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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Appellate Case No. 2012-212146

Joseph E. Mason, Jr., Petitioner,

v.

Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc., and Irwin Levine, Respondents.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioner Joseph E. Mason, Jr. ("Son") petitions the Court for a writ of certiorari to review the opinion of the South Carolina Court of Appeals filed in this case on March 4, 2015. (*Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405, 2015 S.C. App. LEXIS 34 (Ct. App. 2015)).

This case raises important issues of corporate law, including the rights and remedies provided by the South Carolina Business Corporation Act of 1988, S.C. Code §§ 33-1-101, *et seq.* (the "Corporate Code"). It arises from a dispute between the shareholders of the family business, Mason Holding Company, Inc. ("the Company"). Son devoted over 24 years of his life building the Company from scratch until the

termination of his employment in 2008, at which time the Company had annual sales of almost $7 million. Since the termination of his employment, Son has been deprived of all economic value of his ownership in the Company, while the remaining shareholders have received compensation in excess of market value for their services, raises, bonuses, and lavish benefits.

In its March 4, 2015 opinion, the Court of Appeals concluded that Son was not entitled to a forced purchase of his shares or other relief under the judicial dissolution provisions of the Corporate Code and affirmed the special referee's rulings that Son was not entitled to additional shares in the Company, was not entitled to recovery under his tort claims, and that the Mason Respondents (Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and the Company, collectively) were entitled to recover under their counterclaims and to pursue a future claim against Son for damages relating to the Company's tax returns. Son respectfully submits that the Court of Appeals' opinion conflicts with prior precedent of this Court and the provisions of the Corporate Code and erred in the application of important principles of law.

CERTIFICATION BY COUNSEL

The undersigned counsel for Joseph E. Mason, Jr. certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals in this case by Order filed on April 29, 2015.

QUESTIONS PRESENTED

1. The Court of Appeals concluded that Son did not address on appeal the special referee's finding that Son's suit was improper because it was not filed as a derivative action. Did the Court of Appeals err in reaching this conclusion in light of the

detailed and specific factual and legal arguments in Son's Final Brief of Appellant that the claims were appropriately brought by Son as direct claims?

2. Did the Court of Appeals err in upholding the special referee's finding that Son's suit was improper because it was not filed as a derivative action where the damages sought by Son were for his personal loss of income and for his personal loss of value of his shares when no other shareholder sustained similar losses and in light of the judicial dissolution provisions of the Corporate Code's remedy of a direct claim for a forced buyout of an individual shareholder's shares?

3. Does the Court of Appeals' opinion upholding the special referee's finding that Son's suit was improper because it was not filed as a derivative action conflict with the holdings in *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001), South Carolina Code Sections 33-14-310(d) and 33-18-400 to -430, and other authorities?

4. Did the Court of Appeals err in concluding that Son was not entitled to a forced buyout of his shares of the Company or other relief under the Corporate Code when he has been deprived of all value of his shares since 2008?

5. Did the Court of Appeals err in concluding that Son was precluded from recovery for relief under the judicial dissolution provisions of the Corporate Code due to unclean hands or related equitable doctrines thereby allowing Respondents to deprive Son of all value of his shares of the Company?

6. Did the Court of Appeals err in concluding that Son was precluded from recovery for relief under his tort claims due to unclean hands or related equitable doctrines when Son brought legal claims against Respondents rather than derivative claims?

7. Pursuant to the judicial dissolution provisions governing South Carolina corporations and applicable case law, including *Santee Oil Co. v. Cox*, 265 S.C. 270, 217 S.E.2d 789 (1975), is the fair value of the Company $3,673,000, and is the fair value of Son's shares in the Company his proportionate interest in the Company?

8. Did the Court of Appeals err in giving deference to credibility determinations in orders drafted by opposing counsel without specific direction from the special referee?

9. Did the Court of Appeals err in affirming the special referee's holding that Son should not recover on his tort causes of action or be awarded his attorneys' fees and that the Mason Respondents did not breach their fiduciary duties when the evidence demonstrates, among other things, that they failed to take action for over four years after Son raised concerns regarding the Company's problematic tax and accounting practices, continued to employ the incompetent accountant that previously represented that those practices were appropriate, paid themselves excessive compensation and benefits, and deprived Son of all economic value of his ownership interest in the Company?

10. Did the Court of Appeals err in affirming the Special Referee's holding that Respondent Levine did not aid and abet the breach of fiduciary duties by the Mason Respondents when the evidence demonstrates, among other things, that Levine acknowledged, despite his prior representations to the contrary, that his accounting and tax advice was improper, that he continued as the Company account (as well as the owner of an interest in an affiliated Company) but did not take action to properly resolve the problems, and that he was openly hostile and took other actions to retaliate against Son because he raised those issues?

11. Did the Court of Appeals err in concluding that Son was barred under the two-issue rule from pursuing his claim that he owns an additional 20% of the shares of the Company because it was not specifically pleaded when the special referee made no such specific holding, the issue was a supplemental development after the filing of the amended complaint because shares were to be delivered annually, the issue was litigated in discovery, tried by consent, and no opportunity was given Son to move to amend to conform to the evidence pursuant to Rule 15(d), SCRCP or otherwise?

12. Did the Court of Appeals err in ruling that Respondents were entitled to judgment against Son for reimbursement of certain fees of prior counsel when Son solicited the subject advice while President of the Company, the advice concerned the Company's taxes, and the advice was not disputed and ultimately relied and acted upon by the Company (although Respondents waited several years)?

13. Did the Court of Appeals err in upholding a judgment related to funds for casings when the practice was longstanding, approved by the Mason Respondents, and, after entering into the father's "retirement" agreements, the funds were shared with Son's sister?

14. Did the Court of Appeals err in upholding the special referee's ruling that the Mason Respondents could maintain a future action against Son for damages based on the Company's tax returns on the grounds that the amount of damages could not be determined because the IRS had not indicated the amount due in back taxes where this remedy would otherwise be time-barred, this remedy was not sought before or during trial, the Mason Respondents were indisputably on notice of the potential claim since 2007, the reason the amount the IRS would require to be paid was unknown was because

the Mason Respondents elected not to inform the IRS until more than 3 years later in 2011, and the amount due to the IRS substantially increased as a result of that period of the Mason Respondents' intentional failure to report?

STATEMENT OF THE CASE

The shareholders of the Company are Son; his parents, Catherine L. Mason, Joseph E. Mason, Sr.; and his sister, Kathy M. St. Blanchard. Joe Sr., Catherine, and Kathy are also current officers of the Company.

Son initiated this case by filing his complaint in the Horry County Court of Common Pleas on August 5, 2008. (R. pp. 1-13.) He asserted six causes of action for breach of contract, breach of fiduciary duty, civil conspiracy, relief pursuant to the statutory judicial dissolution provisions pertaining to South Carolina corporations, wrongful termination of employment – constructive discharge, and wrongful termination – violation of public policy. He named as defendants the Company and the other shareholders of that entity (the Mason Respondents). The Mason Respondents filed an answer and asserted counterclaims for alleged breach of fiduciary duty and conversion on August 28, 2008. (R. pp. 14-24.)

On September 23, 2009, Son filed an amended complaint (R. pp. 31-45) that added Irwin Levine (the Company accountant and part-owner of one of the affiliated operating entities) as a defendant and added a seventh cause of action against him for aiding and abetting breach of fiduciary duty. The Mason Respondents and Levine are collectively referred to as "Respondents." On October 13, 2009, the Mason Respondents filed an answer and reasserted their counterclaims in response to the amended complaint. (R. pp. 46-58.)

This case was referred with finality to Ralph P. Stroman, Esquire, as Special Referee. (R. p. 82.) This case was tried without a jury during the week of November 14 through November 18, 2011.

At the conclusion of the trial, Special Referee Stroman asked for proposed orders from all parties without providing any guidance or direction with regard to the content. (R. pp. 750-752.) Special Referee Stroman subsequently granted judgment in favor of Respondents and against Petitioner by executing without any change the two proposed orders submitted by counsel for Respondents, which orders were filed on January 20, 2012.

The Final Order with regard to the Mason Respondents (the "Final Order") granted judgment in favor of the Mason Respondents as to all causes of action asserted by Son and granted judgment in favor of the Mason Respondents and against Son on the Mason Respondents' counterclaims in the total amount of $29,017.98.[1] (R. pp. 92-117.) The Final Order also held that the Mason Respondents could pursue a later claim against Petitioner for damages relating to the filing of false corporate tax returns. (R. p. 117.) The separate final order as to Levine (the "Levine Order") granted judgment in favor of Levine and against Son as to the cause of action against Levine. (R. pp. 118-124.)

Son timely filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP dated January 27, 2012, as to the finding and conclusion relating to a future claim against Son for payment of the Company's taxes (R. pp. 125-126), and that motion was denied by order received by Son's counsel on June 1, 2012. (R. pp. 127-128, 130.) This appeal followed.

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[1] Petitioner agreed to dismiss his claim for breach of contract at the close of his case during trial. (R. p. 570.)

STATEMENT OF FACTS

The Company, a statutory close corporation without a board of directors (*see* R. p. 839), wholly owns four subsidiaries that operate tire and auto service stores in four locations. (R. pp. 243-244, 1140.) In addition, the Company owns 48% of another entity that operates a tire and auto service store in a fifth location. Respondent Levine now owns the remaining 52% of that entity. (*Id.*)

Son left an excellent job with Ryder Truck Rental and moved from Florida to Myrtle Beach in about March of 1984 to start the Company. (R. pp. 237-239.) Son served as president of the growing Company for many years until October 24, 2007, and was employed by the Company until July 2008. (R. p. 697.) He generally worked around 12 hours per day Monday through Friday, five hours on Saturday, and often worked on Sunday. (R. pp. 244-245.) The Mason Respondents acknowledge that Son did an excellent job of managing and growing the business until his termination in 2008. (*See* R. pp. 712, 729-730, 789 (Son "has done an excellent job in making the company money"), 882 ("He's done a fantastic job").)

At Joe Sr.'s suggestion, Levine, who knew Joe Sr. and Catherine in Florida, provided accounting services to the Company for many years. (R. pp. 464-465, 1294.) The Company grew throughout the 1980s, 1990s, and into the 2000s, eventually operating the five tire and auto service stores. (R. pp. 241-242, 1140.)

In 1998, the Company structure changed. Mason Holding Company, Inc. was formed as the holding company for the various growing Mason Tire entities, all of which were consolidated under the holding company banner. (R. pp. 253-254.) In 1998, the 1,000 total shares in the Company were held as follows: Joe Sr. 520, Catherine 160, Son

160, Kathy 90, and Ozzy[2] 70. (R. p. 756.) Within several years, Joe Sr. sought to put together a plan to sell his shares back to the Company, which plan changed to a "retirement plan." (R. p. 1290.) Joe Sr. and Levine were the primary architects of Joe Sr.'s retirement package, along with Attorney Ed Kelaher and some input from Son.[3] (R. pp. 466-474, 801, 804-805, 808-809, 810-812.). With specific directions from Levine, Mr. Kelaher changed the structure of the retirement package to include three agreements, all dated on or about January 1, 2003. (R. pp. 473-474, 808.)

The agreements provided considerable benefits to Joe Sr. and his wife, Catherine, including a salary and significant benefits. Further, the Company executed an additional lease to an entity owned by Joe Sr. and Catherine for the location of one of the Company's retail locations, even though the store was already the subject of an existing lease. (R. pp. 815-825, 1295-1296.) The extra lease simply characterized additional compensation to Joe Sr. as rent so that certain employment taxes or capital gains taxes would allegedly not be due. (R. pp. 475-476.)

The parties also entered into a letter agreement pursuant to which Joe Sr. and Catherine gave their "promise, commitment, and absolute and unfailing word" that they would make a "gift" of their shares in the Company to Son and Kathy in certain installments over the period ending on December 31, 2011. (R. pp. 813-814, 1293.) The letter agreement recites that it grants the unusual consideration to Joe Sr. and Catherine of the right to designate the Certified Public Accountant for the Company. (R. pp. 808-809,

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[2] Ozzy refers to Oswaldo St. Blanchard, Kathy's former husband.

[3] Kelaher noted that the final arrangement was unusual, and he expressed serious concerns about how it would be viewed by the IRS, the courts, or other interpreting bodies. (R. pp. 808-809.) Kelaher's notes and correspondence further show the primary role Levine played in crafting the arrangement. (R. pp. 801, 804-805, 808-809.)

813-814, 1293.)[4] As a consequence, Joe Sr. and Catherine arranged to receive substantial benefits and payments over the course of many years and to divest themselves of their shares of the Company, while characterizing the conveyance of the shares as a gift. (R. pp. 474-480.) As Levine testified, this arrangement improved the tax liability landscape for the Company, Joe Sr., and Catherine, and the three documents comprising the "retirement package" were structured according to his advice. (*Id.*) Levine also testified that he did not consider the incorrect characterization of the various payments as salary, rent, and a "gift" to be inappropriate. (R. p. 476.) The Mason Respondents' own expert, Laura DuRant, CPA, however, testified that mischaracterizing the nature of these payments to avoid taxes was unlawful. (R. pp. 449-450.)

After Joe Sr.'s stock redemption and retirement package was in place, he and the other shareholders agreed that Son and his sister, Kathy, should evenly split the remaining "extra money" or the profits of the business. (*See, e.g.*, R. pp. 274-286, 492-493, 507-508, 733-735, 830.) One way in which the "extra money" was split was by Son and Kathy having equal personal expenses paid by the Company. Another way was to divide certain cash on occasion. The cash revenue would be reflected in the books accurately, but then an invoice for "casings"[5] may be created and Son would split the

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[4] Levine has never been a CPA. Levine acknowledges that it was unlawful to hold himself out as a CPA, but he signed Company documents as a CPA, was involved with this "gift" agreement referring to the appointment of a CPA, and never mentioned that he was not a CPA when other correspondence and Company documents referred to him as a CPA. (*See, e.g.*, R. pp. 461-462, 793, 801, 804-805, 808-809, 829-830, 841.)

[5] A casing is used commercial truck tire that has had the remaining old tread removed before it is recapped with new tread. Joe Sr. dealt with the commercial side of the business and admits to selling used commercial tires and dividing the cash with his family members before his retirement package was in place. (R. pp. 1301-1302.) Son's sister generally denied this process but admits taking cash on occasion and testified that she thought they were gifts from her brother. (R. p. 624.)

cash with Kathy after taking into account any imbalance of personal expenses. (R. pp. 274-285, 829-830, 909.)

The Company operated under this arrangement for several years. In addition to guiding Joe Sr.'s retirement plans, Levine provided regular accounting advice to Son as president of the Company, as well as other members of the Mason family—both for the business and for their personal finances. (R. pp. 464-465.) All of the Mason family members relied on Levine to provide tax and accounting advice. (R. pp. 477-478, 1311.) One topic of Levine's accounting and tax advice to the Company was how to deal with the Company's continuing issues with understated inventory. (R. pp. 483-485; *see* R. pp. 779, 780, 837, 851.) The shareholder minutes, annual valuations prepared by Levine, and other trial exhibits demonstrate that the understated inventory problem was well known by all of the shareholders and Levine. (*See* R. pp. 779, 780, 802-803, 806-807.)

Levine advised Son and the other family members that it would be appropriate to "avoid" tax liability with regard to the understated inventory by having the Company "borrow" a total of $440,000 from Son and Kathy. (R. pp. 483-484, 1303-1305.) Although the Company executed promissory notes to both Son and Kathy for $220,000 each (R. pp. 827, 828), it is undisputed that neither Son nor Kathy ever lent the Company the money. (R. pp. 267, 647.) Levine showed these "loans" on the accountings and tax returns of the Company, thereby reducing the Company's tax liability. (R. p. 486.) Levine admitted later and at trial that he knew that what he was doing was fraudulent at the time he was doing it, but he assured Son and other members of the family that this tax treatment was appropriate as long as physical notes existed to provide a paper trail for the "loans." (R. pp. 486-489.) The Mason Respondents' own experts describe Levine's

advice as "not competent" (R. p. 450) and "fraud." (R. p. 458.) The Final Order characterized Levine's conduct as "professionally inappropriate." (R. p. 101, ¶ 18.) The Company's problems with understated inventory continued to accrue during tax years 2003 through 2006. (R. p. 440.)

Although Son signed the Company's tax returns in his capacity as president through tax year 2006, he relied on Levine to provide sound accounting and tax advice in conducting the Company's business. (R. pp. 365-367.) Prior to the fall of 2007, Son simply trusted that Levine was providing legal and legitimate ways of handling the Company's taxes and accountings. (R. pp. 308-309.) Son had been given no reason to believe otherwise, as Levine had assured him that everything was appropriate. (R. pp. 485-486.) Additionally, issues surrounding the Company's tax situation—including inventory issues and related "loan" issues—were fully disclosed and discussed among the family members as such events occurred. (R. pp. 560-561, 806-807, 827.) Family members, including Son, testified that they did not understand the illegality of and adverse impacts of Levine's "loan" scheme on the Company's tax liability at the time the scheme began. (R. pp. 266-269, 315, 366-367, 730-732.)

In August 2007, Son sought legal advice for various issues with the Company. (R. p. 307.) In the course of this advice, Son came to understand that the tax and financial practices of the Company—perpetuated and ratified by Levine and accepted by all the family members for years—were highly improper and needed to be corrected. (R. pp. 308-309.) Son, through counsel, immediately brought his various concerns to the attention of the Mason Respondents, their counsel, and Levine. (R. pp. 844-845, 846-

847, 848-850.) Although Son noted concerns with multiple aspects of the Company, the most pressing and urgent was the tax issue. (*Id.*)

Son's concerns culminated in a meeting of all the shareholders and officers of the Company and its wholly-owned subsidiaries on October 24, 2007. (R. pp. 856-890.) At this meeting, Son, Kathy, Joe Sr., and Catherine all agreed that the tax problems needed to be corrected immediately, that it would be improper for Levine to continue as accountant for the Company, and that the Company would retain Tim Duncan, CPA, to assume responsibility for the Company's accountings and tax returns. (R. pp. 871-873.) Also at this meeting, however, the Mason Respondents voted to remove Son from his position as president. (R. pp. 879-881.) Joe Sr. was elected to serve as president. (*Id.*). Son became vice president, and he no longer had responsibilities for handling financial matters for the Company. (R. pp. 544, 883-884, 895.) Joe Sr. and Levine have signed every tax return filed by the Company and its subsidiaries since that meeting on October 24, 2007, when the significant problems were raised by Son and fully discussed by the Mason Respondents. (R. pp. 636-637.)

The Mason Respondents soon began to reverse course from the positions they expressed in the October 24, 2007 meeting. The draft proposed amended tax returns for the years 2003-2007 were never filed by Joe Sr. as president of the Company. (R. pp. 510, 938-944, 945-946, 947-950, 951-954.) Levine remained the accountant for the Company. He prepared tax returns (signed by Levine and Joe Sr.) for the tax years 2007 and 2008 that over-report income for those years in an attempt to "correct" the under-reporting of income for earlier years. (R. pp. 511-512, 955-978, 979-994.) The Mason Respondents' own expert opined that the returns filed in 2007 and 2008 did not properly

correct the problem because, among other reasons, they did not address interest or penalties due. (R. p. 459.) Joe Sr., as president of the Company, did not file amended tax returns until after the trial of this case began in November 2011, and he has signed off on the recent tax returns after being put on notice of Levine's improper, unethical, and illegal practices. The Final Order attributes the subsequent actions as somehow the fault of Son. (R. pp. 107-109, 117.) The Court of Appeals specifically noted the credibility determinations in favor of Respondents set forth in the Final Order drafted by counsel for Respondents and appears to have relied on those determinations in reaching its conclusions. (2015 S.C. App. Lexis 34 at *5, *11, *14, *31-32, *34, & *36.) Among other things, however, the evidence is undisputed that Son did not draft, discuss the content of, or even see the alleged draft amended returns or the returns filed in subsequent years. (*See, e.g.*, R. pp. 316-317, 539, 544, 565, 743, 744-745.)

The relationships between the Mason family members involving the management of the Company had been stressed and dysfunctional for over a decade. (R. pp. 703-704.) Troubling events during the several years ending in Son's termination with the Company simply exacerbated the unhealthy situation.

Even before Son became aware of the impropriety of Levine's accounting and financial practices, actions of the various defendants were harmful to the Company. In 2004, Ozzy (Kathy's husband and a Company employee at the time) suffered a debilitating injury in a motorcycle accident while riding in a charity event, which left him paralyzed. (R. pp. 270-272.) Ozzy filed a workers' compensation claim for the injuries sustained in the accident. (R. pp. 831-835.) Joe Sr. provided a deposition in the course of the workers' compensation matter wherein he testified that Ozzy was acting in the course

and scope of his employment at the time of the accident. (R. p. 832.) Joe Sr. asked Son to provide similar testimony, but Son refused on the grounds that such testimony in support of the workers' compensation action would be perjury. (R. p. 273-273-A.) Further, Joe Sr. testified in his deposition in this case that he did not personally see Ozzy at the Mason Tire store on the morning of the accident (R. pp. 834, 1299-1300), but in shareholder minutes of Mason Tire, he represented that he had personally seen Ozzy that morning. (R. pp. 829-830.) Although Son was the actual and acting president of the Company, Joe Sr. also testified in his deposition in the workers' compensation proceeding (apparently so that Son's deposition would not be taken) that Joe Sr. was the "managing partner" of the Company. (R. p. 831.)

The Final Order drafted by counsel for the Mason Respondents included a finding that Son's testimony on this topic was not credible (R. pp. 102-103), but the above evidence demonstrates inappropriate representations by Joe Sr. to the Workers' Compensation Commission. Moreover, this workers' compensation issue caused problems in the management of the business of the Company. Joe Sr. and other family members resented Son's refusal to cooperate in the scheme, displayed open hostility towards him, and began retaliating against him. (R. pp. 300, 545-547, 564, 736.)

Son made several unsuccessful attempts to resolve the out of control situation by offering either to buy the other shares from his family members or to sell them his shares. (*See, e.g.*, R. pp. 305-307, 318-321, 327-328, 899.) After this frustrating series of events and discussing the situation with his father, his father very tellingly suggested that Son quit working for the business. (R. p. 321.)

At his father's suggestion, Son also sought a third party buyer for the Company. Son found an interested buyer in Steve Allison, who owned a business with an office next to one of the Mason Tire stores and was familiar with the Company. After being informed of the basic financial situation, he made a proposal to Joe Sr. to buy the Company for $3 million. Joe Sr. told Allison the family was not interested. (R. pp. 287-295, 324-326, 719-721, 900.)[6] Apparently, Joe Sr. thought the offer was insufficient in light of the Company's assets and financial performance, but he did not attempt to negotiate for a higher price. (R. pp. 719-721.)

Son's authority within the Company was continually and regularly undermined by the Respondents after Son brought the financial irregularities to their attention in early fall 2007. He was demoted from his position as president, his duties were reduced, his instructions were undermined, he had no access to bank accounts, he was regularly yelled at and berated by his family members, and the other family members often met without Son. (R. pp. 309-310, 313, 322-323, 339, 355, 357-358, 370, 375-376.) Things came to a head when Son noticed that a Company bookkeeper had discrepancies in her paycheck regarding a supplemental insurance policy that indicated that the employee was stealing money from the Company. (R. pp. 329-332.) With Joe Sr.'s support and on his request, Son terminated the employee. (R. pp. 333-334.) The next day, Joe Sr. told Son that terminating the employee was wrong, and he re-hired the employee over Son's objection. (R. pp. 335-337.) When the employee returned that day with the other Mason Respondents, she made a rude gesture to Son by shooting him "the bird." (R. pp. 337-

[6] After this proposal was rebuffed, Allison, along with other investors, purchased 43 Jiffy Lube stores in Florida. (R. p. 287.) Joe later went to work for that business.

338.) This employee remains a Company employee in the bookkeeping department and often works with Levine on accounting and money-management issues. (R. p. 1307.)

Understandably, Son found the entire situation intolerable and, consequently, acknowledged his constructive discharge from the Company on July 30, 2008 (R. p. 901), and filed this lawsuit. Since that time, Son has had no participation in any aspect of the Company. Moreover, no shareholder meetings have been held and no dividends have been paid. (R. p. 412.) Son has not received any financial benefit from the ownership of his shares in the Company since the termination of his employment in 2008. (*Id.*) On the other hand, the other shareholders have received compensation in excess of their market value (*see, e.g.*, R. pp. 423-426, 433-435, 638-639, & 653-654), raises, bonuses, and other financial benefits, such as new cars, the value of which has not been extended to Son. (R. pp. 1309-1310). Since Son's constructive discharge, the Mason Respondents have allowed the Company's profitability to decline while other companies in this business have enjoyed increasing profits. (R. pp. 295, 654-655, 1079.) The Mason Respondents have continued to ostracize and humiliate Son over the past several years. (*See, e.g.*, R. pp. 340-342, 746, 748-749.)

ARGUMENT

I. Son properly brought his claims in his individual capacity rather than in a derivative capacity, and he properly raised this issue on appeal in response to the special referee's ruling to the contrary.

The Court of Appeals erred in affirming the special referee's ruling that Son's claims should be dismissed because they should have been brought in a derivative capacity rather than in Son's individual capacity, and it erred in concluding that Son had not raised the issue on appeal.

Some claims have dual attributes of both direct and derivative claims. *See In re Activision Blizzard, Inc. Stockholder Litigation*, 2015 Del. Ch. Lexis 140, *41-42 & *64-77 (Del. Ch. May 20, 2015). Son brought his claims in his individual capacity rather than in a derivative capacity. (*See* Amended Complaint, R. 31-45.) **The only damages he sought were unique to him – his loss of compensation as an employee of the Company and the deprivation of the value of his shares.** (*See*, R. 1141-1150-E.) He did not, and did not purport to, assert actions on behalf of the Company nor did he seek damages that would inure to the benefit of the Company. The special referee incorrectly ruled that the claims actually brought by Son were owned by the Company and should have been asserted as derivative claims. (R. 114-115.)

In his Final Brief on Appeal, Son raised the issues that he should have been granted relief under each of his causes of action. (Final Brief of Appellant pp. iv-v.) Son specifically addressed the special referee's ruling that the claims should have been brought in a derivative capacity in his Final Brief of Appellant. (*Id.* at 39-40.) Son referred to that portion of the special referee's order and argued that the special referee erred because the overwhelming evidence demonstrated that the Mason Respondents breached their fiduciary duties and "in such a way as to injure Joe in an individual capacity. Therefore, they are personally liable to Son for those damages." (*Id.* p. 39). Son also cited the leading South Carolina case on point of *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (and the same and only case cited by the special referee; R. 115) for support and quoted its holding that "[a] shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. . . . An individual action is also allowed if the alleged wrongdoers owe a fiduciary

relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation.") (citation omitted). *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (to determine whether a claim is derivative or direct, a court must consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"). Son further argued that he "suffered individual harm, as well as harm in the context of his claim seeking a buyout under the [Corporate Code]." (Final Brief of Appellant p. 39.) In addition, the Corporate Code grants shareholders the right of a direct action (not an action in a derivative capacity) to seek a forced buyout of a shareholder's shares under certain circumstances. See S.C. Code §§ 33-14-310(d) & 33-18-400 to -430.

Son not only properly brought his claims in an individual capacity, but he also properly raised the issue on appeal and certainly should not be deprived of his claim on this basis. Even if an issue is not specifically set out in the statement of issues, the appellate court may consider it if it is reasonably clear from appellant's arguments. *Herron v. Century BMW*, 395 S.C. 461, 465-467, 719 S.E.2d 640, 642-643 (2011); *Eubank v. Eubank*, 347 S.C. 367, 373 n. 2, 555 S.E.2d 413, 416 n. 2 (Ct. App. 2001). The record in this case demonstrates that Son properly raised the issue before the Court of Appeals.

II. Son should be granted the remedy of the forced buyout of his shares or other relief under the judicial dissolution provisions of the Corporate Code.

An action for stockholder oppression under the judicial dissolution provisions of the Corporate Code is one in equity; therefore this Court may find facts with regard to this claim according to its own view of a preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). As this Court recently stated, "[t]he concern and focus in shareholder oppression cases is that the minority faces a trapped investment and an indefinite exclusion [from] participation in business returns," *Ballard*, 399 S.C. at 595, 733 S.E.2d at 110. The Court of Appeals quoted this language but failed to apply these principles in this case. Fundamentally, Son has been deprived of all value of his shares since 2008. Even if this Court concludes that Son engaged in inappropriate conduct, such conduct does not provide a basis for the majority to deprive a minority shareholder of the value of his shares. *See Hanekamp v. Atlas Techs., Inc.*, C.A. No. 2011-CP10-1243, Business Court Op. 2014-05-15-02 (Charleston County, May 15, 2014), available online at: http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2014-05-15-02 (the Business Court held that, despite "his own misconduct," "Plaintiff is entitled to a court ordered buyout for the 'fair value' of his shares... .").[7]

[7] In *Hanekamp*, the plaintiff "engaged in a scheme to defraud" the corporation, including "siphoning money from [the corporation] for his own personal use," "mismanaged the [corporation's] office, and further took actions "that are arbitrary, vexatious and in bad faith." Nevertheless, the Business Court found that the plaintiff was still entitled to a forced buyout of his shares in the corporation because he "faces a trapped investment from which he can no longer derive any benefit." *Id.*

III. The Court of Appeals erred in ruling that Son's tort claims and the claim for relief under the judicial dissolution provisions of the Corporate Code were barred by his "unclean hands."

The Court of Appeals cited *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009) for the proposition that Son's unclean hands precludes his recovery in this case. In *Straight* the plaintiff "had abandoned his individual claims and chose to continue on the derivative claims alone," and, unlike this case, *Straight* did not involve direct claims. *Id.* at 190, 678 S.E.2d at 448. Further, even if a party engages in tortious misconduct, such conduct does not provide a basis for the majority shareholders to deprive that party of all value of his shares and avoid the remedy of a forced buyout of shares under the corporate dissolution statutes. *Hanekamp, supra.* The equitable doctrine of "unclean hands" is simply inapplicable to the direct claims brought by Son as well as to the statutory forced buyout remedy.

IV. Pursuant to the dissolution provisions of the Corporate Code and applicable case law, this Court should find that the fair value of the Company is $3,673,000, and order that the Mason Respondents purchase son's proportionate interest at that value.

The Court of Appeals did not reach valuation issues. 2015 S.C. App. Lexis at *32 n. 9. At trial, the parties' experts reached agreement on many issues with regard to fair value of the Company. (*See, e.g.*, amended report of Dr. Woodside setting forth points of agreement and differences with the expert for the Mason Respondents; R. 1141-1150). Most of the disputed points are legal issues, and this Court may find the limited factual issues regarding valuation according to its own view of a preponderance of the evidence.

V. **The Court of Appeals erred in giving credibility determinations in orders drafted by opposing counsel without direction from the special referee.**

The Court of Appeals noted Son's argument that the final orders below had been drafted by opposing counsel without specific direction by the court and should therefore be treated with caution, but the Court did not do so and in fact appears to have relied on those credibility determinations for its conclusions.

VI. **The Court of Appeals erred in affirming the special referee's holding that Son should not recover on his tort causes of action and that the Mason Respondents did not breach their fiduciary duties.**

The evidence recited above demonstrates, among other things, that the Mason Respondents constructively discharged Son from employment with the Company, failed to take action for over four years after Son raised concerns regarding the Company's problematic tax and accounting practices, continued to employ the incompetent accountant that previously represented that those practices were appropriate, paid themselves excessive compensation and benefits, and deprived Son of all economic value of his ownership interest in the Company. Under these facts, Son should have been awarded recovery under his tort claims, including his claim for breach of fiduciary duties.

VII. **The Court of Appeals erred in ruling that Son should not be awarded the ownership of an additional 20% of the shares of the Company and that he was barred from pursuing his claim.**

Son claimed at trial that he should be awarded an additional 20% of the shares of the Company pursuant to the terms of his father's "retirement plan" under which his father received benefits for years. The Court of Appeals concluded that Son is barred under the two-issue rule from pursuing this claim because he did not address the issue of whether the claim was set forth in his Amended Complaint. 2015 S.C. Lexis at *33. The

special referee, however, made no specific holding that Son could not pursue the claim because it was not specifically pleaded. (R. 116 at ¶11.) Further, the issue was a supplemental development after the filing of the amended complaint because shares were to be delivered annually, the issue was litigated in discovery, tried by consent, and no opportunity was given Son to move to amend to conform to the evidence pursuant to Rule 15(d), SCRCP or otherwise. (R. pp. 1-13, 36-38, 566-567, 1297, 1308; *see also* Appellant's Reply Brief at pp. 13-14.)

The Court of Appeals also concluded that the Son "stopped complying with the terms of contract." 2015 S.C. Lexis at *34. Son, however, was no longer employed by the Company after 2008, and some of the payments to his parents were simply recharacterized as income instead of rent. (R. pp. 566-567, 1308.) Son should be awarded an additional 20% of the Company under these circumstances.

VIII. The Court of Appeals erred in affirming the special referee's ruling that the Mason Respondents were entitled to recovery under their counterclaims.

The Court of Appeals erred in affirming the special referee's ruling that the Mason Respondents were entitled to judgment against Son for $17,301.66 as a result of Son's reimbursement of attorneys' fees paid to the Turner Padget law firm, because Son solicited the advice from that firm while President of the Company, the advice rendered concerned the Company's taxes, and the advice was not disputed and ultimately relied and acted upon by the Company (although they waited until 2011).

The affirmance of the judgment regarding the casings in the amount of $11,716.32 overlooks the evidence that the practice was longstanding, approved by the

Mason Respondents, and, after entering into the father's "retirement" agreements, the funds were split with Sister.

IX. The Court of Appeals erred in allowing the Mason Respondents to maintain a future claim against Son based on the Company's tax returns, and its opinion conflicts with prior precedent of this Court.

The Court of Appeals affirmed the ruling below allowing the Mason Respondents to maintain a future action for damages based on the Company's tax returns on the grounds that the amount of damages could not be determined because the IRS had not indicated the amount due in back taxes and fees. 2015 S.C. App. LEXIS 74 at *45.[8] The Court of Appeals erred and its opinion conflicts with prior case precedent of this Court.

The Mason Respondents did not seek this remedy before or during trial, they were indisputably on notice of the potential claim in 2007 after receipt of the letters from Wayne Byrd, Esq. in August 2007 (R. 844-850) and receiving confirming legal and accounting advice before the October 24, 2007 shareholder and director meeting (R. 886-889), the reason the amount the IRS would require to be paid was unknown was because the Mason Respondents elected not to inform the IRS until more than three years later in 2011 after the trial of this case had started, and the amount due substantially increased as a result of that period of the Mason Respondents' intentional failure to report. This claim was barred by the three year statute of limitations found in S.C. Code Ann. § 15-3-530. The limitations period begins to run once a party knows or, through the exercise of reasonable diligence, should have known that a cause of action may exist in his favor, rather than when a full blown theory of recovery is developed and regardless of whether

[8] The Company proceeded to file such an action in the Horry County Court of Common Pleas on May 13, 2013 (Case No. 2013-CP-26-3484), which action has been stayed pending the resolution of this appeal.

he knows the exact nature or full extent of his damages. *Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996).

CONCLUSION

For these reasons, Petitioner Joseph E. Mason, Jr. urges the Court to grant his Petition for a Writ of Certiorari in this matter.

Respectfully submitted,

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May 28, 2015
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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Appellate Case No. 2012-212146

Joseph E. Mason, Jr., Petitioner,

v.

Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc., and Irwin Levine, Respondents.

PROOF OF SERVICE

I certify that on Thursday, May 28, 2015 that I caused a copy of Petitioner's Petition for a Writ of Certiorari to be served on the following individuals by depositing a copy of the same in the United States mail, first class, postage prepaid and addressed as follows:

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May 28, 2015