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 REPLY BRIEF

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This matter comes before the court on Appellants Tim Roberson, Rick Thoennes, Sr. and Rick Thoennes III's appeal of the lower court's order arising out of its August 6, 2013 hearing. Respondent submitted its Initial Brief of Respondent on June 19, 2014. Appellant's hereby reply as follows:

1. The Court must undertake a *de novo* standard of review.

For the reasons cited by Appellants in this appeal, the standard of review in South Carolina on appeal from a matter decided in equity is *de novo*. This is the long-standing law of South Carolina. Respondent asserts an abuse of discretion standard should be largely applied in this appeal. Respondent goes so far to suggest that an abuse of discretion standard should be accorded to matters of statutory interpretation and the application of law. Respondent cites no authority for this proposition and presents no case where such standard has ever been applied in the appeal of matter decided in equity. For this reason, Respondent's assertion that an abuse of discretion standard should be applied lacks merit and should be discarded.

2. Appellants' issues on appeal are all properly before court.

Respondent's assertion that Appellant's challenge to the court's imposition of a personal judgment is precluded by the prior appeal is without merit. Respondent twists and contorts Appellants' arguments on appeal in a concerted effort to squeeze Appellants' arguments into one they purport is precluded. The court should not entertain such efforts to avoid the issues properly raised in this appeal.

The court's May 3, 2010 order sets forth as follows: "[T]he court concludes 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, as set out in S.C. Code § 33-14-310(d)(4)". (May 3, 2010

Order; R. pp. 1-14) The remedy of "buy-out" is one enumerated by statute. Appellants do not challenge the ability of the court to order a buy-out as it did in 2010. In fact, in Appellant's opinion, an appropriately considered and well-reasoned buy-out could have been fashioned in this matter as suggested by Appellant's Initial Brief. Appellants do not challenge that the court had the authority to order that one or more shareholders and the corporation participate in the buy-out, as it did. Appellants challenge the ability of the court to order a buyout that is (a) secured by a personal money judgment of the company and its shareholders, (b) order a buyout with no regard to whether it can be funded, (c) and order a buyout that leaves the corporation in perpetual limbo with no consideration of its future ability to survive. Not one of these issues presented itself within the 2010 order such that they are the law of the case. As these matters are only now before the court as they arose from the trial court's October 2, 2013 Order (R. pp. 15-22), they are properly raised herein. Respondent's assertion that they are precluded is therefore without merit and should be disregarded.

3. Respondent's suggested interpretation of S.C. Code Ann. §33-14-310(d) renders an absurd result.

With regard to the court's ability to impose a personal money judgment in this matter, Respondent's interpretation in section II of his Initial Brief lacks merit for the reasons expressed in Appellants' Initial Brief. Further, the court need not stretch so far to graft such authority as suggested by the Respondent. If S.C. Code Ann. § 33-14-310(d) can be so broadly interpreted as suggested by the Respondent then most certainly the court may, by analogy, consider how the legislature attended to the same issue in S.C. Code Ann. § 33-18-420 section of the Statutory Close Corporation Supplement, which specifically provides that "if the purchase is not complete

in accordance with the specified terms, the corporation is to be dissolved...". §33-18-420(b)(5). "[T]he goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." Davis v. Sch. Dist. of Greenville Cnty, 375 S.C. 39, 45, 647 S.E.2d 219, 222 (2007). With regard to the issue of judicial dissolution, the Statutory Close Corporation Supplement mirrors the Business Corporation Act in nearly all respects. However, as set forth above, the Statutory Close Corporation Supplement goes one step further and fills in the gaps and ambiguities left within §33-14-310(d) of the Business Corporation Act. A finding of oppression is the same under the Statutory Close Corporation Supplement and the Business Corporation Act. In this case, it would render an absurd result for one to permit a personal money judgment to secure a buy-out and the other not.

4. Respondent is not entitled to a money judgment against either the individual shareholders or the corporation to secure the buy-out.

Respondent suggests in Section II of his Initial Brief that Appellants argue that the judgment should be only against the corporation and not the individual shareholders. Respondent misinterprets Appellants' assertion. Personal judgment includes the corporation also. Appellants assert that ordering a judgment, whether against the individual shareholders and/or the corporation, to secure a buy-out is an improperly applied, inappropriate, inequitable and does not harmonize with analogous law or the aims of the judicial dissolution provisions of the Business Corporation Act.

5. **The court may enforce the buy-out by use of its power to dissolve**

Respondent suggests in Section II of his Initial Brief that Appellants' opposition to the imposition of a judgment to secure the buy-out leaves the court with no means of enforcement. That is not true. The statute upon which Respondent seeks a remedy is within the broader section entitled "Judicial Dissolution". Section 33-14-310 is entitled "Procedure for judicial dissolution". The court's power to dissolve is the means by which the court may enforce the buy-out. By analogy, dissolution is expressly provided as the means of enforcement in the Close Corporation Supplement as quoted *supra* in S.C. Code §33-18-420(b)(5).

6. **The court's order and respondent fail to give any consideration to the equities due the corporation.**

In raising the question of by what means the court may enforce the buy-out, Respondent seeks to answer the wrong question. The 90 days expressed in the trial court's October 2, 2013 Order passed and the court's buy-out remedy has failed. The real question is: How should the court address the state of limbo that the corporation and shareholders now find themselves? At present, the shareholders are together, but not entirely. Respondent has one foot in and one out. He has a buy-out ordered secured by money judgment that cannot be fulfilled yet retains his shares. The corporation and the shareholders that remain cannot function under the court's order. There is no future and no means to move forward. The court's order gave no due consideration to the ability of the corporation to thrive and survive.

In the second to the last paragraph of Respondent's section IV, the respondent sums up the difficulty created by the court's October 2, 2013 Order (R. pp. 15-22). The corporation's time is running short. Even excluding the individual appellants, it was incumbent upon the court

to consider not only the singular desires of the respondent, but the interests of the corporation. It is the corporation's interests that have never been considered by the court. The respondent focuses entirely upon the inequity dealt him and on the inequitable conduct of the individual shareholders. By ordering the buy-out, the court was presumably choosing to permit the corporation to survive. In making that decision and ultimately fashioning a remedy, the corporation's status had to be considered. It was not. An orderly buy-out based on the reality of the circumstances of the corporation and its shareholders in August 2013 was required. The court did not consider the interests of the corporation or undertake a reasoned approach as requested by Appellants. As such, the arbitrary October 2, 2013 decision with no due consideration of its consequences now leaves the corporation in a limbo that cannot be resolved.

7. This court is entitled to a *de novo* review the appropriateness and reasonableness of the terms of the trial court's ordered buy-out.

In section IV, Respondent asserts that it was the court's discretion to set the time frame for the buy-out and the court is not obligated to a time frame as suggested in the matter of Kaplan v. First Hartford Corp., 671 F.Supp.2d 187 (D. Me. 2009), cited by Appellants. First, it is the trial courts duty in equity to set reasonable terms for an ordered buy-out. It is the appellate court's right to undertake a *de novo* review of the terms of the court's order for appropriateness and reasonableness. Second, appellants do not cite Kaplan as controlling authority. Kaplan presents a reasoned alternative for this court to consider in its *de novo* review of the matter before it. Second, it is not up for debate whether the 90 days ordered was reasonable or not. The 90 days has passed. The buy-out has failed. This was the result suggested by Appellants to Judge Miller at the hearing in August 2013 and in subsequent filings. The court gave no due consideration to the actual facts before it in fashioning the buy-out. The court gave no due

consideration to the Appellants request to be financially examined as was performed by the court in Kaplan.

8. The trial court clearly adopted Dr. Woodside's opinion of value in finding a total company value of $7,178,594.

In support of section V of Respondent's Initial Brief, Respondent premises its entire response in opposition on the claim that Judge Miller did not adopt the $7,178,594 July 2010 valuation set forth by Dr. Woodside. This assertion is misleading and is patently false. On September 25, 2013, the parties received an email from Judge Miller's law clerk stating

> Judge Miller would appreciate it if Mr. Lightsey would prepare an order in the above referenced case regarding the valuation. Judge Miller would request in the order that Dr. Woodside's valuation of July, 2010 stating a Total Firm Value as $7,178,594 be used. He would like to set a valuation of plaintiff's shares as 50% of that value. Therefore, $3,589,297 if my calculation is correct (please check).

(September 25, 2013 Email; R. p. 734). Given the court's email, the order drafted by Respondent's counsel was required to adopt Dr. Woodside's July 2010 valuation. The Respondent cannot now assert that the order his counsel drafted does not meet the court's requirements they were bound to meet. The issues presented by the adoption of the Dr. Woodsides' July 2010 valuation were placed before the court on Appellants' motion for reconsideration. (Motion for Reconsideration, October 11, 2013; R. pp. 139-142) The court denied Appellants' motion thereby declining to alter or amend its order. (R. p. 23) Respondent cannot now in good faith deny that the court required its counsel to draft an order adopting Dr. Woodsides' July 2010 valuation.

9. Appellants accepted, but never agreed with Dr. Woodside's $873,000 valuation of Respondent's 20,000 shares.

In support of Section V, Respondent asserts that Appellant Roberson agreed with a valuation greater than that of Dr. Woodside's valuation of $873,000 for Respondent's shares. This is without merit. Roberson testified as follows:

> Q. Do you recall what the amount was that Woodside put on Mr. Ballard's shares?
>
> A. Yes, I believe it was $873,000.
>
> Q. Do you think that from your prospective that was hire(sp.) or lower number than you expected?
>
> ***
>
> THE WITNESS: You're asking me what's in my head okay and I thought it was high and I just paid him a million dollars. If you do the math, it was twice as high, however, I want this behind me and I'm thinking we agreed to have the appraiser appraise it and I accepted it.
>
> (R. pp. 221-222)

Mr. Roberson believed Dr. Woodside's evaluation of $873,000 to be twice as high as he expected based on the $1,000,000 he believed he had paid for 80% of the company in 2007.

10. The July 2010 valuation relied upon by the trial court in reaching the valuation in its October 2, 2013 order is based solely on *ex parte* derived information and is not the independent assumption of Dr. Woodside in reaching his independent evaluation.

In support of Section V, Respondent improperly cites to Dr. Woodside's May 9, 2013 letter setting out the July 2010 valuation as if the assumption of a July 2010 start date was Dr. Woodside's. This was not Dr. Woodside's assumption. Dr. Woodside's May 9 letter specifically provides "Based on our analysis, described in the Summary Report dated April 29, 2013 ..., we have concluded that a reasonable estimate of the fair market value of 20,000 shares or a 20% in Warpath Development, Inc. as of December 31, 2012 is $873,000." (Woodside's May 9, 2013 Letter; R. pp. 723-725). In truth, Dr. Woodside's May 9 letter[1] and July 2010 evaluation was an *ex parte*[2] procured number premised on a gross falsity that was designed by Respondent to do no more that artificially inflate the stock value beyond the bounds of reasonableness.

11. The assumption of a false historical start date of July 2010 to artificially inflate value is grossly inequitable and an improper infiltration of business judgment.

In support of Section V, Respondent asserts that while Dr. Woodside's May 9, 2013 letter may be supported on a false premise, Dr. Woodside's $4.4 million calculation was also based on

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[1] Dr. Woodside's specifically provides that the May 9 letter "should not be referenced or used in any manner without the Valuation Report dated April 29, 2013." (Woodside's May 9, 2013 Letter; R. pp. 723-725)

[2] Q. Let's go back to the May 9th supplement and Mr. Lightsey indicated he made that request of you. Do you recall that?

A. Yes.

Q. How was it made? Was that made by phone, email?

A. I think both if I recall. I don't know initially, but I know we talked about it on the telephone just so I understood and got some clarification of just what he was asking for.

Q. Was [Appellants' counsel] on that phone call or those emails, do you recall?

A. No.

(R. pp. 254-255)

a hypothetical event – the securing of financing and start of construction in 2013. Respondent's assertion merely proves Appellants' point. Dr. Woodside's' assumption of future events, provided they are reasonable, in rendering value are accepted means of valuation. A distinction is drawn between a reasonable assumption of future events and the invention of a past that is false and fantasy. The assumption of a false history renders a gross inequity and is taken in violation of the law of business judgment that the Respondent made no effort to counter.

12. The court cannot equitably ignore the shares in escrow in concluding value.

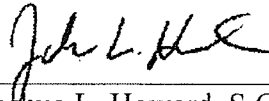
For the reasons set forth in Appellants' Initial Brief, Appellants assign error to the trial court's willful forfeiture of Appellants' escrowed 60,000 shares in computing its valuation. It is entirely inequitable for the court to assume events in reaching the overall value that would cause the shares to be released from escrow, but then ignore those very shares in otherwise reaching the proportionate value of Respondent's shares.

13. Any assertion of Respondent not specifically addressed within this reply is nevertheless deemed opposed and should in no way be deemed accepted or admitted by the Appellants.

CONCLUSION

For the reasons set forth herein and in Appellants Initial Brief, the trial court's October 2, 2013 order should be reversed and the matter remanded for further consideration.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

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

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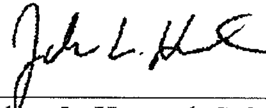

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