 (D. Me. 2009), but there is no support in that case or any other authority for the proposition that he was obligated to do so as a matter of law. Given the particular facts and history of the case at

bar, it was well within Judge Miller's discretion to allow appellants 90 days for compliance with his Order (substantially more time than respondent suggested), rather than allowing them the additional "several years" that they requested. *See In re Petralia*, 267 A.D.2d 1013, 701 N.Y.S.2d 193 (N.Y. App. Div. 1999) (no abuse of discretion in trial court refusing to allow three years to complete purchase of petitioner's shares).

As Judge Miller noted in his Order, appellants had already had over six years to satisfy their contractual and fiduciary obligations to Ballard, and they had known since entry of the 2010 Order that they were facing the possibility of having to buy Ballard's remaining shares. Moreover, in the valuation hearing, appellant Roberson testified that the $1,000,000 price he paid for Ballard's 20,000 shares in 2007 was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the appellants had to have known that the buy-out price for Ballard's remaining 20,000 shares would be at least something higher than $1,000,000 (since the company now has the permits it did not have in 2007). In short, the appellants had more than enough time to prepare for the buyout. Instead of scheming to find ways to squeeze out the founder of the company, if they had merely done what they had agreed to do in the first place, or alternatively marshaled their assets so as to be ready to pay a reasonable buyout price, they would not now be in the predicament they claim to face.

Indeed, after the Circuit Court issued its 2010 Order, respondent's counsel suggested to appellants' counsel that the parties proceed with the valuation hearing so that all issues could be dealt with in one appeal. Appellants refused, and stated that they would not engage in the valuation until they had exhausted their appeal. (R. p. 21)

Having done so and lost, they should not be heard to complain about not being allowed to further delay compliance with the Court's judgment.

Furthermore, Ballard presented undisputed evidence at the August 2013 valuation hearing that the oppressive conduct of the appellants had continued since the 2010 trial through the present. (R. pp. 188-93) Judge Miller later made specific findings to this effect: "[T]he conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the [valuation] hearing." (R. p. 31, ¶ 4; *accord* R. p. 41) In these circumstances, it would have been a miscarriage of justice to allow appellants to continue to string out this six-year-old dispute for the "several years" more they wanted.

Their plea of poverty should be ignored because of their failure to raise this issue in a timely fashion. Not only did the appellants fail to apprise respondent or the Circuit Court that they would be unable to pay even what they agree is a fair price for Ballard's shares, but during the nine months from remand to the valuation hearing they repeatedly assured counsel and the Court that they would be able to pay Mr. Ballard when the time came. (*See* R. p. 177, lines 5-12; R. p. 309, lines 5-25) As a result of these assurances, both the respondent and the Court wasted months of time and numerous hours of preparation and court time pursuing the determination of a valuation number that – appellants now tell us – is meaningless.

Appellants' position is particularly untenable since they presented no evidence to the Circuit Court that if they had more time they would be better able to comply with the Court's judgment. Indeed, given the nature and history of appellants' conduct toward Mr. Ballard and the complete breakdown of the parties' relations, as noted in the 2010

Order and the Supreme Court's opinion, Judge Miller correctly concluded that allowing additional time to buy out Mr. Ballard under a structured payout would likely end up in further litigation. In this regard, it is telling that, in addition to the instant action, the appellants have been sued over the past several years by numerous business partners and clients for fraud, breach of contract, and breach of fiduciary duty. *See, e.g.*, *Odom et al. v. Thoennes et al.*, 2009-CP-23-9828 (S.C. Cir. Ct. Greenville Cty.); *Stoneledge at Lake Keowee Owners Association, Inc., et al. v. IMK Development Co., LLC, et al.*, 2009-CP-37-0652 (S.C. Cir. Ct. Oconee Cty.). Indeed, one of them has been convicted of federal felony conspiracy to commit bank fraud. *United States v. Thoennes*, No. 6:11-cr-02053-HFF-1 (D.S.C. Sept. 1, 2011). These facts, all of which are matters of public record, strongly suggest that appellants' primary objective is merely to drag out this litigation as long as possible in the hope that Mr. Ballard will be worn down and give up. The appellants did not present to Judge Miller, and have not presented to this Court, any reason to believe that they deserve more time or that giving them more time would enable them to satisfy the buyout.

On the other hand, continued protraction of this litigation could have a devastating effect on the value and prospects of Warpath. Under the Lease Agreement with Duke Power, Warpath has a certain amount of time in which to commence and complete construction (R. p. 396, sec. 29(d)), and construction has not yet started even though more than seven years have now elapsed since the lease was signed. (R. p. 188, lines 11-15) The more time that passes without construction commencing, the more likely it is that Duke will terminate the lease. If this should occur, Warpath will become worthless.

This litigation has been ongoing for over six years and it is time for it to come to an end. In these circumstances, Judge Miller acted well within his discretion in allowing the appellants 90 days to carry out the buyout.

V. Judge Miller's valuation of the company at $7.2 million was not based upon a fictional past event, but rather was decided by weighing all of the evidence, including appraisals ranging from $4.4 million to $20 million as well as representations by appellants to third parties that the company was worth from $6 million to $37 million.

Appellants construct a straw man by asserting that Judge Miller adopted the theory and analysis presented by Dr. Woodside with his $7.2 million valuation of Warpath's total worth. In fact, Judge Miller did not do so, but instead reached his finding of the company's value by weighing all of the evidence and testimony. The Order specifically states:

> "The courts uniformly recognize that the valuation of shares in a forced buyout of stock in a closely held company is a flexible, context-specific process that should be guided by the overarching goal of reaching a result that is fair to the parties. ... 'Appraisal is not an exact science, and the precise weight to be given to any factor is necessarily a matter of judgment for the court in the light of circumstances in each case.' Based on all of the evidence presented to the Court, and considering the equities of the case, the Court concludes that, for purposes of S.C. Code section 33-14-310(d), $7,178,594 is a fair and reasonable estimate of the total economic value of the company and that it is supported by the preponderance of the evidence."

(R. p 19 (emphasis added; citations omitted) (quoting *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 124, 522 S.E.2d 357, 365 (Ct. App. 1999)))

The inherent imprecision of appraising the value of a company is particularly acute when, as here, the company is closely held, with no public market for its assets or stock, and is still in a start-up phase with no history of earnings and profits. Given this context, Judge Miller's determination was fair and reasonable in light of all of the evidence, summarized as follows.

In 2007, per the parties' Stock Purchase Agreement, appellant Roberson purchased 20,000 shares representing 20% of the company's ownership directly from Ballard for $1,000,000 cash. In the valuation hearing, appellant Roberson agreed that this was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the overall value placed upon the company by all of the parties in 2007 was at least $5,000,000. (R. p. 186, line 9, to p. 187, line 25) Notably, at that time not all permits necessary for the venture to proceed had been obtained. At the time of the valuation hearing, all necessary permits were in hand, the final needed permit having been obtained in June of 2010. (R. p. 188, lines 1-10) Thus, the value of the company at the time of the 2013 hearing was clearly in excess of $5,000,000.

The Lease Agreement with Duke Power has substantial value in and of itself. The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease. (*See* R. p. 389, sec. 1) In effect, therefore, it is a perpetual lease. (R. p. 16 n.2) All necessary permitting and governmental approvals have now been secured. In light of the unique nature of the property, the fact that there is only one other marina and no hotel on Lake Keowee, and the potentially perpetual lease term, Mr. Ballard opined that a conservative value of the lease interest in the acreage itself is approximately $20 million.[3] (R. p. 184, lines 19-22; R. p. 193, lines 2-8)

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[3] South Carolina courts have consistently held that property owners are qualified to give opinion testimony about the value of their property when such value is at issue in a trial. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) ("ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert") (internal citations omitted); *see also Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 149-50, 735 S.E.2d 659, 662 (Ct. App. 2012) ("property owners can generally testify as to the value of and damage to their own property"); *Abercrombie v. Abercrombie*, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007)

Indeed, in attempting to obtain financing for the project, the appellants themselves represented to third parties that the "appraised value" of the company's property was $36,669,050 (R. p. 476), and that the value of the company upon completion of construction would be in the range of $28 million to $37 million. (R. pp. 462-502; R. pp. 194-95, 233) Appellants also represented to a third party in 2011 that the "current value" of the company's property "in its present condition" was $6 million. (R. p. 477; R. p. 233, lines 23-25) Similarly, a third-party marina developer made an offer of $4.5 million for 70% of the company's equity in the company's current condition in 2012. (R. pp. 504, 510) This price for 70% ownership is equivalent to $6.4 million for 100%. (R. 207, lines 5-28)

Although the dissolution section of the South Carolina Corporate Code does not define the phrase "fair value", the dissenters' rights section defines "fair value" to mean an equitable value "determined by techniques that are accepted generally in the financial community." S.C. Code § 33-13-101(3); *see* Note, *Buyout Remedy for Oppressed Minority Shareholders*, 47 S.C.L. Rev. 195, 223 (1995) ("[I]t seems likely that the definition of fair value [in section 33-13-101(3)] would also be used in dissolution cases."). The seminal case in South Carolina determining fair value in the dissenters' rights context is *Santee Oil Co. v. Cox*, 265 S.C. 270, 217 S.E.2d 789 (1975). In that case, the Court held that "fair value means 'intrinsic value'," which the trial court must undertake to compute by determining the "value of the corporate property <u>as an established and going business</u>." *Id.* at 273, 217 S.E.2d at 791 (emphasis added).

("in South Carolina, a property owner is competent to offer testimony as to the value of his property"). This doctrine has been applied in other jurisdictions in the specific context of the valuation of a business in shareholder oppression suits. *Shane v. Shane*, 891 F. 2d 976 (1st Cir. 1989).

The above is the approach that Dr. Woodside utilized in making his calculations. Dr. Woodside determined that after eight years for construction and "ramp up," the company's net value as a whole would be $20,384,428. (R. pp. 638-39) Using a discount rate of 22.0%, Dr. Woodside's initial report discounted this figure to a present value of approximately $4.4 million, based on the assumption that financing was in hand and construction would begin sometime in 2013. (R. p. 639) In a subsequent analysis, however, Dr. Woodside opined that the present value of the company would be $7,178,594 if construction had begun in July of 2010, when the final needed permits had been obtained. (R. p. 724)

While it is true, as appellants assert, that Dr. Woodside based his $7.2 million calculation upon a hypothetical assumed start of construction in July 2010, two points are worth noting here. First, Judge Miller did not adopt Dr. Woodside's approach or rationale – he simply concluded that the $7.2 million figure was a fair and reasonable one after weighing all of the evidence and the equities of the case. Second, the $4.4 million valuation that Dr. Woodside derived in his initial report, a calculation that the appellants embrace, was also based upon the assumption of a hypothetical event – the securing of financing and start of construction in 2013. Appellants like that assumption because it gives them the benefit of their own failure to begin construction for years after obtaining all needed permits and approvals, but both calculations are predicated on hypothetical events that did not actually occur, and it was abundantly clear from appellants' own testimony and representations to the Court that there was no way construction would begin in 2013 (and in fact it still has not). Consequently, if Dr. Woodside's methodology is flawed because of its reliance on hypothetical assumptions that are counter to fact, then

both of his valuations – including the $4.4 million valuation that the appellants accept – should be thrown out,[4] leaving the other evidence (summarized above) valuing the company at a minimum of $5 million and a maximum of $20 million.

Dr. Alford did not criticize Dr. Woodside's overall approach, but opined that the discount rate used by Dr. Woodside to compute present value was too large in light of an actual offer that had been made for the company in late 2012 by a third-party private venture capital firm called Dakota Holdings. (*See* R. pp. 273-85, 729-32) Using the lower discount rate derived from the Dakota Holdings offer, Dr. Alford computed a present value of the company of $9.3 million to $12 million. (R. pp. 586-87 ("Indicated value of equity $9,268,126 [discounted 8 years, or] $12,034,969 [discounted 6 years]"))

Thus, Judge Miller was presented evidence supporting the following present values of the company as a whole:

- $4.4 million (Dr. Woodside's lowest figure),
- $5 million (the least value placed on the company by the parties' 2007 contract),
- $6 million (appellants' representation to a third party of the "current" value of the company "in its present condition" in 2011),
- $6.4 million (calculated from the Vinings 2012 offer for 70% equity),
- $7.2 million (Dr. Woodside's higher valuation),
- $9.3 million (Dr. Alford's lower valuation),
- $12 million (Dr. Alford's higher valuation), and
- $20 million (Andy Ballard's valuation).

Judge Miller weighed all of the evidence and came to a valuation that he decided was reasonable in light of the record and the inherent imprecision of valuing a closely held start-up company of the nature of Warpath. Appellants have not sustained their

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[4] Before, during, and after the valuation hearing, respondent argued that Dr. Woodside's valuation should not be admitted in evidence because it failed to meet the evidentiary standard for the admission of expert opinion. (*See* R. pp. 97, 100-01, 105-06; R. p. 150, lines 11-14; R. p. 152, line 10, to p. 154, line 21; R. p. 270, lines 10-21; R. pp. 133-34))

burden to show that Judge Miller committed error in making this determination. The Court should sustain his decision.[5]

VI. The Circuit Court did not err by refusing to give value to shares of stock owned by the appellants for which they have never paid.

The appellants acquired their ownership interests in Warpath under the 2007 Stock Purchase Agreement. Per the Agreement, defendant Roberson purchased 20,000 shares constituting 20% of the company's stock directly from Mr. Ballard for $1 million, and he and the other two individual defendants (Thoennes and Thoennes III) also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. (R. pp. 369-70)

In its 2010 Order, the Court concluded that the appellants had not performed the services they had contractually agreed to perform in return for the stock issued to them by the company, and ordered them to place those 60,000 shares in escrow. That holding and remedy were affirmed by the Supreme Court. *Ballard v. Roberson*, 399 S.C. at 598-99, 733 S.E.2d at 112-13. Those shares remain in escrow, and it was undisputed at the 2013 valuation hearing that the appellants have still not performed the services for which they received 60,000 shares of stock from the company. Judge Miller found specifically to this effect (R. p. 17), and appellants cannot point to any evidence contradicting that finding of fact.

Based on that finding, Judge Miller allocated 50% of the company value to Ballard's shares, since Ballard owned 20,000 of the 40,000 shares that were not in

[5] If, notwithstanding the above, this Court should view the weight of the evidence differently than Judge Miller did, respondent urges the Court to set its own valuation number rather than remand for a redetermination of the value. Another valuation hearing, regardless of the outcome, is virtually certain to result in yet another appeal by appellants.

escrow. This was not only legally correct, but was mandated by section 33-6-210(e) of the South Carolina Code. That statute dictates that "the corporation must place in escrow shares issued for a contract for future services." S.C. Code § 33-6-210(e) (emphasis added). The shares must remain in escrow until "the services are performed ... or the benefits are received." *Id.* Further, "[a]ny share dividends in respect of the shares escrowed also must be placed in escrow." *Id.* (emphasis added). If the contract for future services is not completed, the escrowed shares "may be canceled in whole or in part, and the corporation may reclaim the distributions." *Id.* (emphasis added). South Carolina's statute differs from the Model Business Corporation Act and the statutes of most other states, which provide that a "corporation may place in escrow shares issued for a contract for future services." *See, e.g.*, Model Bus. Corp. Act § 6.21(e) (emphasis added); Conn. Gen. Stat. § 33-672(e).

South Carolina's substitution of "must" for "may," and the resulting statutory mandate that shares issued in consideration for future services and any dividends issued thereon be held in escrow, shows that the General Assembly intended to prohibit the value of a shareholder's investment from being unfairly diluted through the issuance of stock to other shareholders in exchange for future services. As the official comment notes, "this problem is particularly acute if the persons providing [future] services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors," S.C. Code § 33-6-210 official comment, which is exactly the case here. Furthermore, the statute specifically provides that "if the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed and the distributions credited may be canceled in whole or

in part and the distributions escrowed may be reclaimed by the corporation." S.C. Code § 33-6-210(e).

In light of these provisions of the South Carolina Code, the value of Ballard's stock ownership should not be diluted by giving the appellants the benefit of counting the escrowed shares in determining Ballard's ownership percentage of the total value of the company, as this would reward the defendants for their failure to deliver the consideration they agreed to provide for those shares. *See Kreischer v. Kerrison Dry Goods Co.*, 172 F.3d 863, at *12 (4th Cir. 1999) (upholding the district court's refusal to apply a minority discount "because such an award would reward the majority stockholders for their wrongful conduct"). This is not a "forfeiture" or "penalty" as the appellants assert, but a fair and equitable conclusion that appellants should not benefit in the valuation process by counting escrowed shares for which they have never paid.

Nor is this conclusion inconsistent with respondent's argument in the Circuit Court that the company should be valued as if fully funded and already developed if Ballard is allocated only 20% ownership, as appellants contend on appeal. *See* Brief of Appellants at 15. In making this argument, appellants quote one sentence from respondent's pretrial memorandum but fail to give this Court the full substance of respondent's position. A more complete statement is the following passage from respondent's pretrial memorandum:

> "Obviously, if the defendants had done what they contracted to do in 2007, the project would have already been completed and would currently be near the end of Dr. Woodside's projected 'ramp up' period. Thus, if Andy's ownership percentage is to be set at 20% (rather than 50% as we assert), then the value of the company should be undiscounted from the $20 million figure determined by Dr. Woodside, and Andy's 20% share should be valued at $4,076,886 (20% of $20,384,428). Conversely, if the Court is going to use the current (discounted) value determined by

> Dr. Woodside, Andy should be treated as a 50% owner since none of the defendants has provided the consideration for which 60,000 shares of stock were issued to them by the company. Accepting Dr. Woodside's current value calculation of $7,178,594 million [*sic*], Andy's stock should be valued at half that amount, or $3,589,297."

(R. p. 97)

Indeed, Judge Miller's decision not to give value to the shares held in escrow is in keeping with what one of the appellants has represented to another court. In 2011, one of the appellants stated in a filing with the United States Bankruptcy Court that his 20,000 shares of Warpath stock held in escrow did not have any economic value. *In re Thoennes*, No. 11-07438-hb, Schedule B (Personal Property), docket entry #1, p.10 (Bankr. D.S.C. Dec. 2, 2011). Judge Miller's refusal to give value to appellants' escrowed stock in the valuation is thus entirely consistent with what this appellant has represented in court on the public record.

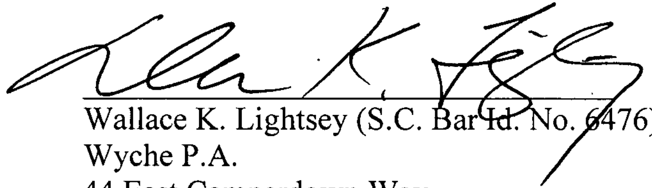
In short, South Carolina Code section 33-6-210 clearly contemplates that a shareholder whose shares were issued for future consideration should not receive any economic benefit from those shares until the consideration has been provided. As it is undisputed that the appellants have not performed the services in exchange for which their stock was issued, the 60,000 shares in escrow should not have been considered in the allocation of an ownership percentage to Ballard. It was entirely correct, therefore, for Judge Miller to allocate 50% of the total company value to Ballard's shares. To do otherwise would be to allow appellants to benefit from stock for which they have not paid, in violation of S.C. Code section 33-6-210.

CONCLUSION

It is time to bring this long-drawn-out case to an end. The relief ordered by Judge Miller was well within his discretion under the statute, is supported by substantial evidence in the record, and is correct in its legal underpinnings.

This Court should affirm.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-002790

Andrew P. (Andy) Ballard,..Respondent,

v.

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

Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing final BRIEF OF RESPONDENT and CERTIFICATE OF COUNSEL on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

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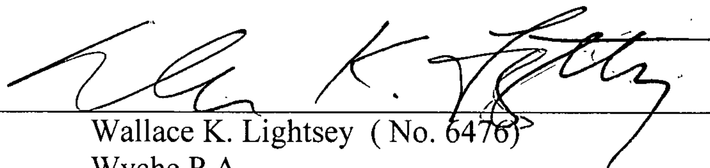

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Date: December 4, 2014

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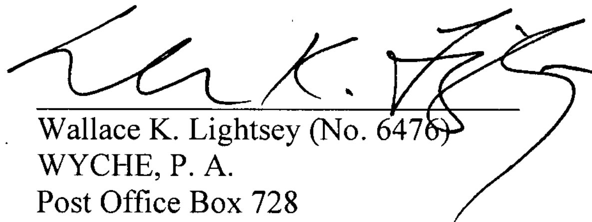
Certificate of Counsel

The undersigned certifies that the foregoing final Brief of Respondent complies with Rule 211 (b), SCACR.

December 4, 2014



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