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.

APPELLANTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

ANALYSIS 4

1. Standard of Review 4

2. The lower court erred by ordering a personal judgment be entered against Appellants in an amount equal to the assessed value of shares 4

   A. A personal judgment is not within the enumerated remedies for oppression set forth within The South Carolina Business Corporations Act. 5

   B. A personal judgment is a more drastic remedy than dissolution 6

   C. Dissolution is the default remedy 7

3. The lower court erred in failing to consider whether the terms of its ordered buyout was "appropriate" and arbitrarily ordering the purchase of the shares within 90 dasys from the date of the order 9

4. The lower court erred in assessing the value of Plaintiff's 20,000 shares at $3,589,297 as opposed to the $873,000 stated in the court's appraiser's report 13

   A. The lower court erred and rendered a gross inequity in assessing the value of Plaintiff's 20,000 shares as representing 50% of the company as opposed to the 20% bargained for the Stock Purchase Agreement 13

      i. The record lacks a factual basis to justify the lower court forfeiting 60,000 of Appellants' shares for purposes of valuing Plaintiff's 20,000 shares 14

      ii. The lower court's valuation of Plaintiff's 20,000 shares as 50% of the company is improper punishment and penalty. 15

   B. The lower court erred and caused a gross inequity in reaching its value by creating a fictional past event in order to arbitrarily increase the present value of Plaintiff's shares 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012) 1,4,14

Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 609 S.E.2d 531 (Ct. App. 2005) 4

Dockside Assoc. Inc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874 (1987) 18

Hendley v. Lee, 676 F.Supp. 1317 (D.S.C. 1987) 8,10,16

In re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002)...................................... 5

Kaplan v. First Hartford Corporation, 671 F.Supp.2d 187 (D. Maine 2009) 11,12

McLeod v. Stevens, 617 F.2d 1038 (4th Cir. 1980) 6

Metromont Materials Corp. v. Pennell, 270 S.C. 9, 19, 239 S.E.2d 753 (1977) 13

Regions Bank v. Wingard Prop., 394 S.C. 241, 256, 715 S.E.2d 348 (Ct. App. 2011).... 15

Santee Oil Co. v. Cox, 265 S.C. 270, 272-73, 217 S.E.2d 789 (1975)........................... 13

Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375 (1938) 4

Statutes

S.C. Code Ann. §33-1-101 *et seq* 6

S.C Code Ann. § 33-6-210 14

S.C. Code Ann. §33-14-300 5,6,7,8,12

S.C. Code Ann. § 33-14-300(2)(ii)... 4,5

S.C. Code Ann. §33-14-310 9,10

S.C. Code Ann. §33-14-310(d) 4,5

S.C. Code Ann. § 33-14-310(d)(4)... 4,5,7

S.C. Code § 33-14-310(e).. 4,12

S.C. Code Ann. §33-18-410 7

S.C. Code Ann. §33-18-420 7

S.C. Code Ann. §33-18-420(b)(5) 7

S.C. Code Ann. §33-18-430 5,7

S.C. Code Ann. §33-21-155 10

Other Authorities

Oxford English Dictionary 5

QUESTIONS PRESENTED

1. Did the lower court err by ordering a personal judgment be entered against Appellants in an amount equal to the assessed value of shares?

2. Did the lower court err in failing to consider whether the terms of its ordered buyout was "appropriate" and arbitrarily ordering the purchase of the shares within 90 days from the date of the order?

3. Did the lower court err in assessing the value of Plaintiff's 20,000 shares at $3,589,297, as opposed to the $873,000 stated in the court's appraiser's report?

   A. Did the lower court err in assessing the value of Plaintiff's 20,000 shares as representing 50% of company as opposed to the 20% bargained for in the Stock Purchase Agreement?

   B. Did the lower court err in assessing value premised on a fictional past event that served to only arbitrarily increase the present value of Plaintiff's shares?

STATEMENT OF THE CASE

This matter comes before the court on Appellants Tim Roberson ("Roberson"), Rick Thoennes Sr. ("Thoennes Sr."), Rick Thoennes III ("Thoennes III"), and Warpath Development, Inc.'s ("Warpath") (collectively the "Appellants") appeal of the lower court's October 2, 2013 order arising out of August 6, 2013 hearing on the valuation of the outstanding 100,000 shares of Warpath as scheduled by the court. This matter has been previously on appeal with respect to the issue of liability for shareholder oppression. In a 3-2 decision the Supreme Court of South Carolina affirmed the lower court's finding and remanded the matter for further consideration of remedy. See Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012).

In furtherance of a buy-out of Plaintiff's 20,000 shares, the lower court appointed Dr. Perry Woodside ("Dr. Woodside") to serve as the court's business appraiser. Dr. Woodside completed his work in April 2013 and submitted his opinion to the court that the Plaintiff's *pro rata* 20% share of Warpath Development, Inc. represented by 20,000 shares was worth $873,000. (Dr. Woodside's Report, R. pp. 601-722) In coming to this conclusion, Dr. Woodside testified that he "developed a discounted cash flow for the primary needs in determining the value of the [Warpath] stock." (R. 238, lines 4-5.) "The model that I developed reflects the agreements that [were] reached among the parties where capital was to be provided by Mr. Roberson sufficient to obtain financing. None of that has happened to this point so what I did was to look at what lending requirements generally were in April of 2012." (R. p. 238, lines 11-16.) Dr. Woodside further assumed construction of all phases of the marina project beginning by the end of 2013, a period of stabilization upon construction, long-term financing and an eventual sale of the project 8 years later. (See id. R. p. 238, line 21–p. 240, line 23; p. 256, lines 7-11.) The resulting value at the time of sale after all debts were paid was then reduced to present value leaving an overall stock value as of December 31, 2012 as $4,360,000. Taking 20% of the overall company value, Plaintiff's shares were then properly valued at $873,000. (Dr. Woodside's Report, R. pp. 601-722)

After the hearing on August 6, 2013, the lower court went against the appraisal of Dr. Woodside and entered an order dated October 2, 2013 assigning a value of $3,589,297 to Plaintiff's 20,000 shares of stock, which is over four times the value assigned by Dr. Woodside. (October 2, 2013 Order; R. p. 22) The lower court did so by improperly assuming Plaintiff's interest accounted for 50%, as opposed to the 20% actually held, and improperly imposing a fictional start to construction in 2010 without any factual or legal support. (R. p. 21) The court

further ordered that the buyout be arbitrarily accomplished within 90-days without any inquiry into the ability of Appellants' ability to accomplish that task and entered personal judgment for the purchase price. [Id.] In so ordering, the court ignored the facts and the law, as well as defied all notions of equity in reaching its conclusion and so ordering.

The Defendants are appealing to this Court to be the fair, equitable and reasonable arbiter of these issues. Plaintiff has not proven any loss or damage, has not asserted a claim of loss or damages, therefore is not entitled to damages. The court's entry of judgment is an unlawful exercise of judicial authority. Plaintiff is only entitled to a remedy for oppression, which may be one that permits him to remove his investment either through dissolution or buyout, or another statutorily enumerated remedy short of money exchanging hands. The law recognizes a distinct difference between fashioning a remedy for the Plaintiff and a *de facto* award of damages. The lower court, however, has been unwilling to consider the difference and, regardless of whether it was the original intent or the inevitable result, ultimately issued a grossly inequitable order that amounts to penalty, punishment and damages as opposed to reasonable remedy for the oppression.

Equity requires consideration of all involved, including the corporation itself. It is the court's task to weigh all interests, including the survival of Warpath, the preservation of the Defendant's interest and the Plaintiff's interest in receiving the fair value for his shares. The Plaintiff requested and the court has ordered a buyout. However, assuming a buy-out remains a reasonable and appropriate remedy; equity does not demand that the buyout be immediate. Equity demands that the value and the terms be fair and reasonable.

ANALYSIS

1. Standard of Review

This appeal is as to an order of the trial court sitting in equity. As such, the Court reviews this matter *de novo* and may find facts in accordance with its view of the evidence. Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).

2. The lower court erred by ordering a personal judgment be entered against Appellants in an amount equal to the assessed value of shares.

In the matter of Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012), the Supreme Court affirmed the lower court's order of oppression pursuant to S.C. Code Ann. § 33-14-300(2)(ii), the judicial dissolution statute. As a remedy for such finding, the court is granted the ability to either dissolve the corporation or, if an alternative remedy is "appropriate", order relief short of dissolution as set out in § 33-14-310(d). See S.C. Code § 33-14-310(e). The lower court chose to enter an order for relief pursuant to § 33-14-310(d)(4), which provides "the court may make such order … (d) providing for the purchase at their fair value of shares of any shareholder …." On October 3, 2013, the lower court entered an order stating as follows: "it is hereby ordered and decreed that defendants pay the plaintiff $3,589,297 within 90 days of the date of this Order, and judgment in this amount is hereby entered for the plaintiff against the defendants jointly and severally." (October 2, 2013 Order; R. p. 22) This order is legally deficient and fatally flawed at entry because the lower court unlawfully imposed a personal judgment in violation of South Carolina law to address the failure of the Appellants to complete the buyout. Equity must follow the law. See Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375 (1938). The law does not permit a personal judgment exposing assets beyond those of the corporation or invested in the corporation to secure a failure to complete a buyout.

A. A personal judgment is not within the enumerated remedies for oppression set forth within The South Carolina Business Corporations Act.

A claim for oppression under South Carolina law is grounded in statute. See S.C. Code Ann. §33-14-300(2)(ii). The only means by which the plaintiff may bring an action for "oppression" is through § 33-14-300 entitled "Grounds for judicial dissolution". By statute, dissolution is the default remedy of shareholder oppression. A party bringing a claim for "oppression" must ask the court to find grounds for dissolution. Dissolution is, however, considered a "drastic remedy" under South Carolina law. See In re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002); see also S.C. Code Ann. 33-18-430 (entitled "Extraordinary relief: dissolution"). As such, the legislature provided alternatives to dissolution in §33-14-310(d) with the caveat that the alternatives must be "appropriate". However, all of the remedies of §33-14-310(d) are short of the "drastic remedy" of dissolution.

Specific to this matter, the court may choose to remedy oppression by issuing an order "providing for the purchase at their fair value of shares" § 33-14-310(d)(4) (emphasis added). According to the Oxford English Dictionary, "provide" means to "make provision for the future", "to make adequate preparation", "to prepare", "to make available", etc. See OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com/view/Entry/153448?rskey=iJgXU6&result=2&isAdvanced=false#eid. The legislature could have, but, did not use the words "order the purchase", "compel the purchase", or "command the purchase". As in this case, to "provid[e] for the purchase" the court may set the value, terms and conditions of sale, but neither §§33-14-300 or 310 permit the court to enter an order also entering a personal judgment.[1] For these reasons, because the lower court improperly

[1] The time for personal judgment has passed. As the record reflects, prior to trial in 2010, Plaintiff had stated legal causes of action for breach of fiduciary duty and breach of contract, which, if successfully proven, would have

imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for further consideration.

B. A personal judgment is a more drastic remedy than dissolution.

As set forth above, according to South Carolina law, dissolution is the "drastic remedy" for oppression. The South Carolina Business Corporations Act governs the creation, the existence and the end of a corporation formed pursuant to its terms. See S.C. Code Ann. §33-1-101 *et seq*. Appellants submit that dissolution is the drastic remedy under the Act because it is a final end to the corporation. Business ceases, the assets are gathered and sold, creditors are paid and what remains is distributed to the shareholders. Once dissolved, a corporation ceases to exist. Dissolution is avoided, if appropriate, to allow the corporation and its remaining shareholders to continue business into the future.

However, by the very nature of the limits of liability at the core of the corporate form, the drastic remedy of dissolution at worst only exposes a shareholder's investment within the corporation to loss. Dissolution, in and of itself, does not expose a shareholder to a personal judgment to remedy oppression. If dissolution is the "drastic remedy", under no circumstance is the Plaintiff entitled to a remedy more "drastic" than dissolution. Appellants would submit that the court ordered compulsion to invest $3,589,297 in an undeveloped, non-operating marina on 90-days' notice without any inquiry into the ability to do so accompanied by a joint and several (including the corporation itself[2]) personal judgment for the same amount that exposes assets

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entitled Plaintiff to recover damages secured by a personal judgment. The Plaintiff, however, chose to pursue equitable remedies for oppression pursuant to S.C. Code Ann. §33-14-300. As a result of this choice, South Carolina law does not now permit the Plaintiff's claim to reduce to damages and personal judgment. Damages cannot be recovered in an equitable action such as involuntary dissolution. See McLeod v. Stevens, 617 F.2d 1038 (4th Cir. 1980).

[2] As the corporation is presently encumbered with the judgment, the majority shareholders cannot even sell the stock to a party who may be inclined to further the development.

beyond the loss of an investment in Warpath is decidedly more drastic than dissolution. For these reasons, because the lower court improperly imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for further consideration.

C. Dissolution is the default remedy.

While §33-14-310(d)(4) permits the court to "provide" for the purchase of the shares, it does not explicitly direct what happens when shares cannot or will not be purchased. While §§33-14-300 and 310 are silent on the particulars of how to address a matter where the corporation or majority does not have the resources to further invest in the company or simply chooses not to further invest, the solution is that the court seeks another enumerated remedy or reverts to default remedies and dissolves the corporation. The minority shareholder gets their relief from further participation and their *pro rata* resulting share. While certainly not controlling in this matter, Appellant's find analogous support for this position in S.C. Code Ann. §33-18-420 of the Statutory Close Corporation Supplement. Section 33-18-420(b)(5) specifically provides that "if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under Section 33-18-430...." §33-18-430 further provides that "[t]he court may dissolve the corporation if it finds: (1) there are grounds for judicial dissolution under Section 33-14-300; or (2) all other relief ordered by the court under Section 33-18-410 or 33-18-420 has failed to resolve the matters in dispute."

In this matter, the lower court's remedy has failed and Warpath sits in limbo with its stock and shareholders tied up in Plaintiff's efforts to execute on the very "judgment" under challenge.[3] Appellants cannot meet the arbitrary terms of the court's buyout. (R. pp. 224, 231)

[3] The court ordered 90 days expired in early January 2014. As we sit here today, Appellants' request to stay execution has been declined and Plaintiff has pressed forward with executing on the judgment. The court has

Under these terms, there is no "appropriate" reason to avoid dissolution in this matter. Unlike other matters where dissolution was rejected, Warpath has no income, is not developed and does not operate. Contra Hendley v. Lee, 676 F.Supp. 1317, 1324 (holding dissolution improper where the company was profitable and growing).

Dissolution is the only available remedy for oppression here. It allows the Plaintiff to release his trapped investment. Warpath's assets are its lease with Duke Energy, development rights, trademarks and architectural and engineering drawings. In a properly managed dissolution those assets could be sold to an interested party with Duke Energy's permission. According to the lower court's October 2, 2013 Order, as of December 31, 2012, Warpath was worth $7,178,594. The result of dissolution would be the fair and equitable *pro rata* distribution to the shareholders. Dissolution would allow the plaintiff to release his trapped investment, which, according to our Supreme Court, is the "concern and focus in shareholder oppression cases." Ballard, 733 S.E.2d at 110. Appellants anticipate that the Plaintiff would object. However, Plaintiff cannot state a viable objection. Plaintiff simply wants his windfall and personal judgment.

The issue is clear. The Plaintiff abandoned legal claims and remedies in exchange for equitable under the judicial dissolution provision of the Business Corporations Act. Therefore, the only means of redress is through the statute and remedies available in §§33-14-300 and 310. Neither of those provisions permits a judgment to be entered and most certainly do not permit a remedy more "drastic" than dissolution. For these reasons, because the lower court improperly imposed a personal judgment in an amount equal to the assessed value of the Plaintiff's shares, the courts October 2, 2013 Order should be vacated and the matter reversed and remanded for

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appointed a receiver with authority to take Appellants' property and required no bond nor provided any protections in the event of damage to the property itself, loss of use, etc. Further, the receiver has demanded that Appellants

further consideration.

3. **The lower court erred in failing to consider whether the terms of its ordered buyout was "appropriate" and arbitrarily ordering the purchase of the shares within 90 days from the date of the order.**

The evidence presented before the lower court established that the defendants, Warpath included, are not in a financial position to buyout the 20,000 shares of the Plaintiff at any amount absent reasonable buyout terms. (R. pp. 224, 231) Defendants stated on the record that they are willing to have their financial conditions examined by the court or someone appointed by the court to determine a reasonable structure for the buyout. (R. p. 224) In its Order, the court wholly rejected Appellants offer on the basis that the judicial process, including discovery, trials and appeals, has been lengthy and on speculation that Appellants would default regardless of what the court ordered. (R. pp. 21-22)

The court's order and reasoning is improper and inequitable. It also further illustrates the fundamental problems inherent with the court's decision. The court only seeks to penalize and punish. The interests of the Appellants and the survival of Warpath were not even considered in the Court's order. The court made no inquiry as to whether its order was "appropriate" as required by §33-14-310. In fashioning this order and making its decision, the lower court only considered <u>one party</u>, the Plaintiff. The lower court made no inquiry or gave any consideration to the equity due to the Appellants. The lower court references that "[h]e who seeks equity must do equity." (Id. at 21-22) However, the lower court makes no reference to what lack of equity the court is referencing. The issue of oppression was decided. The Supreme Court has spoken and the Plaintiff is due a remedy. Oppression is no longer at issue or open to inquiry. The Appellants have not been found to have engaged in a frivolous act or appeal. The Appellants have not been found to have engaged in any improper delays. Liability was decided, appealed,

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turn over their shares of Warpath yet Plaintiff still retains his shares.

highly contested at oral argument and after deliberation was affirmed on a 3-2 decision favoring the Plaintiff. That is our judicial process.

In its Order, the lower court found that "having more time will [not] make any difference" and "a structured payment arrangement, including provisions for interest, security and remedies on default, will simply end up in further litigation." (R. pp. 21-22) If the lower court believed that more time will make no difference and the buyout will nevertheless end up in default and further litigation, the lower court cannot fairly state that "90 days is a fair and reasonable period of time for the defendants to meet the terms of the buyout hereby ordered." (R. p. 21) This internal inconsistency evidences everything the court failed to do, but was nevertheless required to do if it was to meet its statutory required obligation to determine that the terms of its remedy were "appropriate". Despite multiple efforts to engage the court in this exercise, Appellants' appeals to equity and reason were consistently rejected.

In matters such as these, the law of South Carolina supports a court's inquiry and continued jurisdiction in matters raised under the judicial dissolution statutes. See Hendley v. Lee, 676 F.Supp. 1317 (D.S.C. 1987). In Hendley, after a thorough court inquiry into the matter brought pursuant to former S.C. Code Ann. §33-21-155 (now S.C. Code Ann. §33-14-310), the court ordered the purchase of shares by the Plaintiff to occur on December 15, 1987. However, the court did not enter judgment for the shareholder, as it was improper, or rigidly adhere to a closing date. See id. ("Therefore, the sale shall occur December 15, 1987. If the Hendleys experience difficulty in obtaining financing by this date, they may apply to the court for a reasonable extension."). Recognizing the lack of certainty in such a solution, the court remained flexible, as justice obligated, and retained jurisdiction to see that its remedy was accomplished or whether it must be reevaluated. See id. at 1331-32. Such judicial intervention and fair

consideration would have been welcomed by the Appellants.

Further, Appellants reference the matter of Kaplan v. First Hartford Corporation, 671 F.Supp.2d 187 (D. Maine 2009) as it represents as a well-considered and well-reasoned example of a court reasonably and orderly evaluating the feasibility of a majority buyout and putting a structured plan into place. In Kaplan, following a determination of oppression and valuation, the court proceeded as follows: "In this corporate oppression case, I appointed Attorney George J. Marcus as Special Master to determine whether the corporation is financially able to purchase the oppressed shareholder's shares and under what circumstances; and, if the corporation cannot do so, whether the controlling shareholder can." Id. at 189. The Special Master determined that a 5-year structured buy-out was reasonable. Id. at 191. Similar to this matter, the Plaintiff in Kaplan objected to the buy-out stating that the Special Master "should have determined what is reasonably speedy from [Plaintiff's] point of view: "an oppressed shareholder who has had to resort to extraordinarily costly litigation over a period of [four] years." Id. Considering such assertion, the court responded as follows:

> While recognizing that Kaplan had prevailed at trial and was entitled to a remedy, I charged the Special Master with creating a remedy that recognized other interests as well. Specifically, my Order precluded any schedule so speedy as to affect adversely "the corporation's ability to . . . continue as a viable company in its business pursuits for the benefit of other shareholders." It was therefore wholly appropriate for the Special Master to consult both the Bankruptcy Code and commercial practice for guidance on standards of commercial reasonableness. He noted, for example, that it is customary for shareholders in close corporations to be bought out over time and that it is a reasonable commercial expectation that a shareholder buyout will typically be funded over "five to ten years with no security or junior security and with modest interest if any." He also considered how current economic conditions affect First Hartford's core business and First Hartford's financial condition as he assessed the schedule by which First Hartford could buy Kaplan's shares at the 2005 price, a price far above that supported by today's market. The Special Master noted that First Hartford's "operating performance . . . has been marginal and unsteady," that it has a "very thin margin of available working capital" and that it must rely on "opportunistic" liquidations and refinancings to meet its "existing obligations." I agree with his conclusion

> that, given its business model, First Hartford needs flexibility in meeting its existing business obligations and its obligations to Kaplan. Given current economic conditions, the Special Master found that five years would provide reasonable confidence in First Hartford's ability to perform. He quite reasonably did not speed up the buyout by assigning net sales proceeds to Kaplan because of the consequences for First Hartford's operations and because the five-year schedule is already on the speedier end of the spectrum of shareholder buyouts. I agree with the Special Master that the five-year buyout is reasonably speedy for a shareholder buyout, and I conclude that the Special Master has crafted a reasonably speedy, commercially reasonable buyout schedule.

(Id. at 192.) As the court in Kaplan recognized, and the courts of South Carolina similarly recognize, a finding of oppression "entitled" Plaintiff to a remedy, but that is all. Appellants seek no more than a fair consideration of all interests, a reasonable inquiry into the ability to fund a buyout, and a reasonable amount of time to act. Appellants assert that principles of equity and South Carolina law demand such engagement by the court.

Absent such action by the lower court, based on the evidence presented of Appellants' inability to fund a buyout in that short a time period, such an order calls into question the equity of the buyout and creates questions has to whether such remedy is "appropriate" under §33-14-310(e). An order providing 90 days to accumulate nearly $3.6 million without any inquiry into the ability of Appellants to do so accompanied by a personal judgment for an equal amount that exposes assets beyond the investment in Warpath is punitive. A finding of oppression under §33-14-300 does not allow for such punitive action.

The courts "remedy" and judgment opens the door to inequity. The Plaintiff wants the corporation without paying anything for it. However, Plaintiff can present no legal support for the court to order the Defendants to sign over their shares of Warpath to the Plaintiff for no value. Plaintiff nevertheless seeks to achieve that result indirectly through default of the court ordered buyout secured by a personal judgment. Plaintiff's counsel stated as such on the record. (R. p. 177, lines 17-19 ("One of the first things we will seize to satisfy the judgment is their stock

in the company. Mr. Ballard would like to take the company back over.").) This "backdoor" tactic is wholly inequitable. It is the court that must protect against these tactics. The lower court's order fails in all such respects.

A buyout only makes sense as an "appropriate" remedy if it is structured in a manner that is reasonably achievable. The court has refused to take such reasonable steps. As such, the court's October 2, 2013 order must be vacated and remanded for further proceedings consistent with the statutory obligation to "provide" for the purchase of the shares if such remedy remains "appropriate."

4. The lower court erred in assessing the value of Plaintiff's 20,000 shares at $3,589,297 as opposed to the $873,000 stated in the court's appraiser's report.

The valuation of Warpath and Plaintiff's shares is premised around the legal concept of "fair value". In South Carolina, "fair value" means "intrinsic value," which is computed by establishing the fair market value at a fixed moment in time as an established and going business. See Metromont Materials Corp. v. Pennell, 270 S.C. 9, 19, 239 S.E.2d 753, 758 (1977). Historically, South Carolina has focused on three factors to consider in establishing "fair value": (1) net asset value, (2) market value, and (3) the earnings or investment value of the stock. See Santee Oil Co. v. Cox, 265 S.C. 270, 272-73, 217 S.E.2d 789, 791 (1975). The Santee method is substantially similar to the well-known "Delaware Block Method".

A. The lower court erred and rendered a gross inequity in assessing the value of Plaintiff's 20,000 shares as representing 50% of the company as opposed to the 20% bargained for in the Stock Purchase Agreement.

On the one hand, in reaching the value of 100% of the outstanding 100,000 shares of Warpath as of December 31, 2012, the lower court assumed for purposes of reaching that value that all contractual obligations of Appellants' Roberson, Thoennes and Thoennes III to secure funding and build the marina had been met and the marina had operated for 8 years into the

future. On the other hand, in reaching a value for Plaintiff's <u>individual</u> 20,000 shares, which according to the law and all testimony offered was a bargained for 20% of the total, without any reasonable, factual or equitable basis, the lower court assumed that <u>none</u> of the events justifying the value of the company, *i.e.* funding, construction and 8 years of operation, occurred, forfeited the shares of Roberson, Thoennes and Thoennes III, and valued Plaintiff's interest at 50% of the total company value. There is no reasonableness or equity in this result. This is pure penalty and punishment. The lower court's order must be reversed.

i. The record lacks a factual basis to justify the lower court forfeiting 60,000 of Appellants' shares for purposes of valuing Plaintiff's 20,000 shares.

The record lacks a factual basis for forfeiting 60,000 of the shares held by Appellants in reaching a value of the 20,000 shares held by the Plaintiff. In justifying its conclusion to forfeit 60,000 shares for purposes of valuing 20,000 shares, the court solely relies upon the current escrow of those 60,000 pursuant to S.C Code Ann. § 33-6-210. The escrow was required by the court due to the need to complete future services, *i.e.* achieve funding and construct the marina, in order to fulfill consideration for those escrowed shares. <u>See</u> <u>Ballard v. Roberson</u>, 399 S.C. 588, 733 S.E.2d 107 (2012). The court's reasoning is without merit as follows.

The escrow of the shares is inconsequential for purposes of valuation because Dr. Woodside's opinion assumes that all contractual obligations to fund and build were met with the further addition of 8 years of successful operation. (R. 256, lines 17-23) (Woodside's Report; R. pp. 601-722) Therefore, the court's reliance on the present escrow to justify its forfeiture of Appellants' shares for purposes of valuing Plaintiff's shares is illogical when the company value relies on contractual obligations being met in full. Here, Appellants and the Plaintiff agree. In memorandum and argument to the lower court, Plaintiff interjected the issue of whether his

20,000 shares represent 20% or 50% of the company. On this issue, Plaintiffs own Memorandum submitted prior to the hearing provides that "if the defendants are to receive the economic benefit of their escrowed shares for purposes of determining ownership percentages, in fairness [the company should] be valued under the hypothetical assumption that they had already done what they agreed to do in order to receive those shares." (R. pp. 92-107) As set forth above, Dr. Woodside's appraisal that was accepted by the lower court does assume that the development is funded, constructed and operational for 8 years. Given the assumptions of Dr. Woodside accepted by the court coupled with the Plaintiff's representations to the court, the issue of 20% or 50% is moot.[4]

Plaintiff's 20,000 shares should be valued as representing 20% of the value of Warpath. To do otherwise is *de facto* forfeiture of Appellants' 60,000 shares and a gross inequity. "A court of equity abhors forfeitures, and will not lend its aid to enforce them." Regions Bank v. Wingard Prop., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). For these reasons, the lower court's order should be reversed.

ii. The lower court's valuation of Plaintiff's 20,000 shares as 50% of the company is improper punishment and penalty.

Because the court's forfeiture of Appellants' 60,000 shares has no factual basis, defies logic and is inconsistent with the lower court's assumptions in reaching the overall company value, assigning a 50% value to Plaintiff's 20,000 shares is no more than punishment and penalty. "Equity does not favor ... penalties and will relieve against them when practicable in the interest of justice." Id.

In assessing value, the lower court was tasked with assessing "fair value". In reaching

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[4] The argument would certainly be different if Warpath was valued by the court in its present state, unfunded and not constructed. However, as it is valued as a fully funded, constructed and operational marina, there is no viable

value, "the ultimate issue is what is fair between the parties in each case." Hendley v. Lee, 676 F.Supp. 1317, 1327 (D.S.C. 1987). Fairness and equity is afforded to all parties, not just one. In this case, reality is that the project today sits with no funding and no ability to move forward. In reaching value and extracting his investment before all others, the value of Plaintiff's 20,000 shares receives the benefit of funding and construction in a time of tight credit markets, 8 years of successful operation and a generous sale of the business after a significant reduction in the business debt. These benefits come without having to encounter any of the risk or stress of successfully operating the venture. Penalizing the Appellants by *de facto* forfeiting the very interests they would earn by funding and building the project is not "fair value." It is a punishment and court imposed penalty without any legal or equitable justification. There is no place in this matter for penalty and punishment. The ramifications of such a policy run far beyond this contours of this case. For these reasons, the lower court's order should be reversed.

B. The lower court erred and caused a gross inequity in reaching its value by creating a fictional past event in order to arbitrarily increase the present value of Plaintiff's shares.

In order to further manipulate the value of Warpath to artificially inflate the value of Plaintiff's 20,000 shares, the court created a fictional past event to cause a 2.5 year shift back in Dr. Woodside's calculation. The particular fictional event was the invented start of construction on the Warpath marina in June 2010, as opposed to starting before the end of 2013 as assumed in Dr. Woodside's model. (R. pp. 15-22) Dr. Woodside's model accepted by the court sets the valuation of the financial condition of Warpath as of December 31, 2012. (R. pp. 601-722) On December 31, 2012, it was true then as it is today that Warpath was not funded and construction had not begun. As set forth above, in testimony and within the report of Dr. Woodside, in order

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arguments to ignore and de facto forfeit 60,000 shares to arbitrarily and inequitable increase the value of Plaintiff's holding.

to build a model to value Warpath through a discounted cash flow model, Dr. Woodside had to make a number of assumptions about the future of Warpath. [Id.] These included that Warpath would be funded and construction would begin before the end of calendar year 2013, that Warpath would be constructed at a given cost and on schedule, that Warpath would begin commercial operations within a given time period, that Warpath would perform in accordance with its *pro formas*, that Warpath would obtain favorable long-term financing, that Warpath would significantly pay down its debts over an 8 year time period, that Warpath would become profitable at a given time period, that Warpath would begin to make shareholder distributions at a given time period and that Warpath would be sold a generous amount at the end of 8 years. (R. p. 237, line 2-p. 242, line 15) [Id.] In generating the model, Dr. Woodside accepts the current condition of Warpath. Each of the assumptions made is as to the happening of a future event.

Plaintiff, on the other hand, sought to manipulate the timing of Dr. Woodside's December 31 valuation by creating a fictional construction beginning in June 2010 and a fictional 2.5 years of operation up to December 31, 2012. (R. p. 254, line 18-p. 255, line 5; p. 256, line 1-p. 257, line 22.) This is pure fiction that the court inexplicably, improperly and inequitably accepted. First, this is not a valuation of Warpath as of June 2010. The testimony of Dr. Woodside is that there was no valuation of Warpath done in consideration of the financial condition of Warpath as of 2010, as well as there was no consideration of the general economic conditions overall of the United States' economy or of the marina market specifically done as of 2010. Factually, there was no valuation of Warpath in 2010 done at all by anyone. Second, this is far beyond a rational or reasonable assumption. This is an absolute fiction. Warpath did not start construction in 2010 and there was factually no obligation for management to begin construction in 2010. Further, by accepting the fiction the court is imposing an obligation on management to begin construction in

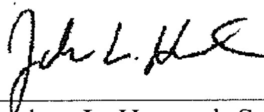
2010, which by implication means that they were improper in failing to do so. "The business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct." Dockside Assoc. Inc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). To claim management impropriety is a separate claim, involving evidence outside of the confines of this proceeding, potentially involves a right to a jury and most certainly implicates management's business judgment into this valuation hearing which is beyond the scope of the hearing and the evidence before the lower court. There has been no challenge to the decision to not build in June 2010, no inquiry into why construction did not begin in June 2010 and no such evidence exists that the decision was in any way improper such that the court can intervene. Last, while a court may choose when to value a business at a moment in time, the law provides that the financial condition is considered as is, where is at that fixed moment in time. The courts order assuming a fictional past event in order to manipulate the valuation violates all such notions of law and equity.

In summary, the only time period properly evaluated and evidenced before this court is the financial condition Warpath as is, where is and fixed as of the moment of December 31, 2012. The lower court's imposition of a fictional start of construction in June 2010 cannot be legally or factually supported, is an improper exercise of judicial authority and is inequitable. As such, for these reasons, the lower court should be reversed, its October 2, 2010 Order vacated, and this matter remanded for further consideration.

CONCLUSION

For the reasons set forth herein, the lower court's October 2, 2013 Order is unlawful and inequitable, therefore should be vacated and the matter reversed and remanded for further consideration.

Respectfully Submitted,



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November 17, 2014

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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,

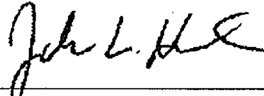
v.

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

CERTIFICATE OF COUNSEL

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

HAYNSWORTH SINKLER BOYD, P.A.



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PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the APPELLANTS' FINAL BRIEF and APPELLANTS' FINAL REPLY BRIEF were served upon all counsel of record on this the 2nd day of December, 2014, by depositing a copy in the United States Mail, postage prepaid addressed as follows:

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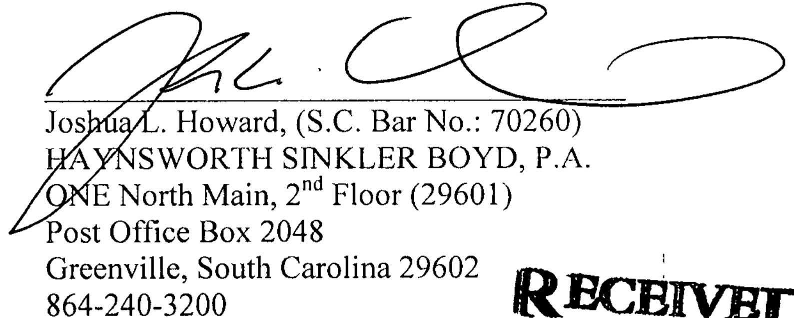

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