

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM Horry County
Court of Common Pleas

S.C. Supreme Court

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Appellate Case No. ~~2012-212146~~

2015-001157

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.

**APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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Joseph E. Mason, Jr.,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Does the evidence establish that the Mason Defendants should be required to purchase Appellant's shares in the Company at fair value or that Appellant be granted other appropriate relief under the judicial dissolution provisions governing South Carolina corporations when Appellant devoted over 24 years building the business from scratch, he has been constructively discharged from his employment, and has been deprived of all economic values of his shares in the Company, and Respondents have engaged in numerous acts that are illegal, fraudulent, oppressive, or unfairly prejudicial to Appellant?
2. Should Respondents Joseph E. Mason, Sr. and Catherine L. Mason be required to deliver shares for an additional 20% interest in the Company when they have been paid significant amounts for those shares and received other valuable consideration for them pursuant to written agreements?
3. 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 Mason Holding Company, Inc. \$3,673,000, and is the fair value of Appellant's shares in the Company his proportionate interest in the Company?
4. Does sufficient evidence support the Special Referee's holding that the Mason Defendants did not breach their fiduciary duties when the evidence demonstrates, among other things, that they failed to take action for over four years after Appellant 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 have deprived Appellant of all economic value of his ownership interest in the Company?
5. Does sufficient evidence support the Special Referee's holding that Respondent Levine did not aid and abet the breach of fiduciary duties by the Mason Defendants 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, he continued as the Company accountant (as well as the owner of an interest in an affiliated Company) but did not take action to properly resolve the problems, and he was openly hostile and took other actions to retaliate against Appellant because he raised those issues?
6. Does sufficient evidence support the Special Referee's holding that the Mason Defendants were not liable to Appellant under his cause of action for civil conspiracy where the evidence establishes that the individual Respondents combined to take actions that wrongfully and constructively discharged him from employment with the Company and have deprived him of all economic value of his ownership interest in the Company?

7. Does sufficient evidence support the Special Referee's holding that the Mason Defendants did not constructively discharge Appellant from employment with the Company when the evidence demonstrated, among other things, that, after Appellant raised the issues regarding the Company's problematic tax and accounting issues, they demoted him, undermined his actions, and took other actions adverse to Appellant and the Company's interests in retaliation?

8. Does sufficient evidence support the Special Referee's holding that Appellant is liable under the Mason Defendants' counterclaim for conversion regarding certain cash sales where the overwhelming evidence demonstrates that Appellant was entitled to half of those proceeds and that he split those proceeds with his sister, who was entitled to the other half?

9. Does sufficient evidence support the Special Referee's holding that Appellant is liable under the Mason Defendants' cause of action for conversion for reimbursement for certain amounts paid to the Turner Padgett law firm where these proceedings have demonstrated that the serious tax and accounting issues raised by that firm warranted corrective action by the Company and that the Company benefited from that advice?

10. Does sufficient evidence support the Special Referee's holding that the Mason Defendants may bring a future action for damages based on the Company's tax returns filed in or before 2007 when the issues were fully tried, such relief was not requested below, the Company is responsible for payment of its own taxes, and the Mason Defendants failed to take action regarding the tax issues for over four years after the issues were raised by Appellant thereby resulting in potential increased payments of interest and penalties?

STATEMENT OF THE CASE

This case arises from a dispute between the shareholders of Mason Holding Company, Inc. (“the Company”). The shareholders of this family-owned business are Joseph E. Mason, Jr. (“Joe” or “Appellant”); his parents, Catherine L. Mason, Joseph E. Mason, Sr.; and his sister, Kathy M. St. Blanchard.

Joe 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 (collectively with the Company, “the Mason Defendants”). The Mason Defendants 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, Appellant filed an amended complaint. (R. pp. 31-45.) The amended complaint 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 Defendants and Levine are collectively referred to as “Respondents.” On October 13, 2009, the Mason Defendants filed an answer and reasserted their counterclaims in response to the amended complaint. (R. pp. 46-58.) Defendant Levine filed his answer to the amended complaint dated November 23, 2009. (R. pp. 59-69.) Defendant Levine filed a motion to dismiss

dated February 22, 2010, an amended motion to dismiss dated November 17, 2010, and a motion for summary judgment dated April 15, 2011.¹

Pursuant to Consent Order for Referral to Special Referee and Scheduling Order filed on February 11, 2011, and Consent Order for Referral to Special Referee filed April 13, 2011, 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 of the proposed order. (R. pp. 750-752.) Special Referee Stroman subsequently granted judgment in favor of Respondents and against Appellant 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 Defendants (the “Final Order”) granted judgment in favor of the Mason Defendants as to all causes of action asserted by Appellant and granted judgment in favor of the Mason Defendants and against Appellant on the Mason Defendants’ counterclaims in the total amount of \$29,017.98.² (R. pp. 92-117.) The Final Order also held that the Mason Defendants could pursue a later claim against Appellant with regard to damages relating to the filing of false corporate tax returns. (R. p. 117.) The Final Order as to defendant Levine (the “Levine Order”)

¹ By Order of Special Referee Stroman dated September 26, 2011, Levine’s motions to dismiss and for summary judgment were denied. (R. pp. 84-91.)

² Appellant agreed to the dismissal of his claim for breach of contract at the close of Appellant’s case during trial. (R. p. 570.)

granted judgment in favor of Levine and against Appellant as to the cause of action against Levine. (R. pp. 118-124.)

Plaintiff timely filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCF dated January 27, 2012, with regard to the finding and conclusion relating to a future claim against Joe for payment of the Company's taxes. (R. pp. 125-126.) Special Referee Stroman denied the motion by order received by plaintiff's counsel on June 1, 2012. (R. pp. 127-128, 130.)

Plaintiff timely filed his Notice of Appeal dated June 4, 2012, an Amended Notice of Appeal dated June 8, 2012, and a Second Amended Notice of Appeal dated July 19, 2012. (R. pp. 130-161, 162-193, 194-232.)

STATEMENT OF FACTS

Joe 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, Joe has been deprived of all economic value of his ownership in the Company, while the remaining shareholders have received raises, bonuses, and lavish benefits. As a result of the conduct of the Respondents, Joe filed this action seeking a forced buyout of his shares of the Company at fair value under the judicial dissolution provisions of South Carolina law governing corporations as well as other causes of action.

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 the following locations: Surfside Beach (Mason Tire & Auto Service, Inc.); North Myrtle Beach (J&O Tire & Auto Service, Inc.); Pawleys Island (M&S Tire Co., Inc.); and

Myrtle Beach (K&J Tire, Inc.). (R. pp. 243-244, 1140.) In addition, the Company owns 48% of another entity that operates a tire and auto service store in Conway (BCJ Tires, Inc.). Defendant Levine now owns the remaining 52% of that entity. (*Id.*)

Joe owns shares in the Company, and for many years he served as an officer of the Company and its subsidiaries and certain affiliated entities. (R. pp. 254-257.) The Company is a family owned business, with shares owned now or previously by not only Joe but also by Joe's parents and sister. (*Id.*) In addition to being shareholders of the Company, Joe Sr., Catherine, and Kathy are current officers of the Company. Defendant Levine is the long-time accountant for the Company and for members of the Mason family. (R. pp. 460-462.) Levine is not and never has been a CPA, and he has never held an accounting license of any sort from the State of South Carolina. (R. pp. 462-463.)

Joe 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.) Joe oversaw and guided the beginnings of the Company, which started with his oversight of the construction of a single tire store in Surfside Beach—Mason Tire & Auto. (*Id.*) His sister Kathy moved from Florida to work with him and for the Company at or about the time the first store opened. (R. p. 240.) Although the four family members—Joe, Kathy, Joe Sr., and Catherine—were all original shareholders, Joe Sr. and Catherine did not physically move to South Carolina from Miami until the late 1980s. (R. pp. 694-695.) Joe 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 Defendants acknowledge that Joe did

an excellent job of managing and growing the business until his termination in 2008. (See R. pp. 712, 729-730, 789 (Joe “has done an excellent job in making the company money”), 882 (“He’s done a fantastic job ...”).) Joe Sr., Catherine, Kathy, and Kathy’s former husband Oswaldo St. Blanchard were all employed by or participated in the Company in various and fluctuating capacities. (R. pp. 1298, 1306.) After Joe Sr. moved to South Carolina, Joe Sr. managed the commercial business of the Company, which involves selling tires for large trucks and other commercial vehicles. (R. pp. 246-247.)

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 five tire and auto service stores on the Grand Strand through several subsidiary corporations. (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, Joe 160, Kathy 90, and Ozzy 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 Joe.³ (R. pp. 466-474, 801, 804-805, 808-809, 810-812.). As originally conceived, the Company

³ Kelaher noted that the final arrangement was unusual, and he expressed serious concerns about how such an arrangement would be viewed from the standpoint of 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.)

would purchase Joe Sr. and Catherine's shares in the Company under a typical stock purchase agreement, with immediate conveyance and delivery of the shares and with a stock pledge agreement securing the consideration. (R. pp. 794-800, 1291-1292.) 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.)

First, the parties entered into an employment agreement whereby the Company would employ Joe Sr. or his wife at a salary of \$10,400 per year, along with various generous and valuable perquisites. (R. pp. 810-812, 1308.)⁴

Second, the Company executed an additional lease to an entity owned by Joe's parents (Catson, LLC) for the Pawleys Island store, 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.)

Third, 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 Joe 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,

⁴ Under the Employment Agreement, Joe Sr.'s monthly salary broke down to \$866.66 (R. p. 810), the same figure as the monthly interest payments on the unexecuted Stock Purchase Agreement. (R. pp. 794-795.)

813-814, 1293.)⁵ 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 Defendants’ 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 Joe and his sister 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.) Levine even prepared tax returns for the corporation attributing none of the profit to Joe Sr. or his wife even though they purported to continue to be shareholders in this corporation organized under Chapter Sub S, which tax law mandates profits be attributed to shareholders based on percentage of share ownership. (*See, e.g.* R. pp. 995, 999-1004, 1019, 1022-1025, 1036, 1042-1046.) Levine now admits, and it is undisputed, that this tax treatment was inappropriate. (R. pp. 507-508.) This issue was raised in 2007, but the returns were never amended. (*Id.*; R. pp. 587-588, 891 at ¶ 4, 896 at ¶ 4.)

⁵ As noted above, Levine has never been a CPA. Until this fact was revealed in 2007, the family members apparently did not realize it. Even though Levine acknowledges that it would be unlawful to hold himself out as a CPA, 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.)

One way in which the “extra money” was split was by Joe and his sister 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”⁶ may be created and Joe would split the cash with his sister after taking into account any imbalance of personal expenses. (R. pp. 274-285, 829-830, 909.) Kathy’s son worked for the business (which served as another source of friction between Joe and the other shareholders) (R. pp. 301-304, 610-614, 615-617), and, at Company expense, he upfitted about 15 cars with tires, wheels, and other equipment, which cars he bought and then resold while he was still in high school. That served as part of this balancing process. (R. pp. 280-283.)

The Company operated under this arrangement for several years. In addition to guiding Joe Sr.’s retirement plans, Levine provided regular accounting advice to Joe 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 target and achieve a contrived level of income by the operating companies of about \$100,000. (R. pp. 503-504.) Further, he provided accounting and tax advice on 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

⁶ 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.) Joe’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.)

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 Joe 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 Joe and Kathy. (R. pp. 483-484, 1303-1305.) Although the Company executed promissory notes to both Joe and Kathy for \$220,000 each (R. pp. 827, 828), it is undisputed that neither Joe 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 Joe 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.) Indeed, Levine “overruled” and disregarded the tax laws “because [he] had a relationship with the family – a strong, loveable relationship with the family.” (R. p. 488.) The Defendants’ own experts describe Levine’s advice as “not competent” (R. p. 450) and “fraud.” (R. p. 458.) The Special Referee’s 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 Joe 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, discussed *infra*, Joe simply trusted that Levine was providing legal and legitimate ways

of handling the Company's taxes and accountings. (R. pp. 308-309.) Joe 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 Joe, 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, Joe sought legal advice for various issues with the Company. (R. p. 307.) In the course of this advice, Joe 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.) Joe, through his attorneys, immediately brought his various concerns to the attention of the Mason Defendants, their counsel, and Levine. (R. pp. 844-845, 846-847, 848-850.) Although Joe noted concerns with multiple aspects of the Company, the most pressing and urgent was the tax issue. (*Id.*)

Joe's concerns culminated in a meeting of all the shareholders and directors of the Company and its wholly-owned subsidiaries on October 24, 2007. (R. pp. 856-890.) At this meeting, Joe, 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 Defendants voted to remove Joe from his position as

president. (R. pp. 879-881.) Joe Sr. was elected to serve as president. (*Id.*) Joe became vice president, and he no longer had responsibilities for handling financial matters for the Company. (R. pp. 544, 883-884, 895.) Defendants 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 Joe and fully discussed by the Defendants. (R. pp. 636-637.)

The Mason Defendants soon began to reverse course from the positions they expressed in the October 24, 2007 meeting. Indeed, and even in the face of the opinions of his own retained expert witnesses and correspondence to the contrary, Joe Sr. testified that he does not believe that Levine did anything wrong. (R. pp. 1312-1313.) Following the October 24, 2007 meeting, Joe Sr. did in fact hire Duncan as the new accountant for the Company; however, after later receiving and reviewing draft amended tax returns prepared by Levine and reviewed in form only by Duncan (R. p. 586), Joe Sr. fired Duncan. (R. pp. 892-893, 894.) Levine did not know of his own termination, and, to his knowledge, continued as the accountant for the Company without interruption. (R. p. 509.) 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 Defendants' own expert opined that the returns filed in 2007 and 2008 did not properly correct the problem. (R. p. 459.) Joe Sr., as president of the Company, did not file amended tax returns prior to the trial of this case,

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 Joe. (R. pp. 107-109, 117.) The evidence is undisputed, however, that Joe 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 have been stressed and dysfunctional for over a decade. (R. pp. 703-704.) Troubling events during the several years ending in Joe's termination with the Company simply exacerbated the unhealthy situation.

Even before Joe 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 St. Blanchard suffered a debilitating injury in a motorcycle accident while riding in a "Toys for Tots" 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 Joe to provide similar testimony, but Joe 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 Joe was the actual and acting president of the Company, Joe Sr. also testified in his deposition in the workers compensation proceeding (apparently so that Joe'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 Defendants included a finding that Joe'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 Joe's refusal to cooperate in the scheme, displayed open hostility towards him, and began retaliating against him. (R. pp. 300, 545-547, 564, 736.)

Joe 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 Joe quit working for the business. (R. p. 321.)

At his father's suggestion, Joe also sought a third party buyer for the entire Company. Joe found an interested buyer in Steve Allison. Mr. Allison owned a business with an office next to one of the Mason Tire stores, and he was very familiar with the Mason Tire business. 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.)⁷ 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.)

In addition to the grave tax and accounting issues facing the Company—which had been known for over four years yet not appropriately addressed until after the trial of this case began—Joe was subjected to great humiliation and demotion at the hands of the Mason Defendants. This treatment began prior to 2007 when the tax and accounting issues came to light and continues to this day.

Joe's authority within the Company was continually and regularly undermined by the Respondents after Joe 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 Joe. (R. pp. 309-310, 313, 322-323, 339, 355, 357-358, 370, 375-376.) Things came to a head when Joe noticed that Sandra Adams,⁸ a bookkeeper, had discrepancies in her paycheck regarding a supplemental insurance policy. (R. pp. 329-332.) Such discrepancies indicated that Ms. Adams was stealing money from the Company. With Joe Sr.'s support and on his request, Joe terminated Ms. Adams. (R. pp. 333-334.) The next day, Joe Sr. told Joe that terminating Ms. Adams was wrong, and he re-hired Ms. Adams over Joe's objection. (R. pp. 335-337.) When Adams returned that day with the other Mason Defendants, she made a rude gesture to Joe by shooting him "the bird." (R.

⁷ Allison's offer was obviously a very serious one. After this proposal was rebuffed, he, along with other investors, purchased 43 Jiffy Lube stores in Florida. (R. p. 287.) Joe later went to work for that business after leaving Mason Tire.

⁸ Adams had prior disciplinary problems at the Company. (R. pp. 650-652, 842-843.)

pp. 337-338.) Ms. Adams remains an employee of the Company in the bookkeeping department and often works with Levine on accounting and money-management issues. (R. p. 1307.)

Understandably, Joe 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.⁹ Since that time, Joe 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.) Joe 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 raises, bonuses, and other financial benefits, such as new cars, the value of which has not been extended to Joe. (R. pp. 1309-1310). Since Joe's constructive discharge, the Mason Defendants have allowed the Company profitability to decline while other companies in this business have enjoyed increasing profits. (R. pp. 295, 654-655, 1079.) The Mason Defendants have continued to ostracize and humiliate Joe over the past several years. (*See, e.g.*, R. pp. 340-342, 746, 748-749.)

STANDARD OF REVIEW

Under South Carolina law, “[w]hen legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997); *see also Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (“The proper analysis is to view the [legal and equitable] actions separately for the purpose of

⁹ Joe Sr. has been involved in litigation with family members on prior occasions. (R. p. 236.)

determining the appropriate standard of review.”). This appeal involves both legal and equitable causes of action. See *McDuffie v. O’Neal*, 324 S.C. 297, 302-03, 476 S.E.2d 702, 705 (Ct. App. 1996) (describing an action for stockholder oppression and the relief sought under the judicial dissolution statute (S.C. Code Ann. § 33-14-310) as equitable); *Corley*, 326 S.C. at 92 n.1, 485 S.E.2d at 99 n.1 (describing an action for breach of fiduciary duty as an action at law).

“A shareholders derivative action, as well as an action for stockholder oppression, is one in equity.’ ... Therefore [this court] may find facts 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) (citations omitted). As recently stated by the South Carolina Supreme Court, “Article V, § 5 of the South Carolina Constitution provides in relevant part that our appellate jurisdiction in cases of equity requires that we ‘review the findings of fact as well as the law.’” *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Indeed, the appellate courts have a *de novo* standard of review as to facts in equity cases. *Id.* “*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” *Id.* at 390, 709 S.E.2d at 654-55. Additionally, “questions of law may be decided with no particular deference” to the trial court’s findings in both legal and equitable matters. *N. Am. Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 131-32, 720 S.E.2d 53, 58 (Ct. App. 2011). By contrast, in appeal of a legal cause of action, such as breach of fiduciary duty, “the trial judge’s findings will be upheld unless without evidentiary support.” *Jordan*, 362 S.C. at 205, 608 S.E.2d at 131.

Notably, some courts take into account a trial court's "lack of personal attention to factual findings" and wholesale adoption of one party's proposed findings when applying the applicable standard of review. *In re Luhr Bros., Inc.*, 157 F.3d 333, 338 (5th Cir. 1998) ("[I]n cases such as the instant one, where the district court's Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party's proposed findings and conclusions, with minimal revision, we should approach such findings with 'caution.'"). The United States Supreme Court has also criticized the practice of verbatim adoption of a party's submitted findings, as happened in this case. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985); *see also Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004) ("When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."). For this reason, the Orders appealed from here as authored by counsel for the Defendants/Respondents should be approached with caution in applying the applicable standards of review.

ARGUMENT

I. The Trial Court erred in denying Joe relief under the judicial dissolution provisions governing South Carolina corporations.

Appellant contends that the Special Referee erred in concluding that Joe is not entitled to relief under the judicial dissolution provisions pertaining to South Carolina corporations. The judicial dissolution provisions of the South Carolina Business Corporation Act provide in part as follows:

The circuit courts may dissolve a corporation:

(2) in a proceeding by a shareholder if it is established that:

(ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation); . . .

(iv) the corporate assets are being misapplied or wasted

S.C. Code Ann. § 33-14-300. The Act sets forth the procedures governing dissolution in the next section, S.C. Code Ann § 33-14-310:

(d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:

(2) canceling, altering, or enjoining any act or resolution of the corporation;

(3) directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons party to the action; or

(4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

(e) The relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.

The very similar provisions pertaining to South Carolina statutory close corporations are set forth in S.C. Code Ann. §§ 33-18-400 to -430. The statutory grounds

for dissolution or other relief under these statutes are intentionally broad and vague, and the Court has discretion to fashion an appropriate remedy based on the facts presented. *Kiriakides v. Atlas Foods Sys. & Servs., Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001). The statutory terms “oppressive” and “unfairly prejudicial” “are elastic terms and their meaning varies with the circumstances presented in a particular case,” and the proper inquiry is “a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior.” *Id.* at 602-03, 541 S.E.2d at 266. In making that determination, the Court must consider whether the conduct of the majority is sufficiently egregious or unfair to the minority shareholders or whether “the circumstances are such that the relief” is appropriate. *See id.*

The *Kiriakides* Court further addressed factors or “badges of oppression” to consider in determining whether to grant a shareholder’s request to be bought out for fair value under this statute.¹⁰ In articulating factors and examining conduct warranting relief under the statute, the Court stated that “[c]ommon freeze out techniques include the termination of a minority shareholder’s employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination.” *Id.* at 604-05, 541 S.E.2d at 267. The Court also noted “that in a classic ‘freeze out,’ the majority first denies the minority any return and

¹⁰ The Court’s Order misconstrues the appropriate measure of relief when it describes the relief requested by Joe to be the “purchase [of his] shares at fair market value.” R. p. 112. The judicial dissolution statutes require purchase at *fair value*, not fair market value. S.C. Code Ann. § 33-14-310(d)(4) (“[T]he court may make such order or grant such relief . . . including . . . providing for the purchase at their *fair value* of shares . . .”) (emphasis added); *see also* S.C. Code Ann. § 33-18-420.

then proposes to buy the shares at a very low price.” *Id.* at 604 n.27, 541 S.E.2d at 267 n.

27. The Court further provided a “host of factors” to consider:

including, but not limited to, dividend withholding, eliminating minority shareholders from directorate and excluding them from employment, siphoning off corporate earnings via high compensation, leases and loans favorable to majority shareholders, failure to enforce contracts for the benefit of the corporation, appropriation of corporate assets, contracts or credit for personal use, usurping corporate opportunities, transactions between a parent corporation and a subsidiary, withholding information from minority shareholders.

Id. at 605 n.28, 541 S.E.2d at 541 n.28. The Court further noted that the judicial dissolution statute was amended in 1963 to broaden the grounds for dissolution to include conduct which might not rise to the level of fraud but which was unfairly prejudicial to the minority shareholder. *Id.* at 597 n.17, 541 S.E.2d at 263 n.17. The Court concluded that the facts presented constituted a classic example of a majority freeze-out and that the trial court properly found that the defendant had engaged in conduct which was fraudulent, oppressive, and unfairly prejudicial such that a forced buyout of the shares was appropriate. *Id.* at 603, 541 S.E.2d at 266.

In a case on appeal from a federal court in South Carolina, the Fourth Circuit concluded that the trial court had the ability under South Carolina statutory judicial dissolution provisions to order a forced buyout of a minority shareholder’s shares where the conduct at issue warranted such relief, even though it upheld a finding that there had been no breach of fiduciary duty, fraud, or oppression. *Kreischer v. The Kerrison Dry Goods Co.*, 1999 U.S. App. Lexis 1097 (4th Cir. 1999); *see also A. Teixeira & Co. v. Teixeira*, 1994 R.I. Super. LEXIS 71, *18 (R.I. 1994) (finding no oppression by the majority but ordering a buyout of the minority shareholders at fair value because “[a]

once friendly business venture which developed into a successful and profitable corporation has been damaged by corporate infighting and stagnated by dissention. There is no prospect for harmony between the factions”). In *Kreischer*, the Fourth Circuit found that a buyout achieved both parties’ goals—the plaintiffs’ goal of exiting the business and the majority’s goal of continuing the business. Given these competing interests, a buyout was the most equitable solution for terminating the parties’ relationship. *Kreischer*, 1999 U.S. App. Lexis at 1097.

The Court in *Ballard* recently addressed the factors set forth in *Kiriakides* and confirmed that “illegal or fraudulent conduct is not required under section 33-14-300(2)(ii).” *Ballard*, 399 S.C. at 595, 733 S.E.2d at 110. The Court further held that “[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.’” *Id.* (citing *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267 (quoting Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 790-791 (2000))). The Court concluded that Ballard, “like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* The Court also noted that the defendants had plans to hire other family members and thus to profit from their ownership of the company “while not affording Ballard similar benefits. This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends.” *Id.* at 596, 733 S.E.2d at 111 (quoting Moll, *Shareholder Oppression* at 758 (“[T]he close corporation investor typically looks

to salary rather than dividends for a share of the business returns because the earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits.”)). Even if no one action by the controllers of the corporation is so egregious as to warrant a finding of oppression, relief under the judicial dissolution statute is appropriate if the evidence as a whole demonstrates oppression by the majority. *Id.* at 597 n. 6, 733 S.E.2d at 112 n.6. The *Ballard* Court concluded that the record in that case “evinces a clear intent by Appellants to ‘freeze-out’ Ballard and exclude him from involvement with [the corporation] and from the benefits of ownership” and affirmed the forced buyout of Ballard’s shares. *Id.* at 597-98, 733 S.E.2d at 112.

In this case, Respondents committed numerous acts and engaged in conduct that is illegal, fraudulent, oppressive, or unfairly prejudicial to Joe, or present circumstances such that an order compelling the Mason Defendants to purchase Appellant’s shares at fair value is appropriate. This conduct includes, but is not limited to, the following:

- Asking Joe to commit perjury to support a fraudulent workers’ compensation claim regarding a significant injury to Ozzy St. Blanchard, perjury by Joe Sr. in support of the claim, and acts and displays of retaliation and hostility toward Joe when he refused to cooperate with the scheme.
- Preparation and execution of documents that mischaracterize the nature of the redemption or sale of Joe’s parents’ shares of the Company.
- Refusing to acknowledge Joe’s proper share ownership in the Company and to deliver the remaining shares for 20% of the Company due to him.
- The inclusion of consideration for the purchase of Joe’s parents’ shares in the form of a provision allowing them to select the Company’s accountant (Levine) and then their exercising that provision to hire an incompetent accountant for the Company and to retain that accountant for years after Joe discovered and brought to the attention of the Company and the other Respondents the fact that Levine’s accounting and tax services were incompetent and inappropriate.

- Retaliating against Joe for demanding that the Company amend its tax returns, terminate Levine, and adopt appropriate accounting and tax practices by, among other things, wrongfully refusing those demands, immediately terminating Joe's role as President of the Company, prohibiting Joe from further roles in certain banking and financial matters of the Company, limiting Joe's access to information about the Company's tax and accounting practices, and other acts of retaliation and public and private displays of hostility towards Joe.
- Asking Joe for offers to purchase the other shares of the Company and negotiating and declining those offers in bad faith.
- Asking Joe to pursue third party offers to buy the Company but then, in bad faith, unreasonably rejecting and refusing to negotiate or pursue an offer to purchase the Company for \$3 million.
- Submitting a low-ball valuation based on inaccurate information and based on improper methods.
- Making a low-ball offer to purchase Joe's shares.
- Refusing to acknowledge the annual values of the Company computed by Levine.
- Failing to conduct a shareholder meeting since the termination of Joe's employment with the Company in 2008.
- Failing to pay any dividends whatsoever since terminating Joe as President in 2007.
- Mismanaging the Company since Joe's wrongful discharge and allowing sales and profits to decline during a period when other similar businesses have enjoyed increasing sales and profits.
- Paying significant amounts of Company funds to lawyers and experts to defend allegations of serious wrongdoing committed by the individual Mason Defendants.
- Siphoning off and wasting Company assets by paying bonuses, excessive compensation, and granting substantial pay increases to the individual Mason Defendants despite the fact that the market value of their skills and services do not warrant that compensation and despite their mismanagement of the Company, the Company's declining revenues and profits, and the fact that no dividends have been paid during the same multi-year period.

- Buying Kathy a new Cadillac despite their mismanagement of the Company and the Company's declining revenues and profits.
- Repeated acts of hostility and retaliation against Joe as a result of his actions and efforts to refuse to act wrongfully and to attempt to resolve serious problems with the Company's tax and accounting practices.
- Depriving Joe of all financial value of his ownership of shares in the Company -- and the value in the Company that he devoted almost 25 years of his life building -- by wrongfully discharging him from the Company by constant humiliation and acts of retaliation and failing to pay him any compensation or dividends since then.

As a result of all of the above, the appropriate remedy in this case is a court-ordered buyout of Joe's shares by the Mason Defendants at fair value.

II. The Fair Value of the 100% interest in Mason Holding Company, Inc.

The Special Referee held that Appellant did not establish entitlement to relief under the judicial dissolution provisions of the Corporate Code and did not address valuation issues. Under the standard of review for equitable claims of this nature, this Court can make its own findings and conclusions with regard to valuation issues, and Appellant requests that this Court do so.

Appellant retained Perry Woodside, III, Ph.D., as a business valuation expert in this case, and he issued his report with regard to his conclusion of value of the 100% equity interest of the Company as of August 5, 2008. (R. pp. 1058-1139.) The Mason Defendants retained Sherry Smith as their business valuation expert, and she issued her original report as to her opinion of value of Joe's shares as of May 31, 2009. (R. pp. 1204-1281.)

At the request of the Special Referee, the parties' valuation experts met to ascertain what issues they could agree upon and, as to issues on which they could not reach a consensus, they were directed to be prepared to explain the bases of their

respective positions and reasons for disagreement. As a result of these efforts, the Mason Defendants' expert issued a revised report dated November 7, 2011. (R. pp. 1196-1203.) Woodside issued a report dated November 15, 2011, that sets forth amended valuation conclusions as well as a comparison of the two experts' amended valuation conclusions. (R. pp. 1141-1148.) The Mason Defendants' expert agreed that Dr. Woodside's summary of the comparison and contrast of their opinions was a reasonable and fair description of the experts' respective positions. (R. pp. 665-666.)

A. Valuation date.

At trial, both experts agreed that the appropriate valuation date was August 5, 2008, which is the date of the filing of the original complaint in this case and shortly after the termination of Joe's employment with the Company. (R. pp. 667-668.) Selecting the date of filing as the valuation date in this case is supported by the law of South Carolina and other jurisdictions and by the circumstances presented in this case. *See, e.g., Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (finding the date of ouster would be most appropriate in a minority stockholder oppression case); *Hollis v. Hill*, 232 F.3d 460, 472. (5th Cir. 2000) ("The presumptive valuation date for other states allowing buy-out remedies is the date of filing unless exceptional circumstances exist which require an earlier or later date to be chosen."); *see also Kaplan v. First Hartford Corp.*, 522 F. Supp. 2d 275 (D. Me. 2007).

A joint and several judgment against the Mason Defendants requiring them to purchase Joe's shares as of this date also obviates the necessity of addressing certain other issues that arose after the filing date and the amount of any resulting damage to the Company or amount of adjustments needed in the share valuation, such as alleged

mismanagement of the Company and the inappropriate payment by the Company of the attorneys' fees and expenses of the individual Mason Defendants since the Valuation Date. For these reasons, August 5, 2008, is the appropriate valuation date for this analysis.

B. The correct standard of value is "fair value."

The starting point for this analysis consists of selecting and understanding the applicable standard of value, which informs and guides each of the various approaches and methods generally employed by business appraisal professionals. At the direction of the Mason Defendants' attorneys, their business appraisal expert, Smith, employed a *fair market value* standard of value in her analysis because she was specifically directed to use that standard of value rather than the fair value standard of value. (R. pp. 667.) Dr. Woodside employed the fair value standard of value and specifically relied on applicable South Carolina law including the principles set forth in the case of *Santee Oil Co. v. Cox*, 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975). (R. pp. 1064-1065.)

Both the dissenters' rights statute and the judicial dissolution statute (which applies in this case) provide that, when appropriate, the claimant's shares must be purchased at "fair value" in an amount to be determined by the court. S.C. Code Ann. § 33-13-102(A) ("A shareholder is entitled to dissent from, and obtain payment of the *fair value* of, his shares") (emphasis added); *Id.* § 33-14-310(d)(4) ("[T]he court may make such order or grant such relief . . . including . . . providing for the purchase at their *fair value* of shares") (emphasis added). The statutes, the comments to the statutes, and applicable case law further define and explain how to compute fair value. *E.g. id.* § 33-13-101(3); *see also* S.C. Code Ann. § 33-18-420. That law also makes it clear that

fair value under this state law is something different from the concept of fair market value commonly used in the business valuation industry for certain purposes. *See, e.g., Santee Oil*, 265 S.C. at 274, 217 S.E.2d at 791 (finding that fair value involves the three major factors of net asset value, market value, and the earnings or investment value of the dissenting stock); *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 116, 522 S.E.2d 357, 360 (Ct. App. 1999) (equating fair value with “intrinsic value” and affirming *Santee Oil* method); *see also* 18A Am Jur 2d Corporations § 706 (“‘Fair value,’ for the purposes of a proceeding appraising the value of shares in a corporation, carries a statutory purpose of fair compensation to shareholders, which may not equate to the market’s judgment of the value of a share. ‘Fair value’ is not necessarily synonymous with ‘fair market value,’ and ‘fair value’ is not even necessarily tied to market value, as reflected in actual stock trading.”).

“It is impossible to intelligently discuss methods of valuation without reference to some assumed definition of value....” S. Pratt and A. Niculita, *Valuing a Business, the Analysis and Appraisal of Closely Held Companies*, (5th ed. McGraw Hill Co. 2008), *quoting* J.C. Bonbright, *Valuation of Property*, Vol. 1 (The Michie Co. 1965). The standard of value for purposes of analysis under state law statutes governing shareholder dissent and appraisal rights and shareholder oppression litigation is a “*legally created standard of value*.” Pratt, *Valuing a Business* at 45 (emphasis added): “When a situation arises of actual or potential stockholder dissent or dissolution action, it is necessary to *carefully research the legal precedents applicable to each case. The appraiser should solicit the view of counsel as to the interpretation of fair value....*” *Id.* (emphasis added).

The appropriate standard of value for this analysis is fair value as further defined by South Carolina statutory and case law, including the cases of *Belk* and *Santee Oil*. Despite clear statutory and case law authority establishing fair value as the appropriate standard in South Carolina, Smith, at the direction of counsel for the Mason Defendants, failed to use this standard in her analysis. To the extent her resulting opinion varies from the legal guidance set forth under South Carolina law for fair value, it should be rejected entirely.

C. Discounts are not warranted or appropriate.

One critical valuation issue in this case that can be resolved by selecting the appropriate standard of value is the propriety of the application of discounts or premia. Dr. Woodside applied the fair value standard of value in his analysis and concluded that the application of discounts was not warranted or appropriate. Smith applied a discount of 30% for lack of control under both of the approaches she used and an additional 35% discount for lack of marketability under the method she selected under the income approach in both her original report dated September 9, 2009 (R. p. 1269), as well as the very different report she prepared a few days before trial. (R. p. 1203.)

The entire Company should be valued as a going concern, and Joe's shares should be valued pro-rata based on that valuation. No discounts should be applied, including any discounts based on theories of lack of control or lack of marketability. *See, e.g., Morrow v. Martschink*, 922 F. Supp. 1093, 1105 (D.S.C. 1995) (“[N]o minority discount or marketability discount should be applied to reduce the fair value of Plaintiff's shares. These discounts have not been recognized in South Carolina in the context of corporate dissolution actions and have been rejected by many courts.”); *see also Charland v.*

Country View Golf Club, 588 A.2d 609, 613 (R.I. 1991) (reviewing case law from multiple jurisdictions and holding that marketability and minority discounts are inappropriate in valuing shares in a dissolution or buyout proceeding). Neither *Santee Oil* nor *Belk* apply discounts in their calculations of fair value. This approach is in accord with the law of Delaware and virtually all other states. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989); Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L. J. 293, 363 n. 262 (2004).

The application of discounts as suggested by Smith is legally and factually inappropriate in this case.

D. Valuation factors.

Santee Oil guides the analysis of what constitutes fair value of a corporation's shares. In *Santee Oil*, the South Carolina Supreme Court examined Delaware law and held that "fair value means 'intrinsic value.' ... But 'fair value' does not restrict the appraising court to the use of any one method of valuation." *Id.* at 273, 217 S.E.2d at 791. Each case must be "decided upon its own facts and circumstances. 'Every relevant fact and circumstance which enters into the value of the corporate property and which reflects itself in the worth of the corporate stock' ... must be considered." *Id.* at 273-74, 217 S.E.2d at 792 (citations omitted). "[T]he three major factors to be considered are: (1) net asset value; (2) market value; and (3) the earnings or investment value of the dissenting stock." *Id.* The various major factors, known as the Delaware Block Method, "should then be weighed as to their relative bearing upon the ultimate question of the fair value of the dissenting stock, and a final determination of value made." *Id.* (citations

omitted).

The South Carolina Court of Appeals reaffirmed that the *Santee Oil* analysis must be considered in evaluating fair value under the Act in *Belk*, 337 S.C. at 116, 522 S.E.2d at 361.

In *Santee* our supreme court determined three factors were ordinarily to be considered in a stock valuation case: (1) net asset value, (2) market value, and (3) the earnings or investment value of the dissenting stock. After these factors have been considered, each is then weighted as to their relative bearing upon the ultimate determination of the fair value of the dissenting stock. Not only did the dissenters' experts not utilize *all three of these methods*, they also did not engage in weighting. Because [the appraisers] failed to engage in a *Santee* analysis, *we must accordingly discount* the significance of their appraisals in valuing Thompson's shares.

Id. (emphasis added, citations omitted). Although "each case must be decided on its own facts and circumstances," the Court of Appeals made it clear that a fair value appraisal that did not consider the three approaches of the Delaware Block method would be immediately suspect and not entitled to great weight. *Id.* To determine the fair value of Appellant's shares of the Company, the Court may examine the methods used by the parties' experts in this case and make its independent analysis.

Under the facts presented in this case, both experts concluded that the net asset and income approaches did not lead to reliable or appropriate indications of value of the Company. Both experts placed 100% weight to the indications of value resulting from the use of the market approach.

The *Belk* court instructed "[i]f there is no reliable established market value for the shares a reconstructed market, if one can be made, must be given consideration." *Belk*, 337 S.C. at 124, 522 S.E.2d at 365 (quoting *Santee Oil*). The parties agree that

there is no reliable, established market value for shares of the Company. Both parties' experts calculated a reconstructed market value by using the guideline company transaction method, also known as the direct market data method. (R. pp. 1086, 1201.) Under this method, value indications can be derived from actual sales of other businesses. The parties' experts also agreed that, under the facts of this case, the appropriate metric to use to derive value should be based on the level of revenues of the Company. (R. pp. 422, 674-675.) The unreliability of the Company's financial records stems from the uncertainty and propriety of the level of certain expenses, but the level of revenue was considered generally reliable by the parties. This method is an appropriate method to use in this case, and the Company's level of revenue is the appropriate and reliable metric to consider.

For revenue estimates for this method, Woodside used the Company's weighted average revenues for the period of 2004 through August of 2008 in the amount of \$6,685,007. (R. pp. 1091, 1147.) Smith used the Company's 2008 year-end consolidated revenues of \$6,152,830. (R. pp. 1501, 1258.) Using data from a multi-year period, as Woodside did, is more appropriate and more reliable under the facts presented by this case than using data from just one year. In *Santee Oil*, the Court used data from an average of three years. 265 S.C. at 275-76, 217 S.E.2d at 792-93. In *Belk*, the Court noted the *Santee Oil* court's use of the average of three years performance and was critical of an expert who used data from only one year. 337 S.C. at 115 n.4, 522 S.E.2d at 360 n.4. Smith's reliance on 2008 year-end revenues suffers the additional problem of relying on data that was not known or knowable as of August 5, 2008. It is appropriate to use the Company's weighted average revenues for the period of 2004 through August of

2008 in the amount of \$6,685,007 for purposes of these calculations of value under the market approach.

The next critical step in this analysis is to select the appropriate multiple based on a selection of the most comparable transactions. Woodside used two databases, Bizcomps (R. p. 1150) and one published by the Institute of Business Appraisers ("IBA") (R. p. 1149). From these databases, he selected only transactions that occurred in the five years preceding the Valuation Date and for acquired companies with revenues in excess of \$1 million. (R. pp. 1096-1097.) This screening left him with 22 observations, 10 from Bizcomps and 12 from the IBA database. (R. p. 1097.) Using these observations, he found a median sales price to annual gross sales multiple of .39 using the Bizcomps database and .54 using IBA. (R. pp. 1143, 1149, 1150.) After adding the Company's cash, account receivables, and inventory and subtracting working capital liabilities, he reached a value indication of \$3,236,398 from Bizcomps and \$3,354,794 from IBA for a rounded average of \$3,296,000. (R. p. 1143.)

Smith also used the IBA database but did not use the one published by Bizcomps. (R. p. 1201.) More importantly, she used the IBA database in a different fashion than Woodside. She selected transaction data for Auto and Home Supply Stores and then removed any company that did not have the words "tire dealer" in the description. (*Id.*) This approach left her with 55 transactions that are identified at pages 39-40 of her original report. (R. pp. 1247-1248.) As she notes in her report, the Company's sales in 2008 of over \$6 million were "nearly twice as large as the largest company in the IBA data." (R. p. 1257.) In fact, over half of the companies in her screened database had sales of less than \$500,000 and all but five had sales of less than \$2 million. (R. pp.

1247-1248.) Moreover, the data relied upon by Smith included transactions that occurred as early as 1989, almost 20 years before the Valuation Date. (*Id.*)

In *Belk*, the Court was critical of an expert that used data from large multi-state chains to value a corporation that owned only two stores and specifically did not approve of the use of such data in the application of the guideline public company method (another method under the market approach). 337 S.C. at 115 n.4 & 120-21, 522 S.E.2d at 360 n. 4 & 363. It is instructive to note that both experts in this case concluded that the guideline public company method could not be applied reliably in this case because all of the publicly traded companies in this industry are much larger than Mason Holding Company. (R. pp. 1096, 1252.) The data used by Smith suffers from the same problem in that it includes information for companies with a fraction of the sales of Mason Holding, and Smith agreed that most presumably only had one retail location as opposed to Mason Holding, which has the synergies and scale associated with five retail locations. (R. pp. 672-673.)

The revenue to price multiple derived by Woodside is the appropriate multiple to use in this case under this method. Smith's data is not reliable in that it uses information from companies that are too small and includes transactions that are too remote in time to provide a reliable guide to value in this case.

The parties' experts disagree with regard to whether an amount should be added to the value indicated by the income approach for non-operating assets – specifically for the real estate owned by the Company. Woodside relied upon the value of the real estate reflected in the books of the Company shortly after the building was constructed on the site on Highway 544 in Conway. (R. pp. 420-421.) After reducing that value by the

mortgage balance as of the Valuation Date, he concluded that the real estate had a value over the mortgage balance of \$377,056. (*See R.* pp. 1142, 1145-1146.)

Smith agreed that, conceptually, if there is equity in this real estate, the amount of that equity would be considered a non-operating asset and should be added to the indicated value under this method. She concluded, however, that the real estate had no equity over the mortgage balance. (*R.* p. 683.) For her conclusion, Smith relied on a letter from an appraiser about the approximate current value of the property as of the trial date and other statements about the current value of the property. (*R.* pp. 684-685.) This analysis must look to the value as of August 5, 2008. Based on the evidence presented, the Company had a non-operating asset of equity in this real estate in the amount of \$377,056, and, for the reasons set forth above, the total value indication using the guideline company transaction method is \$3,673,000.

The parties and their experts also disagree as to whether the value indications should be reduced by an amount representing the Company's tax liability as a result of under-reporting income in prior year tax returns. Appellant submits that whether any additional taxes and the amount of such taxes owing as of August 5, 2008, has not been determined and is too speculative to be considered in this analysis.

Smith does not do her own analysis of the tax liability but simply adopts the conclusion from the report of Laura DuRant that the tax liability could be \$745,832. (*R.* p. 1202.)¹¹ In her report, DuRant does not attempt to compute what the current tax liability will ultimately be, but rather calculated a worst case scenario, including an

¹¹ Smith also inappropriately reduced her value conclusions for the tax liability after taking discounts for lack of control and marketability. Even if such discounts were appropriate, and they are not, any reduction for the tax liability should have been taken prior to applying those discounts.

assumed finding of fraud by the taxing authorities and the assessment of penalties based on such a finding. (R. 442-447.) The witnesses for the Mason Defendants acknowledged that this is not the position they would advocate with the taxing authorities. (R. p. 456.) Further, DuRant's calculations are based on the liability as of August 23, 2011, not what the liability allegedly was several years earlier on the valuation date of August 5, 2008. (R. p. 446.) Indeed, most of the alleged liability is the accumulation of interest and penalties that may have accrued since Joe left the employment of the Company in 2008 and after the appropriate Valuation Date in this case. Moreover, any tax liability would undoubtedly be much lower if the issues had been properly handled when Joe raised them in 2007. (See, e.g., R. pp. 454-455, 457-458.) Under these circumstances, it is not appropriate to reduce the indication of value of the Company for an unascertained potential tax liability as of August 5, 2008.

As noted above, the asset approach and income approach are not reliable or appropriate methods for indications of value in this case. As a result, the value indication under the market approach, using the guideline company transaction method, should be given 100% weighting. Accordingly, the fair value of the entire equity interest in Mason Holding is \$3,673,000.¹²

III. Appellant owns 50% of the Company's shares.

Joe has physical possession of 30% of the outstanding shares of the Company, and it is undisputed that he owns at least that portion of the shares. Joe also contends that

¹² This value is consistent with other record evidence. For example, Steve Allison made an attempt to buy the Company for \$3 million, and Levine prepared annual valuations that reflected the growing Company was increasing in value over time and had a value as of the end of 2006 of \$4.4 million. (R. pp. 292, 779, 780, 837, 900.)

he owns another 20% of the shares of the Company, which shares the Mason Defendants have refused to deliver.

This issue requires the analysis of certain “unusual” documents pertaining to the “retirement plan” for Joe Sr. The original document drafted by Ed Kelaher, Esq. sometime around early 2002 was a typical stock purchase agreement. (R. pp. 794-800.) Under that agreement, Joe’s parents, Joe Sr. and Catherine, were to deliver and convey immediately at closing their share certificates to Plaintiff and his sister, leaving Plaintiff and his sister with 50% each of the shares of the Company. A stock pledge agreement would secure the payment of the consideration. (*Id.*)

After discussion with family members and at the direction of Respondent Levine, Mr. Kelaher drafted a package of several agreements. Mr. Kelaher informed the shareholders that the agreements were very unusual documents that raised a number of legal and tax issues. (R. pp. 808-809.) The final set of executed documents included an employment agreement (R. pp. 810-812), an extra, second lease for the Pawleys Island location (the location was already the subject of another lease that remained in effect) (R. pp. 815-826), and a letter agreement purporting to “give” the shares to Joe and Kathy for the quite unusual consideration to Joe Sr. and Catherine of the right to designate the Company’s “Certified Public Accountant.” (R. pp. 813-814.)

Joe Sr. and Catherine stated in the letter agreement that the agreement stood “as our promise, commitment, and absolute and unfailing word that we will make a gift to” Joe and Kathy of their shares in the Company in installments, the last installment of a 5% interest each due on or before December 31, 2011 – a date that has now passed. (*Id.*) After the last installment, Joe and the St. Blanchards (Kathy and Ozzy) were to each own

50% of the Company's shares. Joe Sr. and Catherine received valuable consideration for their shares for many years, and Joe Sr. continued to receive compensation and benefits under his retirement plan after the termination of Joe's employment with the Company, although some of the payments may have been recharacterized¹³ since Joe raised his concerns about certain of the Company's financial issues in 2007. In fact, Joe Sr. testified that the only reason he did not deliver the remaining shares to Joe was "because he sued me." (R. p. 1297.)

The consideration under the letter agreement of the right to appoint Levine as the Company "CPA" proved to be quite substantial – and detrimental. As noted above, Joe notified the Mason Defendants in the summer and fall of 2007 that there were many serious problems with Levine's accounting advice and the tax returns he prepared. Rather than work to cure those problems, the Mason Defendants immediately terminated Joe as President and elected Joe Sr. to serve in that capacity. Moreover, despite the acknowledged problems with Levine's prior advice and actions and tax returns, Joe Sr. has continued to employ Levine as the Company's and his personal accountant to the present. Further, as of the trial of this case, no amended tax returns had been filed, although counsel for the Mason Defendants indicated that after the trial started they began notifying the tax authorities of the situation. However, that was *over four years after receiving the letters from Mr. Byrd addressed to them informing them that the earlier returns and advice by Levine were inappropriate and needed urgent attention.* (R. pp. 844-845, 846-847, 848-850.)

The Special Referee concluded that, even though Joe Sr. received valuable consideration under these agreements for many years, "under no circumstance could this

¹³ The extra rent was recharacterized as salary to Joe Sr. (R. pp. 566-567, 1308.)

Court engage in the enforcement of a series of agreements which clearly, on their face, were illegal and unenforceable.” (R. p. 116, ¶ 11.) This result is completely inequitable. Joe spent many years of hard work earning the income that was diverted and paid to his parents under these agreements. Under the facts presented by this arrangement, the Court should declare Joe the owner of 50% of the shares of the Company, require that the shares be delivered to Joe, and require the Mason Defendants to purchase all of those shares for fair value. Because the fair value of the entire equity interest in Mason Holding is \$3,673,000, the Special Referee’s holding should be reversed and the Mason Defendants should be ordered to purchase Joe’s 50% interest in the Company for the amount of \$1,836,500.

IV. The Special Referee erred in concluding that the Mason Defendants did not breach their fiduciary duties to Joe.

Directors and officers of a corporation owe fiduciary duties to the corporation’s shareholders. S.C. Code Ann. §§ 33-8-300 & -420; *see also Clearwater Trust v. Bunting*, 367 S.C. 340, 350, 626 S.E.2d 334, 339 (2006) (“The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by §§ 33-8-300 and -420.”). The statute provides in pertinent part: “(a) A director shall discharge his duties as a director . . . (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.” S.C. Code Ann. § 33-8-300(a).¹⁴

¹⁴ The provision for officers is almost identical: “(a) An officer with discretionary authority shall discharge his duties under that authority: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.” S.C. Code Ann. § 33-8-420(a).

The Mason Defendants, as corporate officers and directors, owed fiduciary duties to the Company and its shareholders, including Joe. The Special Referee held that the Mason Defendants did not breach their fiduciary duties and that any such claim was owned by the Company. (R. pp. 114-115.) The Final Order should be reversed because the overwhelming evidence demonstrates that the Mason Defendants breached their fiduciary duties and in such a way as to injure Joe in an individual capacity. Therefore, they are personally liable to Joe for those damages. *See Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) ("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); *Davis v. Hamm*, 300 S.C. 284, 292, 387 S.E.2d 676, 680 (Ct. App. 1989) (Section 33-8-420(a) "imposed on officers of a corporation a duty of care to discharge their duties in good faith, with prudent care, and in the reasonable belief they are acting in the best interest of the corporation and its shareholders. After careful analysis of all authority relating to the 1981 Act and its successor Act, we hold there is no liability to shareholders unless the duty asserted to have been breached flows to the plaintiff . . . in actions [such as those] brought by minority stockholders of close corporations pursuant to . . . Sections 33-14-300 to 33-14-330.").

Joe has suffered individual harm, as well as harm in the context of his claim seeking a buyout under the Act. Joe is no longer employed by the Company, and the Mason Defendants, as officers of the Company, have given themselves raises¹⁵ and

¹⁵ The compensation to the Mason Defendants constitutes excess compensation because their services could be replaced in the market at a lower rate of compensation. For

bonuses, and purchased a Cadillac for Kathy (among other things) without paying a dividend or otherwise allowing Plaintiff—the *sole* excluded minority shareholder—to reap the benefits of maintaining an ownership stake in the Company. Further, the Mason Defendants have undertaken various fraudulent and improper activities that would entitle Plaintiff to relief under the judicial dissolution statute, as discussed above. Consequently, the Mason Defendants have breached their fiduciary duties to Joe.

V. The Final Order as to Levine should be reversed because Defendant Levine aided and abetted the Mason Defendants in breaching their fiduciary duties to the shareholders of the Company.

South Carolina law recognizes a cause of action for aiding and abetting breach of fiduciary duty. The plaintiff must prove: “(1) a breach of a fiduciary duty owed to the plaintiff, (2) the defendant’s knowing participation in the breach, and (3) damages.” *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). “The gravamen of the claim is the defendant’s knowing participation in the fiduciary’s breach.” *Id.*; see also *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).

The Special Referee held that Joe had not established liability against Levine under this cause of action because: (1) the Mason Defendants did not breach their fiduciary duties to Joe; (2) the claim against Levine could only be pursued on behalf of the Company; (3) Joe had “unclean hands;” and (4) there were no distinct damages arising from the conduct of Levine. (R. pp. 118-124.) These holdings should be reversed.

example, Kathy’s salary increased from \$50,000 in 2005 to \$90,000 in 2008 and forward, plus bonuses and benefits, such as a new Cadillac. (R. pp. 653-654.) She does not have a college degree and had no prior training or education in accounting. Her services could easily be replaced in the market at a lower rate. (R. pp. 423-426, 433-435, 638-639.)

As argued above, the Mason Defendants breached their fiduciary duties to Joe in numerous respects. And, because the damage was unique to Joe and Levine's conduct was adverse to the Company's interest, Joe had standing to assert the claim. Levine's conduct was a proximate cause of damage to Appellant in the form of his constructive discharge from employment and the deprivation of the value of his shares in the Company. Unclean hands is not a recognized defense to the claim against Levine. Furthermore, Levine admits advising all family members that the accounting and tax advice he gave was appropriate at the time he gave that advice. (R. pp. 485-486.) Consequently, Joe is not barred from asserting the claim as a result of unclean hands.

Levine is more than the accountant for the Company – he owns 52% of the shares of an affiliated entity that operates one of the stores. Levine also knowingly participated in the breaches of fiduciary duties by the Mason Defendants. Levine played a key part in many of those allegations and was the author of the false and fraudulent tax filings and other accounting documents. Levine admitted knowledge of such fraud and falsity in his testimony at trial and in writing: “In order to maintain the above figure [\$100,000] I closed my eyes knowing that the family would benefit in the long run.” (R. p. 851.) Despite assuring the shareholders it would be appropriate at the time, he admits that the loans to Joe and his sister were “set up on a fraudulent basis.” (R. pp. 498-502, 506, 853.) Levine also admits that he was mad at Joe for raising the problematic tax and accounting issues because of the professional embarrassment to Levine. (R. pp. 503, 506, 513, 514-515.)¹⁶ Levine attempted to extort an excessive fee to provide to Joe's new accountant a copy of a prior schedule and then sent Joe a handwritten note calling him a

¹⁶ Levine acknowledges that the other family members were also mad at Joe for raising these issues. (R. p. 513.)

bastard. (R. pp. 902-903, 904-905, 906-908.) Further, Levine perpetuated the breach of fiduciary duties by not appropriately fixing the false and fraudulent tax returns, despite having actual knowledge of the problems for over four years. In addition, Levine aided and abetted the Mason Defendants in retaliating against Joe when he attempted to cure the problems.

The Special Referee's holding that Levine was not liable for aiding and abetting breach of fiduciary duties should be reversed because Levine's shockingly unprofessional and inappropriate conduct and active participation in efforts to run Joe out of the business and to deprive him of the value of his shares constitutes aiding and abetting breach of fiduciary duties.

VI. The Mason Defendants engaged in a civil conspiracy to loot the Company at the expense of Appellant.

To prove a claim for civil conspiracy, a plaintiff must show a combination of two or more persons for the purpose of injuring plaintiff causing plaintiff special damage. Hubbard & Felix, *S.C. Law of Torts* 404-408 (3d ed. 2004). Damages may include specific items of loss, including loss of business. *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942). Punitive damages are possible if actual malice is shown. *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 475, 596 S.E.2d 51, 59 (2004).

Here, the Mason Defendants and Levine—four people—retaliated against Joe and sought to cut him out of the management of and employment with the Company due to Joe's vocal and repeated concerns about false and fraudulent practices pressed and carried out by the Mason Defendants, with guidance and assistance from Levine. The Mason Defendants have demonstrated actual malice against Joe by removing him from

his positions within the Company due to his concerns, which the Mason Defendants refused to remedy for over four years. The Mason Defendants have continued to financially benefit from the Company at Joe's expense, by refusing to pay any dividends or hold a shareholders' meeting despite giving themselves raises, bonuses, and additional perquisites, such as company cars. Further, the Mason Defendants have looted the Company at Joe's expense by continuing the employment of Levine as the Company's accountant and not fixing known problems with the taxes and accountings for years, thus severely damaging the Company.

Joe has suffered damages due to the Mason Defendants' conduct by losing his employment with the Company, the business relationships he built at the Company, and the financial and other benefits associated with his work with the Company. Such financial and other benefits have only been partially mitigated by Joe's current employment with Atlantic Coast Enterprises. Joe is entitled to actual and punitive damages due to the Mason Defendants' civil conspiracy.

VII. The Mason Defendants violated public policy and wrongfully and constructively discharged Joe from his employment with the Company.

Joe worked tirelessly for the Company for years with the understanding that his employment was secure. Indeed, he consistently tried to do his very best for the Company. When it became clear to Joe and the Mason Defendants that Levine had concocted improper and fraudulent accounting devices that could seriously harm the Company, Joe was the *only* shareholder to insist repeatedly that the problem be fixed. After Joe's departure, the Mason Defendants have persisted in the retention of Levine and, as of the trial of this dispute, had not appropriately addressed the tax issues despite

knowing of them for over four years. Such delay caused significant harm to the Company by allowing penalties and interest to accrue.

Although South Carolina is generally an employment at-will state, the “public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law.” *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Here, Joe was asked to assist the Mason Defendants in defrauding the federal and state governments with respect to tax and workers compensation benefits and when he failed to do so, Respondents retaliated against him and constructively discharged Joe from his employment with the Company. This dismissal clearly violates the public policy of this state and cannot be condoned by this Court.

Woodside computed damages in the amount of \$1,161,585 (R. p. 1150-B) with regard to the employment and breach of fiduciary duty claims. Such an award is appropriate and is supported by the evidence. The Special Referee should be reversed and the case should be remanded for a trial on damages as to this cause of action.

VIII. The Special Referee erred in awarding judgment against Joe on the Mason Defendants’ Counterclaims.

The Mason Defendants asserted counterclaims against Plaintiff for breach of fiduciary duty and conversion. The actions complained of by the Mason Defendants, however, were well known by the Mason Defendants, the Mason Defendants participated in and benefitted from the accounting and financial practices at issue, and they all approved, authorized, or ratified the actions. Like Joe, prior to October of 2007, the Mason Defendants relied on the professional judgment of Levine to guide various corporate decisions and policies. Such advice, as now recognized by Joe but persistently

ignored by the Mason Defendants, was grossly inappropriate and detrimental to the Company. Consequently, the Mason Defendants are barred from challenging the actions by the applicable statute of limitations for certain matters and by the doctrines of waiver, estoppel, and laches.

The Mason Defendants are further barred from challenging these actions by the doctrine of *in pari delicto*. Very generally, *in pari delicto* is “[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” *Black’s Law Dictionary* 806 (8th ed. 1999); *see also Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395-96, 635 S.E.2d 545, 547-48 (Ct. App. 2006). This rule bars recovery where the plaintiff and defendant are equally in the wrong. *See generally Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230, 237 (7th Cir. 2003). Here, the Mason Defendants had full knowledge of everything they point to as wrongdoing and further ratified all actions. They also refused to remedy the situation when Plaintiff brought the problems of Levine’s tax and accounting advice to light. They have no standing or right to recover anything from Joe.

The Special Referee held that the Mason Defendants may bring a future action for damages against Joe based on the Company’s tax returns filed in or before 2007. (R. p. 117.) That judgment should be reversed. The issues regarding such liability were fully tried, this relief was not requested below, the Company is responsible for payment of its own taxes, and the Mason Defendants failed to take action regarding the tax issues for over four years after the issues were raised by Joe thereby resulting in potential increased payments of interest and penalties.

The Special Referee awarded damages against Joe for \$11,716.32 with regard to cash for casings sold by the Company. (R. p. 117.) That judgment should be reversed. As discussed above, the cash proceeds from those sales were to be divided equally between Joe and his sister. The overwhelming evidence is that those proceeds were divided and otherwise equalized between Joe and his sister with regard to payment of personal expenses by the Company.

The Special Referee also awarded damages against Joe in the amount of \$17,301.66 for alleged conversion of funds used to pay the Turner Padgett law firm. (R. p. 117.) That judgment should be reversed. These proceedings have demonstrated that the serious tax and accounting issues raised by that firm (*see* R. pp. 844-845, 846-847, 848-850) were appropriate issues warranting corrective action by the Company. The Company benefitted from that advice, and it was fully appropriate for Joe to be reimbursed for the fees paid to that law firm. *See, e.g.*, S.C. Code Section 33-8-250.

IX. Appellant is entitled to his attorneys' fees and expenses.

In addition to the remedies sought for each of the causes of action in this case, Joe further seeks an award of attorneys' fees. Such an award is consistent with the broad powers given to the Court by the Act. Under the dissolution statute, the Court may "grant such relief, other than dissolution, as in its discretion is appropriate." S.C. Code Ann. § 33-14-310(d). In addition to the mandatory indemnification provisions found in Sections 33-8-520 and -560, Section 33-8-540 provides the Court the ability to award indemnification even when the criteria in S.C. Code Ann. § 33-8-510 are not met if the director (or officer per -560) "is fairly and reasonably entitled" to it. As demonstrated at trial, Joe has fought to force the company to do the right thing for many years to no avail

and at great personal expense. The Defendants have engaged in illegal, unfair, and vexatious conduct towards Joe. Joe is entitled to recover from the Respondents his attorneys' fees incurred in this matter.

CONCLUSION

For the reasons set forth herein, the Final Order should be reversed with regard to the cause of action for relief under the South Carolina statutory judicial dissolution provisions; and the case should be remanded with instructions to require Respondents Joseph E. Mason, Sr. and Catherine L. Mason to deliver to Appellant shares representing an additional 20% interest in the Company and to require the Mason Defendants to purchase Appellant's shares for the amount of \$1,836,500.00 or for a determination of the fair value of those shares.

In addition, Appellant requests that the Final Order and the Levine Order be reversed and the case remanded for a new trial on damages as to Appellant's other claims against the Mason Defendants and as to the aiding and abetting breach of fiduciary duties as to Levine.

Further, the Final Order should be reversed as to the holdings regarding the counterclaims asserted by the Mason Defendants, including the holding that the Mason Defendants can pursue a future claim against Appellant based on the Company's prior tax returns.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

RECEIVED

AUG 19 2013

SC Court of Appeals

Joseph E. Mason, Jr.,

Appellant,

v.

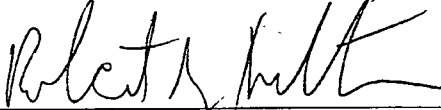
Catherine L. Mason, Joseph E. Mason, Sr.,
Kathy St. Blanchard, and Mason Holding
Company, Inc., and Irwin Levine,

Respondents.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Final Brief, Final Reply Brief and Record on Appeal in this matter comply with Rule 211(b), SCACR and the August 13, 2007 Order of the South Carolina Supreme Court relating to personal data identifiers.

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THE STATE OF SOUTH CAROLINA
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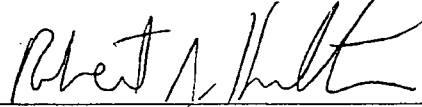
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Kathy St. Blanchard, and Mason Holding
Company, Inc., and Irwin Levine,

Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, Final Reply Brief of Appellant and Record on Appeal by depositing a copy of these documents in the U.S. Mail on August 19, 2013, addressed to the attorneys of record for Respondents: J. Jackson Thomas, Esq., and Emma Ruth Brittain, Esq., Thomas & Brittain, P.A., Post Office Box 1290, Myrtle Beach, South Carolina 29578; and John M. Leiter, Esq., Law Offices of John M. Leiter, P.A., 1203 48th Avenue North, Suite 109, Myrtle Beach, South Carolina 29577.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr. Appellant

v.

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

FINAL BRIEF
OF RESPONDENT
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SC Court of Appeals

AUG 19 2013

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STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE CORRECTLY HOLD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC. BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT?
2. DID THE SPECIAL REFEREE CORRECTLY DETERMINED THAT SON HAD MADE NO CLAIM TO, AND WAS NOT ENTITLED TO AN ADDITIONAL 20% INTEREST IN COMPANY FROM MOTHER AND FATHER BECAUSE SUCH CLAIM WAS NOT PLEAD AND HAS NO MERIT?

3. WAS THE ISSUE OF THE VALUATION OF SON'S STOCK IN COMPANY NOT REACHED BY THE LOWER COURT AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT?
4. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S DUTY OWED TO SON BY VIRTUE OF THE STATUS AS OFFICERS, DIRECTORS OR MAJORITY SHAREHOLDERS?
5. DID THE EVIDENCE PRESENTED AT TRIAL SUPPORT THE SPECIAL REFEREE'S HOLDING THAT LEVINE DID NOT AID OR ABET ANY ALLEGED BREACH OF FIDUCIARY DUTIES BY THE MASON RESPONDENTS?
6. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT CONSPIRE TO WRONGFULLY DISCHARGE SON AND DEPRIVE HIM OF THE VALUE OF HIS STOCK OWNERSHIP IN COMPANY?
7. BECAUSE THE RECORD EVIDENCE ESTABLISHES THAT SON VOLUNTARILY QUIT HIS EMPLOYMENT, DID THE SPECIAL REFEREE PROPERLY HOLD THAT SON HAD FAILED TO ESTABLISH THAT HE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY?
8. DID THE SPECIAL REFEREE PROPERLY HOLD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME?
9. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM?
10. DID THE SPECIAL REFEREE PROPERLY DETERMINE THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN?
11. DID SON HAVE STANDING TO BRING THE CLAIM THAT LEVINE AIDED AND ABETTED THE MASON RESPONDENTS IN BREACHING THEIR FIDUCIARY DUTIES?
12. DID SON FAIL TO PERFECT HIS APPEAL AGAINST LEVINE?

STATEMENT OF THE CASE

The Respondent, Irwin Levine ("Levine"), adopts by reference, pursuant to Rule 208(b)(6) SCACR, the Statement of the Case of Catherine L. Mason ("Mother"), Joseph E. Mason, Sr. ("Father"), and Kathy St. Blanchard ("Sister"), (collectively referred to as the "Family Respondents"); and Mason Holding Company, Inc. ("the Company"), (the Family Respondents and the Company are collectively referred to as "Mason Respondents"). In addition the following is submitted:

The Appellant, Joseph E. Mason, Jr. ("Son") did not file a Rule 59(e) motion to alter or amend a judgment to any finding of fact or conclusion of law ruled upon in the Final Order [Ending Action as to Defendant Irwin Levine] filed on January 20, 2012 (the "Levine Order").

Thereafter, Son timely filed his Notice of Appeal dated June 4, 2012. In his Notice of Appeal, the Son did not name Levine as a respondent and did not attach the Levine Order to his Notice of Appeal. Son only attached the Final Order as to the Mason Respondents.

Son then filed his Amended Notice of Appeal on June 8, 2012 and included Levine within the caption. He did not, however, attach the Levine Order to his Amended Notice of Appeal.

Son subsequently filed his Second Amended Notice of Appeal on July 19, 2012 and this time, attached the Levine Order to the Second Amended Notice of Appeal.

After being served with the Second Amended Notice of Appeal, Levine filed a Motion to Dismiss. The Court of Appeals denied Levine's Motion to Dismiss, but allowed Levine to raise the issues in this Brief that he had raised in his Motion to Dismiss. (See this Court's Order dated 3-4-13.)

I. STATEMENT OF FACTS

Levine adopts the Statement of Facts as presented by the Mason Respondents. In addition, the following is submitted:

Son did not bring a shareholders derivative action pursuant to Rule 23(b)(1) SCRCP against the Mason Respondents nor did his complaint comply with the pleading requirements of Rule 23(b)(1) SCRCP. Specifically, in his second cause of action alleging breach of fiduciary duty, Son sued Mother, Father and Sister directly and not as a derivative action.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Scope of Review

Levine adopts the Standard of Review as presented by the Mason Respondents.

B. Arguments

- 1. THE SPECIAL REFEREE CORRECTLY HELD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC. BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 1.

2. **THE SPECIAL REFEREE CORRECTLY DETERMINED THAT SON HAD MADE NO CLAIM TO, AND WAS NOT ENTITLED TO, AN ADDITIONAL 20% INTEREST IN COMPANY FROM MOTHER AND FATHER BECAUSE SUCH CLAIM WAS NOT PLEAD AND HAS NO MERIT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 2.

3. **THE ISSUE OF VALUATION OF SON'S STOCK IN COMPANY WAS NOT REACHED BY THE LOWER COURT AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 3.

4. **THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT BREACH ANY DUTY OWED TO SON BY VIRTUE OF THE STATUS AS OFFICERS, DIRECTORS OR MAJORITY SHAREHOLDERS.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 4.

5. **THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT LEVINE DID NOT AID OR ABET ANY ALLEGED BREACH OF FIDUCIARY DUTIES BY THE MASON RESPONDENTS.**

The evidence fully supports the Special Referee's findings and conclusions that Levine did not aid and abet the Mason Respondents in any alleged breach of fiduciary duty. The first element in establishing a claim for aiding and abetting a breach of fiduciary duty is that the plaintiff must prove "(1) a breach of a fiduciary duty owed to the plaintiff". Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478

S.E.2d 45, 50 (1996). See also Vortex Sports Entertainment, Inc. v. Ware, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008). The Special Referee found and concluded that the Mason Respondents had not breached any fiduciary duty to Son. Therefore, it is axiomatic that a claim that Levine aided and abetted the Mason Respondents must fail because Son has not proved an essential element of his claim.

As importantly, Levine's actions would not support a claim that he aided and abetted the Mason Respondents even if the Mason Respondents were found in breach of some alleged a fiduciary duty to Son. In order to prevail on his aiding and abetting claim, Son must also establish that Levine knowingly participated in the Mason Respondents' alleged breach of a fiduciary duty. Future Group II, id.

Levine, in essence, is being accused of having exercised poor judgment in how he prepared the 2003 and 2006 tax returns.¹ Son argues that Levine exercised his poor judgment while aiding and abetting the Mason Respondents. The facts of their breaches of their fiduciary duty owed to Son established at trial, however, demonstrate that Levine prepared these returns at the specific direction of Son. As a result, Levine cannot have knowingly participated in an alleged Mason Respondent breach of fiduciary duty when he was acting at the direction of Son.

¹ Levine prepared the tax returns based on the general ledger and other related accounting documents provided to him by the Company. Levine did not make entries into the general ledger. (R. at 409; R. at 548, 556.) The loans, which covered for the understated inventory, were all entered by Son.

Additionally, Levine prepared amended returns for 2003 and 2006 to correct the deficiencies of the previous returns. The amended returns were approved by D. Timothy Duncan, the independently retained certified public accountant for the Company.² When presented for signing at a board meeting of the Company, Son said the amended returns would not be filed. (R. at 513; R. at 536-537; R. at 625-626.) This further supports the Special Referee's ruling that was following the direction of Son, not the Family Respondents.

Lastly, Son presented no evidence as to Levine's motive for having prepared the tax returns in the manner in which he did. There is no suggestion that Levine personally profited from the preparation and filing of the 2003 and 2006 tax returns. Levine received a retainer from the Company for his accounting services but was not specially compensated for his preparation of the 2003 and 2006 tax returns. (R. at 688-689.) The only probative evidence submitted was that Levine was acting at the direction of Son.

The evidence supports the ruling of the Special Referee; the Levine Order dismissing the charge of aiding and abetting against Levine should be sustained.

6. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT CONSPIRE TO WRONGFULLY DISCHARGE SON AND DEPRIVE HIM OF THE VALUE OF HIS STOCK OWNERSHIP IN COMPANY.

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 6.

² Son approached Mr. Duncan and requested that he manipulate the inventory similar to what had been done in prior years. Mr. Duncan refused to do so, and refused to serve as the accountant for the Company for this reason. (R. at 599-600.)

7. **BECAUSE THE RECORD EVIDENCE ESTABLISHES THAT SON VOLUNTARILY QUIT HIS EMPLOYMENT, THE SPECIAL REFEREE PROPERLY HELD THAT SON HAD FAILED TO ESTABLISH THAT HE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 7.

8. **THE SPECIAL REFEREE PROPERLY HELD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 8.

9. **THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 9.

10. **THE SPECIAL REFEREE PROPERLY DETERMINED THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS COULD BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 10.

11. **SON DID NOT HAVE STANDING TO BRING THE CLAIM THAT LEVINE AIDED AND ABETTED THE MASON RESPONDENTS IN BREACHING THEIR FIDUCIARY DUTIES.**

The Special Referee ruled that Son did not have standing to bring his action against the Family Respondents for breaches of fiduciary duties and as such, did

not have standing to sue Levine for allegedly aiding and abetting the Family Respondents. (R. at 122-123.) The gravamen of Son's claim against Levine is that Levine's preparation of the tax returns for 2003 and 2006 may have caused the Company to be exposed to tax liability which, in turn, may have caused a loss to the value of the Company. If the Company had suffered a loss, then Son argues he would have suffered a corresponding loss to the value of his shares in the Company.³

In South Carolina, the general rule is that individuals may not sue corporate directors or officers for losses suffered by the company. Brown v. Stewart, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001). If the gravamen of the complaint is an injury to the company and not to the individual interest of the shareholder, then the action is derivative and must be brought as a shareholders' derivative suit. Brown, id. See also Rivers v. Wachovia Corporation, 2010 WL 3258328 (D.S.C.).

In this case, Son sued the Family Respondents for breaches of fiduciary duty. The essence of his claim is that their alleged breaches of fiduciary duties caused a loss to the Company and, therefore, a loss to the value of his shares in the Company. In this type of action, the Son would have to bring an action as a shareholder's derivative action pursuant to Rule 23(b)(1) SCRPC. As a result of not bringing a shareholder's derivative action, Son did not have standing to bring this

³ In paragraph 70 of his Amended Complaint, Son alleges that the actions of Levine were "... detrimental to the Corporation and its shareholders, including the plaintiff." (R. at 43.) Son did not prove any individual loss to him that would not have been shared by all the shareholders as a result of any alleged breaches of fiduciary duty that may have been committed by the Family Respondents.

action at all. Brown, supra. If Son did not have standing to bring these claims against the Family Respondents, then he also did not have standing to bring an aiding and abetting claim against Levine.

Son's lack of standing to bring this action is an additional reason to affirm the Special Referee's Order dismissing Son's claim as to Levine.

12. SON FAILED TO PERFECT HIS APPEAL AGAINST LEVINE.

When Son filed his Notice of Appeal, he neither named Levine as a Respondent nor attached a copy of the Levine Order to his Notice of Appeal. When he filed his first Amended Notice of Appeal, Son did add Levine as a Respondent, but still did not attach a copy of the Levine Order. Finally, in his second Amended Notice of Appeal, Son did attach a copy of the Levine Order to the Notice of Appeal.

Rule 203(d)(1)(B)(ii) SCACR, requires that "[a] copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing" be attached to the Notice of Appeal. This was not done in this case until well after the thirty (30) days to file the Notice of Appeal had expired.

The requirements of 203(d)(1)(B)(ii) SCACR are mandatory, although mere clerical errors in a Notice of Appeal do not destroy the appeal. Charleston Lumber Co. Inc. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). However, the errors in this case may not be mere clerical errors. Not only was Levine not originally named as a Respondent in the Notice of Appeal, Son did not attach a copy of the Levine Order to the Notice of Appeal, or even to the Amended Notice of Appeal.

In Weatherford v. Price, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct. App. 2000), the appellant failed to identify, in the notice of appeal itself, the underlying order being appealed, although he did refer to the order which denied the appellant's motion for reconsideration. The underlying order, itself, however, was attached to the notice of appeal. Under those circumstances, this Court deemed the appellant's failure to refer to the underlying order in his notice of appeal as a mere clerical error because the order itself was attached to the notice of appeal. In contrast, in this appeal, Son, at first neither named Levine nor attached the Levine Order to the Notice of Appeal. The Levine Order was only attached to the Second Amended Notice of Appeal. The combination of not originally naming Levine as a respondent and not attaching the Levine Order is more than a clerical error.

It is true that after the Clerk of Court of Appeals office notified Son's counsel that Levine was not included as a respondent, Son's counsel filed the Amended Notice of Appeal which included Levine as a respondent. However, as pointed out, Son still did not attach a copy of the Levine Order to the Amended Notice of Appeal. This was done only after the original thirty (30) days to perfect the Notice of Appeal had run.

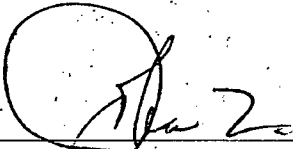
Had Son only failed to originally identify Levine as a respondent and then corrected it in his subsequent Amended Notice of Appeal, then that correctly would be seen as a mere clerical error. However, the failure to add the Levine Order is more than a mere clerical error and, for this reason, the appeal against Levine should be dismissed.

III. CONCLUSION

For the above and foregoing reasons, Respondent Irwin Levine prays that this Court affirm the Special Referee's Orders.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this **BRIEF OF RESPONDENT IRWIN LEVINE** complies with Rule 211(b).


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August 16, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry County
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr., ... Appellant

v.

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

PROOF OF SERVICE

I certify that I have served the **Respondent Irwin Levine's Final Brief** by depositing
a copy of it in the U.S. Mail on August 16, 2013, addressed to:

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SC Court of Appeals

AUG 19 2013

August 16, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

RECEIVED

AUG 19 2013

SC Court of Appeals

ORIGINAL

Joseph E. Mason, Jr.,

Appellant,

v.

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

Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc. (“the Company”) (collectively, “the Mason Respondents”) make several statements in their Initial Brief regarding the facts and arguments regarding the applicable law that warrant a reply.¹ The central arguments by the Mason Respondents and Respondent Irwin Levine (collectively, “Respondents”) are that Appellant Joseph E. Mason, Jr. (“Appellant” or “Joe”) presented no material support for his claims at trial, Appellant participated in improper activities that were a source of the Company’s problems, or that the problems raised are “not germane to his request for relief” (Mason Respondents’ Initial Brief at 24), and that, as a result, Appellant is not entitled to *any* relief. As discussed herein and in Appellant’s principal Brief, the Respondents’ arguments are not supported by the record evidence, the applicable law, or public policy. The additional arguments advanced by Respondent Levine in his separately filed Initial Brief fail for the same reasons.

I. Reply Statement of the Case and Facts.

A. The Statement of the Case.

Respondents state that Appellant did not reply to Respondents’ counterclaims set forth in their Answer to the Amended Complaint. Mason Respondents’ Brief at 2, 42, 43. In response to Appellant’s original Complaint, the Mason Respondents filed an answer and counterclaims dated August 28, 2008. (R. pp. 14-24.) Appellant replied to the counterclaims on September 23, 2008. (R. pp. 25-28.) Pursuant to a Consent Order dated September 23, 2009, Appellant was granted leave to file its Amended Complaint

¹ Respondent Irwin Levine (“Levine”) adopted essentially all of the Mason Respondents’ factual assertions and legal arguments in his separately filed Initial Brief.

“to include Irwin Levine as an additional Defendant and assert a cause of action against Defendant Levine for Aiding and Abetting Breach of Fiduciary Duty.” (R. p. 29.) The Amended Complaint added no new claims against the Mason Respondents. The Mason Respondents filed an Answer to the Amended Complaint that was substantially and substantively identical to its answer to the original complaint and asserted identical counterclaims. (*Compare* R. pp. 14-24 with R. pp. 46-58.) Appellant’s case was being handled by prior counsel at the time, and a record was not developed regarding this issue because it was never raised before the trial court. What is clear, however, is that Appellant had already replied to the identical counterclaims, and Respondents have identified no delay or prejudice whatsoever resulting from the lack of a filing of another reply to these counterclaims. Moreover, Respondents did not raise this hyper-technical issue to the trial court and may not raise it in this court for the first time. *Patterson v. Goldsmith*, 292 S.C. 619, 626, 358 S.E.2d 163, 167 (Ct. App. 1987) (“An issue which was not raised below cannot be considered on appeal.”). Indeed, Respondents confirmed to the trial court that they had put in their case on the counterclaims at trial and did not mention any failure to file another responsive pleading or that Appellant is or should be in default for failing to file another reply. (R. p. 750.)²

Respondents assert, without citation to the record, that they were granted a directed verdict with regard to Appellant’s Fifth Cause of Action alleging a breach of contract claim arising under the terms of the Company’s employee handbook. Mason

² The trial court executed the proposed order provided by the Mason Respondents, which failed to include any mention of any failure by Appellant to file a responsive pleading to the amended answer.

Respondents' Brief at 2. There was no such ruling, but Appellant voluntarily dismissed that claim. (R. p. 570.)

B. Facts.

The Mason Respondents state a number of alleged facts in their brief that are disputed without noting they are disputed.³ With regard to the primary claim for relief under the South Carolina Business Corporation Act due to shareholder oppression, this Court "may find facts 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). It is also critical to note that Appellant need not necessarily prove that the Mason Respondents engaged in illegal or fraudulent conduct. "The concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" *Id.* at 595, 733 S.E.2d at 110 (quoting *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 604, 541 S.E.2d 257, 267 (2001)).

With regard to Appellant's contention that he was asked to testify falsely in support of Ozzy St. Blanchard's workers' compensation claim,⁴ the Mason Respondents point to the fact that the claim was ultimately successful. The Mason Respondents do not address the highly suspicious facts that Joe Mason Sr. ("Joe Sr.") testified in his deposition in this case that he did not personally see Mr. St. Blanchard at the Mason Tire store on the morning of the accident (R. pp. 834, 1299-1300), but in shareholder minutes

³ For example, Respondents assert that Appellant was absent from the Company's business without notice or excuse on several occasions over the course of many years. Mason Respondents' Brief at 9. Appellant denies he was ever absent from the Company's business without notice or excuse. (R. pp. 348-349.)

⁴ Mr. St. Blanchard was the then-husband of Respondent Kathy St. Blanchard. (R. p. 644.)

of Mason Tire, he represented that he had personally seen Mr. St. Blanchard that morning. (R. pp. 829-830.) Nor do the Mason Respondents mention the fact that, although Appellant was the actual and acting president of the Company, Joe Sr. testified in his December 2, 2005 deposition in the workers' compensation proceeding that Joe Sr. was the "managing partner" of the Company. (R. p. 831.) In any event, Appellant need not prove that the Mason Respondents committed workers' compensation fraud. The evidence is clear, however, that the controversy caused friction between the parties, and that friction (which resulted from additional factors, as well) led the Mason Respondents to deprive Appellant of any value from his ownership interest in the Company. (R. pp. 378, 494, 545-547, 564, 736-741.)

Perhaps the most contentious issue that developed between Appellant and the Mason Respondents revolved around the Company's taxes and the accounting practices by Respondent Levine. The Company's shareholder minutes, annual valuations prepared by Levine, and other trial exhibits amply demonstrate that the Company's problems with regard to overstated inventory were fully disclosed to and known by all parties. (See R. pp. 258-265, 402, 406-407, 779, 780, 802-803, 806-807.) Mr. Levine, as the Company accountant, informed Appellant and the Mason Respondents that the accounting practices and promissory notes dealing with overstated inventory were a lawful and appropriate method to deal with the issue. (R. pp. 477-478, 483-486, 488-491, 1303-1305.) In addition, Mr. Levine prepared and signed tax returns for the Company and its affiliates for the years 2003 through 2006 based on that accounting and informed Appellant and the Mason Respondents that the tax treatment regarding the overstated inventory was lawful

and appropriate. (R. pp. 486-489.) Appellant signed those tax returns based on that advice. (R. pp. 364-365.)

A corporate officer has a statutory right to rely on information or advice presented by a public accountant or other professional as to matters the officer reasonably believes are within the person's professional competence. S.C. Code Ann. § 33-8-420(b)(2) (2006).⁵ Reliance on a professional's advice is not appropriate and is not in good faith "if [the officer] has knowledge concerning the matter in question that makes reliance otherwise permitted unwarranted." S.C. Code Ann. § 33-8-420(c). It is undisputed that Appellant relied on Levine with regard to the Company's tax and accounting matters. (R. pp. 308-309, 365, 477-478.) Appellant's reliance on Levine's advice to the Company was reasonable at the time the notes were signed by the parties (2003) and the tax returns were submitted (2003-2006). (R. pp. 308-309, 827, 828, 910-922, 923-937.)

Now, by all accounts, it is understood that those promissory notes, the related accounting practices, and the 2003 through 2006 tax returns were not appropriate or lawful. These facts were emphatically brought to the attention of all Respondents and counsel for the Mason Respondents by Wayne Byrd, Esq.'s letters dated **September 17, 2007**. (R. pp. 846-847, 848-850.) All Respondents acknowledge that the assertions and tax and accounting problems identified in the letters "were substantially accurate."

⁵ The South Carolina Business Corporation Act of 1988 (S.C. Code Ann. §§ 33-1-101 to 33-20-105) consists of Chapters 1-20. S.C. Code Ann. § 33-1-101 (2006). The Company is a Statutory Close Corporation under the provisions of Chapter 18 of that Act, known as the South Carolina Statutory Close Corporation Supplement. S.C. Code Ann. §§ 33-18-101 *et seq.* (2006). The provisions of the other chapters of the South Carolina Business Corporation Act apply to Statutory Close Corporations "to the extent not inconsistent with the provisions of" Chapter 18 (S.C. Code Ann. § 33-18-102(1) (2006)), and nothing in Chapter 18 is inconsistent with the standards of conduct for officers set forth in Section 33-8-420.

Mason Respondents' Brief at 14.⁶ There was never any real debate that the assertions in Mr. Byrd's letters were accurate. But, rather than appropriately dealing with the issue at the October 24, 2007 meeting, the Mason Respondents voted to remove Appellant as President and to terminate his ability to handle financial matters for the Company. (R. pp. 544, 849-881, 895.)⁷ After that meeting, Appellant did not ever see another tax return, draft tax return, or proposed amended return for the Company or its affiliates until late in the discovery process in this lawsuit. (R. pp. 316-317, 538-539, 544, 565, 743, 744-745.) As the new president, Joe Sr. hired and dealt with Tim Duncan, a CPA, with regard to preparing amended tax returns or taking other appropriate steps to correct the situation. (R. pp. 744-745.) Mr. Duncan thought the problems were significant enough that he also consulted in the fall of 2007 with Eddie Bowers, an experienced tax attorney in the Myrtle Beach area. (R. pp. 577-580, 587-589.) After consulting with Mr. Bowers, Mr. Duncan concluded that there were "serious and substantial" tax and accounting

⁶ Levine adopted the Mason Respondents' Statement of Facts (which includes page 14 of the Mason Respondents' Brief). Levine Brief at 2. In addition, Levine asserts that he, "in essence, is being accused in having exercised poor judgment in how he prepared the 2003 and 2006 tax returns." *Id.* at 4. This grossly mischaracterizes Levine's own testimony that he knew that his advice to the Company on preparing the 2003 and 2006 was *fraudulent at the time he made the advice*, but that he also assured Appellant and the other family members that this tax treatment was appropriate. (R. pp. 486-489.) The Respondents' own experts have described Levine's advice as "not competent" (R. p. 450)) and "fraud." (R. p. 458.) This goes far beyond mere "poor judgment."

⁷ The Mason Respondents state that Appellant was the only shareholder who declined to repay personal expenses to the Company in late 2007. Mason Respondents' Brief at 14. Appellant declined because, at the time such action was requested, all the Respondents were furious at him because he raised the tax issues, and he viewed their actions as retaliation. (R. pp. 311-312, 416.) He also testified that he questioned whether the repayment plan devised by Levine was appropriate because the expenses had been fully approved by the Company previously. (R. pp. 311-312.)

issues that needed to be addressed, and so informed Joe Mason, Sr. – in 2007.⁸ (R. pp. 577-580, 587-589.) Rather than appropriately dealing with the situation, Joe Sr. terminated the Company's relationship with Duncan on November 27, 2007. (R. pp. 580-582, 894.)

After additional and further retaliation from the Mason Respondents, which made the situation unbearable for Appellant, he accepted his constructive discharge from employment with the Company in July of 2008. (R. p. 901.)

Although Joe Sr. had control over the financial affairs and tax returns of the Company beginning in October 2007 and the Mason Respondents had sole control of the Company beginning in August 2008, they did not take action to address the problematic tax returns for several years. In fact, the tax officials were not notified of the problems *at all* until Mr. Bowers notified them after the trial of this case started in November of 2011.⁹ (R. pp. 452, 454-455.) Mr. Bowers assumed the tax authorities had not been contacted earlier because the Company would have owed substantial amounts that it did not want to pay (R. p. 456), but there is no doubt that if the Company had properly addressed the problem in 2007 or 2008 the amounts of interest and penalties owed by the Company would have been reduced "a great deal." (R. p. 455.) Under the circumstances, it is obvious that the Mason Respondents would never have informed the tax authorities about these issues but for the fact that the issues were being discussed in a

⁸ The Mason Respondents argue or suggest in their brief that they did not discover the tax problems, their significance, or the need to disclose them to the tax authorities until 2011. See Mason Respondents' Brief at 21. As discussed above, they were aware of the situation since at least 2007.

⁹ Mr. Bowers was reengaged by the Company just three weeks before trial and was then given permission for the first time to report the problems to the taxing authorities. (R. pp. 453-454.)

trial and being made a matter of public record. The Mason Respondents certainly did not conduct themselves in an appropriate manner, and their failure to properly and timely address the Company's acknowledged tax problems caused the Company significant damage. Moreover, the tax issues were a source of "terrible friction" among the parties. (R. p. 544.)

II. Reply Legal Argument

A. Respondents ignore the core harm done to Appellant that the judicial dissolution provisions of the Corporate Code were designed to address.

"The 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 (quoting *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267). That is precisely the situation that Appellant faces: his investment is trapped, and the Respondents have afforded him no ability to participate in the returns of the business, whether through employment, payment of dividends, or otherwise. *See id.* ("Ballard here, like John and Louise in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment."). Respondents ignore this core reasoning behind the judicial dissolution statutes, and inappropriately focus on Appellant's actions instead of "upon the actions of" the Respondents. *Kiriakides*, 343 S.C. 600, 541 S.E.2d at 265.¹⁰

¹⁰ Respondents repeatedly misstate that Appellant *knew* the Company tax returns that Levine prepared and that Appellant signed in his capacity as President were "false and incorrect" or that Appellant *knew* he was committing tax fraud (e.g. Mason Respondents' Brief at 26). Levine, Appellant, and Joe Sr. all testified that Levine assured Appellant (as well as the other family members) that the tax treatment he advised was appropriate and that Appellant relied on Levine's advice as the company accountant. (R. pp. 308-309,

Judicial dissolution is available when, among other situations, “the directors or those in control of a corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder” S.C. Code Ann. § 33-14-300(2)(ii) (2006); *see also* S.C. Code Ann. § 33-18-400(a)(3) (2006) (applying the standards of § 33-14-300 to judicial dissolution of a statutory close corporation). Under South Carolina law, “the terms “oppressive” and “unfairly prejudicial” are elastic terms whose meaning varies with the circumstances presented in a particular case.” *Ballard*, 399 S.C. at 594, 733 S.E.2d at 110 (quoting *Kiriakides*, 343 S.C. at 602, 541 S.E.2d at 266).¹¹ Although analysis is done case-by-case, this case contains various hallmarks of the conduct found to be oppressive and unfairly prejudicial under South Carolina law:

1. Counsel for Appellant raised the improper tax and accounting issues by letters to Respondents in September of 2007. Respondents then demoted Appellant and prohibited him from handling the Company’s financial matters, and Respondents did not properly and timely address the problems raised by Appellant. Indeed, they waited over *four years* to inform the taxing authorities. This is improper, and in the opinion of the Mason Respondents’ own expert, this delay could cause the Company

365-367, 483-489, 1303-1305.) Appellant testified that he did not understand the illegality of and adverse impacts of Levine’s scheme at the time the fraudulent tax returns were prepared and filed. (R. pp. 266-269, 314-315.)

¹¹ The Statutory Close Corporation Supplement, which applies to this matter, is in accord: “No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.” S.C. Code Ann. § 33-18-400, Off. Cmt. 2 (2006).

significant harm in the form of interest and penalties potentially assessed by the IRS and South Carolina Department of Revenue. (R. pp. 443-446, 448.)

2. The Company workplace was entirely dysfunctional among the parties, and there is total estrangement between Appellant on one hand and the Mason Respondents on the other. *See Kiriakides*, 343 S.C. at 606, 541 S.E.2d at 268 (finding “the fact that Alex, majority shareholder in total control of Atlas, is totally estranged from John and Louise” as an important factor in the “classic situation” of a “freeze out”).
3. The company has failed to hold its required annual shareholders meeting since August 2008, yet the other shareholders have conducted shareholder business informally without notifying or inviting Appellant to participate. (R. pp. 655, 656-657, 838-840.) This is improper. *Kiriakides*, 343 S.C. at 605 n.28, 541 S.E.2d at 267 n.28 (finding that “withholding information from minority shareholders” is one of a “host of factors” present in freeze out situations); *see also Ballard*, 399 S.C. at 597, 733 S.E.2d at 111 (“Thoennes admitted at trial that they have not had a directors’ meeting since Ballard’s election nor have they sent him any updates on financing.”).
4. The Mason Respondents have paid excessive salaries to the majority shareholders, far out of proportion to what their positions would command in the marketplace. (R. 424-425, 433-435.) *Kiriakides*, 343

S.C. at 603 n.25, 541 S.E.2d at 266 n.25 (citing “paying excessive salaries to majority shareholders” as a factor “indicative of oppression”).

5. After Appellant accepted his constructive discharge in July of 2008, he has received no dividends or other value for his ownership interest in the Company.¹² This is improper. *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267 (citing “termination of a minority shareholder’s employment [and] the refusal to declare dividends” as “[c]ommon freeze out techniques”).

B. This Court has the power to determine issues of valuation and share ownership, both of which were properly before the lower court and were fully developed in the record.

Should this Court agree that Appellant is entitled to relief under the judicial dissolution provisions of the Corporate Code and that the most appropriate remedy is a required share purchase pursuant to Section 33-18-420, this Court can also determine the appropriate value of Appellant’s shares without remand. The issue of share valuation under this statute was fully tried below. The parties and their respective experts agreed that the appropriate valuation date was August 5, 2008, that the asset approach did not lead to a reliable indication of value, that an appropriate approach to consider was the market approach, that the appropriate method to consider within the market approach was

¹² The Mason Respondents argue that Appellant was “overpaid” while he was still employed by the Company and that, now that he has left the Company, the compensation to the other family members was increased because they undertook certain of his duties (and other functions were performed by other employees). See Mason Respondents’ Brief at 30. Given Appellant’s work hours and success in building and running the business, this point is certainly debatable, but the argument misses the critical point: “returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends.” *Ballard*, 399 S.C. at 596, 733 S.E.2d at 111. Once Appellant was no longer employed by the Company, it was improper for the Mason Respondents to pay themselves at a level higher than their services could be replaced in the marketplace rather than paying dividends. (See R. pp. 424-425, 433-435.)

the guideline company transaction method, and that the appropriate metric to consider using that method should be based on the level of revenues of the Company. (R. pp. 422, 667-668, 674-675, 1086, 1146-1147, 1196, 1201.)

The remaining issues debated by the parties are largely legal issues or issues that can be appropriately resolved by this Court without remand. As discussed in Appellant's principal Brief, those issues are as follows:

1. Is the appropriate analysis "fair value" within the meaning of the statutory language and cases interpreting it¹³ or "fair market value"?
2. Are discounts for lack of control or marketability appropriate in this analysis?
3. Does the income approach lead to a reliable indication of value when the underlying Company expense records and tax returns are not reliable and comparisons are made to non-normalized after tax net income margins of other companies? (See R. pp. 674-682, 1198-1199.)¹⁴
4. Should the calculations use an extrapolated portion of one year's revenue or an average of three years' revenues?

¹³ See, e.g., S.C. Code Ann. 33-18-420 (2006) & Off. Cmts.; S.C. Code Ann. § 33-13-101(3) (2006); *Santee Oil Co. v. Cox*, 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975); *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 116, 522 S.E.2d 357, 360 (Ct. App. 1999).

¹⁴ Appellant's principal Brief stated on page 31 that both experts concluded that the income approach to valuation did not lead to reliable or appropriate indications of value of the Company. This is not entirely accurate, as the Mason Respondents' expert, Ms. Smith, in abandoning the income calculations in her initial report because it was based on the unreliable tax returns, modified the income approach to consider the income "based on industry average after tax income." (R. pp. 669-671, 674.)

5. Should multiples be used that are derived from sales of much smaller companies and from sales that occurred many years earlier or from more recent sales of companies of relatively similar sizes?
6. Should a value amount be added representing the non-operating asset of the Company's equity in real estate derived from the Company's books and records as of the valuation date based on the then-recent purchase and construction costs or should the analysis be based on a letter regarding value as of several years after the valuation date?
7. Should the value indication from the calculations be reduced by a potential tax liability and, if so, should that liability be computed as of the valuation date?

As discussed in Appellant's principal Brief, these questions should be decided in Appellant's favor based on applicable law and the full record on these issues.

The Mason Respondents argue that Appellant should not prevail on the issue of whether he owns 50% of the Company's shares because it was not specifically mentioned in the Amended Complaint. Mason Respondents' Brief at 32-33. Pursuant to the letter agreement regarding the conveyance of additional shares, an additional 5% interest was to be conveyed to Appellant at the end of calendar years 2008 through 2011. (R. pp. 813-814.) The Complaint was filed on August 5, 2008 (R. pp. 1-13), thus, at that time, delivery of the additional shares was not yet due. By the time the Special Referee issued his final orders in this case in January of 2012, delivery of the remaining shares was past due. These breaches of the letter agreement were supplemental developments after the filing of the original complaint. *See* Rule 15(d), SCRCF. Moreover, both the Complaint

and the Amended Complaint assert a cause of action for breach of express and implied promises and agreements. (R. pp. 6-7, 36-38.) The breaches of the letter agreement were the subjects of discovery, including questions at depositions. (*See, e.g.*, R. pp. 1297, 1308.) These breaches were also the subject of testimony at trial. (*See, e.g.*, R. pp. 566-567.)

The letter agreement was admitted into evidence on the first day of the trial without objection by the Mason Respondents. (R. pp. 234-235.) Counsel for the Mason Respondents later argued that the breaches of the letter agreement were not mentioned in the Complaint, and these responses were discussed. (R. pp. 413-415, 417, 568-569.) The Special Referee took the matter under advisement, but did not subsequently address the objection, rule that the Complaint did not fairly raise the issue, give Appellant an opportunity to submit a supplemental pleading, or determine whether the issue had been litigated by consent pursuant to Rule 15(b), SCRCF. Appellant should not be deprived of the value of the additional shares of the Company based on the Mason Respondents' argument when Appellant adequately raised the issue in the Complaint, the issues were the subject of full discovery without objection, and the Mason Respondents can show no prejudice from proceeding with the litigation of the claim at trial.

C. Respondents' retaliation against Appellant violates South Carolina public policy that seeks to protect the rights of whistleblowers and those who seek to right corporate wrongdoing.

There is abundant record evidence that the Respondents retaliated against Appellant because of his refusal to cooperate in what he believed to be possible workers' compensation fraud and raising the improper tax and accounting issues. (*See* R. pp. 369, 410-411, 505-506.)

It has long been the public policy of this State that it is unlawful to retaliate against an employee by terminating his or her employment in violation of a clear mandate of public policy. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985); *see also* S.C. Code Ann. § 41-1-80 (Supp. 2012) (prohibiting termination of employment in retaliation for filing workers' compensation claim). "The determination of what constitutes public policy is a question of law for the courts to decide." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 617, 713 S.E.2d 634, 638 (2011); *see also* S.C. Code Ann. § 8-27-20(A) (Supp. 2012) (prohibition of retaliation against public body employee as a result of employee's report of wrongdoing). Numerous federal statutes are in accord. *See, e.g.*, 26 I.R.C. § 7263(a)&(b) (establishing award program for individuals providing information for detecting underpayments or detecting violations of IRS laws);¹⁵ 18 U.S.C. §§ 1514A & 1513(e) (Sarbanes-Oxley provisions establishing civil and criminal claims and penalties for retaliating against employees who provide information regarding securities fraud or other violation of federal law);¹⁶ 31 U.S.C. §§ 3730(d)(1) & 3730(h) (incentive and anti-retaliation section of False Claims Act); 15 U.S.C. § 78u-6 (securities whistleblower incentives and protection provisions of Dodd-Frank Wall Street Reform and Consumer Protection Act).

¹⁵ An informant is not disqualified from receiving an award even if he participated in the wrongful conduct. For example, Bradley Birkenfeld was sentenced to 40 months in prison because of his participation in the UBS Swiss/offshore bank account conspiracy, but he was awarded a \$104 million whistleblower payment as a result of the information he supplied that aided in collecting taxes. *See* Orly Lobel, "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems," 54 S. Tex. L. Rev. 37, 38 (2012).

¹⁶ Firing an employee who whistleblows regarding alleged corporate tax fraud can also serve as a RICO predicate act under Section 1961(1). *DeGuelle v. Camilli*, 664 F.3d 192, 201 (7th Cir. 2011).

Here, the Mason Respondents should not be allowed to deprive Appellant of all value of his ownership in the Company in retaliation against Appellant because he raised the important but difficult issues presented in this case, including those of possible workers' compensation fraud and fraudulent tax activities on behalf of the Company. Such deprivation contravenes the important public policy of encouraging those with knowledge of wrongdoing to come forward.

D. The Mason Respondents have breached their fiduciary obligations to Appellant.

Respondent Levine argues that “[t]he essence of [Appellant’s] claim is that [the Mason Respondents’] alleged breaches of fiduciary duties caused a loss to the Company and, therefore, a loss to the value of his shares in the Company.” Levine Brief at 7.¹⁷ This misstates and mischaracterizes Appellant’s claims for breach of fiduciary duty. The evidence shows that the Mason Respondents’ actions as corporate officers caused Appellant individualized harm. Appellant is the *only* shareholder to be excluded from the business, and Company business that was previously conducted at shareholder meetings is now being handled by other shareholders without notice or invitation to Appellant. (R. pp. 655, 656-657.) The Mason Respondents have given themselves raises, cars, bonuses, and other perquisites all the while extending *nothing* of value to Appellant in the way of a dividend or other way to reap the benefits of his ownership. (R. p. 412.) *See Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Wely, Inc.*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (holding that corporate mismanagement which resulted in a diminution of

¹⁷ The Mason Respondents argue similarly that Appellant should have brought his fiduciary duty claims as a derivative action. Mason Respondents’ Brief at 36.

corporate ownership percentage was an individual loss); *see also Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929) (“It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs directly, or as their interests were submerged in the corporation whose assets were thus dissipated.”).¹⁸

E. Levine has aided and abetted the breaches of fiduciary duties committed by the Mason Respondents.

Levine argues that he could not be liable for aiding and abetting the various breaches of fiduciary duties demonstrated in this case because he was acting at Appellant’s direction and, consequently, did not “know” he was participating in a breach of fiduciary duty. Levine Brief at 4-5. The evidence is to the contrary. While President of the Company until October 24, 2007, Appellant relied on Levine to provide competent, appropriate, and legal tax and accounting advice. (R. pp. 365-367.) Levine has admitted that the advice he provided to Appellant and the Company and the tax returns he prepared were fraudulent (and that he knew it was fraudulent at the time he was doing it), but that he nevertheless assured Appellant that it was proper. (R. pp. 486-489.) In addition, and with full knowledge of the tax and accounting problems that Appellant raised through counsel in September 2007 (R. pp. 846-847, 848-850), Levine has continued as the accountant for the Company and inexplicably failed to appropriately remedy the tax

¹⁸ Appellant recognizes that the Mason Respondents have also breached their fiduciary duties of acting in good faith, with ordinary care, and with a reasonable belief that the action undertaken is in the best interests of the corporation and its shareholders by (1) continuing to retain Levine as the Company accountant and continuing to rely on his financial advice in the face of actual knowledge of his incompetent and fraudulent accounting advice in violation of S.C. Code Ann. § 33-8-420(c) (2006) and (2) failing to appropriately remedy the improper tax returns for 2003-2006 until the week this matter was tried (in *November 2011*) despite *actual knowledge* of the problems since *September 2007*.

problems for over four years.¹⁹ He also retaliated against Appellant and assisted the Mason Respondents in retaliating against Appellant because Appellant brought his unprofessional and incompetent behavior to light. (R. pp. 503, 506, 513, 514-515.) Levine's claims that he had no knowledge of his participation in the many breaches of fiduciary duties and retaliation against Appellant must fail.

F. Appellant's Appeal as to Respondent Levine is properly perfected.

This Court has already considered and rejected Respondent Levine's argument that Appellant's mistake in failing to initially properly name Respondent Levine as a respondent was not a clerical error. (Order of March 4, 2013.) On June 4, 2012, Appellant filed a timely Notice of Appeal in the Court of Appeals. (Appellant's Return to Levine's Motion to Dismiss ("Return") at p. 2.) Levine was not listed as a Respondent in the Notice of Appeal, nor was the Levine Final Order listed or attached to the Notice of Appeal, although the Notice of Appeal listed and attached the Final Order and the Order denying the Rule 59(e) motion. *Id.* John M. Leiter, Esq., counsel for Levine, however, was served with the Notice of Appeal. *Id.* On June 8, 2012, Appellant filed an Amended Notice of Appeal, which listed Levine as a Respondent. *Id.* at p. 2-3. Counsel for Levine was again served with a copy of the Amended Notice of Appeal. *Id.* at p. 3. Immediately after a conversation with counsel for Levine during which he pointed out that there was a separate final order with respect to Levine and it was not attached to the Amended Notice of Appeal, on July 19, 2012, Appellant filed a Second Amended Notice of Appeal, which again listed Levine as a Respondent and further listed and attached the Levine

¹⁹ Even the amended returns that Levine prepared and that were reviewed in form only by Tim Duncan, CPA, were improper and would, if filed, have failed to fix the problems. (R. pp. 586, 587, 592-593.)

Final Order. *Id.* Counsel for Levine was served with a copy of the Second Amended Notice of Appeal. *Id.* On September 24, 2012, Appellant filed his Initial Brief and Designation of Matter. *Id.* Counsel for Levine was served with a copy of Appellant's Initial Brief and Designation of Matter. *Id.*

It is well established that “[c]lerical errors in a notice of appeal do not destroy the appeal.” *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). The hallmark of the clerical error analysis focuses on any prejudice to the moving party. *See, e.g. Moody v. Dickinson*, 54 S.C. 526, 534, 32 S.E. 563, 566 (1899) (finding that there was no “error in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced, and were not delayed” where the error was an improper listing of the parties to the appeal in the notice); *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (discussing that the moving party “demonstrates no prejudice as a result of the omission” from the notice of appeal); *Charleston Lumber*, 318 S.C. at 478, 458 S.E.2d at 436 (“Charleston Lumber’s effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled is rejected.”).

In *Conner v. City of Forest Acres*, 348 S.C. 454, 460-61, 560 S.E.2d 606, 609 (2002), the South Carolina Supreme Court recognized that failure to properly name respondents in a Notice of Appeal could be a clerical error if the error was rectified promptly and prejudice did not occur. In *Conner*, the appellant filed a Notice of Appeal on January 12, 1998, naming only one of three defendants as a respondent. *Id.* at 460, 560 S.E.2d at 609. The Court of Appeals advised the appellant on January 14, 1998, that

the caption should read differently and identify the additional two defendants as defendants if not respondents. *Id.* Despite such notice from the Court of Appeals, the appellant did not file an Amended Notice of Appeal until after the appellant's initial brief and designation of matter were filed in late May 1998 – almost five months after the Notice of Appeal was originally filed. *Id.* at 461, 560 S.E.2d at 609. Under these facts and relying on *Moody*, the Court of Appeals found that the correction did not occur “soon” after the mistake was discovered and that the failure to take action promptly “misled [the two defendants] into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment.” *Id.* at 462, 560 S.E.2d at 610.

This case is clearly distinguishable from *Conner*, and indeed, the contours of *Conner* would classify the deficiencies in the various notices of appeal in this matter as clerical errors. First, Appellant filed his Amended Notice of Appeal a mere four days after the Notice of Appeal, and the Amended Notice of Appeal named Levine as a Respondent. Counsel for Levine was served with the Amended Notice of Appeal, thereby putting Levine on notice that Appellant intended to appeal issues regarding Levine. Both the Notice of Appeal and the Amended Notice of Appeal, filed on June 4, 2012, and June 8, 2012, respectively, were filed within the 30 day window after receipt of the written notice of the entry of the order denying Appellant's Rule 59(e) motion on June 1, 2012, pursuant to Rule 203(b)(1), SCACR. Second, Appellant filed a Second Amended Notice of Appeal on July 19, 2012, in direct response to inquiries from counsel for Levine about the specifics of Appellant's appeal. Levine can hardly be prejudiced or misled about whether he was to be included in the appeal if he asked for and was given

immediate oral and written confirmation that the Levine Final Order was a subject of the appeal. Third, the Second Amended Notice of Appeal was filed over two months before Appellant filed his Initial Brief and Designation of Matter on September 24, 2012. Unlike in *Conner*, in which the appellant filed his initial brief and designation of matter before correcting the notice of appeal, Levine has been included in the briefing and designation of matter all along. Consequently, Appellant has properly perfected his appeal as to Respondent Levine.

Conclusion

For the reasons set forth herein and in Appellant's principal brief, both the Final Order and the Levine Order should be reversed.

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August 19, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

ORIGINAL

Ralph P. Stroman
Special Referee

Case No.: 2008-CP-26-6169

Joseph E. Mason, Jr., ... Appellant

v.

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

**FINAL BRIEF OF RESPONDENTS CATHERINE L. MASON,
JOSEPH E. MASON, SR., KATHY ST. BLANCHARD AND
MASON HOLDING COMPANY, INC.**

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INC.

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AUG 27 2013

SC COURT OF APPEALS

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STATEMENT OF ISSUES ON APPEAL

- I. THE SPECIAL REFEREE CORRECTLY HELD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC. BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT.
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- VIII. THE SPECIAL REFEREE PROPERLY HELD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME.

- IX. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM.
- X. THE SPECIAL REFEREE PROPERLY DETERMINED THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS COULD BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN.

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint by Appellant Joseph E. Mason, Jr. ("Son") in the Horry County Court of Common Pleas on August 5, 2008. Son named as Defendants his mother, Catherine L. Mason ("Mother"), his father, Joseph E. Mason, Sr. ("Father"), his sister Kathy St. Blanchard ("Sister") and Mason Holding Company, Inc., ("Company"). Company is a tire and automotive services business wholly owned by Son, Mother, Father and Sister.

Son asserted six causes of action in his Complaint: (1) breach of express and implied contracts for permanent employment by constructive termination of Son's employment with Company; (2) breach of officer's/director's duties owing to Company and its shareholders; (3) civil conspiracy by Mother, Father and Sister ("Family Respondents") to deprive Son of his employment with Company and cause him harm; (4) for relief pursuant to S.C. Code Ann. §33-14-300 (Rev. 2006) *et seq.* requiring Family Respondents to purchase Son's interest in the Company; (5) constructive termination of Son's employment in violation of Company employee handbook; and (6) constructive termination of Son's employment in violation of public policy. Defendants filed their Answer and Counterclaims on August 28, 2008; asserting defenses including the affirmative defense of "unclean hands". Additionally, Defendants asserted counterclaims against Son for damages resulting to Company and its shareholders from Son's actions while employed by Company as its President and for the conversion of Company funds. Son filed his Answer to the Defendant's Counterclaims dated September 23, 2008, alleging multiple defenses.

On September 23, 2009, Son filed an Amended Complaint reasserting his initial

claims against Mother, Father Sister and Company, and adding a claim against Irwin Levine, the Company's accountant ("Accountant"), of aiding and abetting the Family Respondents in breaching fiduciary duties as Company officers and directors. On October 13, 2009, the Company and Family Respondents filed their Answer and Counterclaims to Son's Amended Complaint. Son filed no Reply to the Counterclaims asserted in the Answer and Counterclaim to Son's Amended Complaint. Accountant filed his Answer to Son's Amended Complaint dated November 23, 2009.

The case was referred, with finality and by consent, to Ralph Stroman, Esquire, as Special Referee by Consent Orders filed February 11, 2011, and April 13, 2011. The case was tried without a jury over five (5) days during the week of November 14-18, 2011. At the conclusion of Son's case, a directed verdict was granted as to Son's claim of constructive termination in violation of Company's employee handbook alleged in his fifth cause of action.

The Special Referee filed separate Final Orders disposing of (1) Son's claims against Company and the Family Respondents (the "Mason Order"), and (2) Son's claim against Accountant (the "Levine Order"); both Final Orders were filed on January 20, 2012. The Mason Order granted judgment in favor of the Family Respondents and Company as to all remaining causes of action asserted by Son and granted judgment against Son on the counterclaims in the total amount of Twenty-nine Thousand Seventeen and 98/100 (\$29,017.98) Dollars. The Mason Order also held that the Company could later pursue its claim against Son for damages resulting from his filing, while Company President, of false and inaccurate Company State and federal tax returns once the amount of damages and

additional tax liabilities to the Internal Revenue Service and the South Carolina Department of Revenue were determined. The Levine Order granted judgment in Levine's favor.

Plaintiff filed a motion dated January 27, 2012, to Alter or Amend the Mason Order pursuant to Rule 59(e) S.C.R.C.P. solely as to that portion of the Mason Order allowing Company to pursue its claim against Son for damages relating to his filing of false Company tax returns at a later date. After oral argument, the Special Referee denied Son's motion by Order filed May 4, 2012.

Son filed a Notice of Appeal dated June 4, 2012. Son thereafter filed an Amended Notice of Appeal dated June 8, 2012, and a Second Amended Notice of Appeal dated July 19, 2012.

STATEMENT OF THE FACTS

This case involves the ownership and operation of Mason Holding Company, Inc., by members of the Joseph E. Mason, Sr. family. Company operates five stores in Horry and Georgetown counties under the trade name "Mason Tire & Auto Service" ("Mason Tire"). Mason Tire is in the business of selling automobile and truck tires and automotive maintenance of personally owned and commercial vehicles. All store locations except one are operated on land leased by separate corporations wholly owned by Company. The store location on South Carolina Highway 544 (the "Conway Store") is owned by Company and is operated by BCJ Tires, Inc., which is owned 52% by Accountant and 48% by Company.¹

The Company's stock is owned 30% by Son, 30% by Sister, 20% by Father and 20% by Mother. (Amended Complaint, Par. 13; R. p. 33; R. p. 413, line 16 - p. 415, line 3; R. p.

¹ Son consented to the acquisition of BCJ Tires, Inc. stock by Accountant. (R. p. 373, line 14 - p. 374, line 18).

619, lines 17-20). Son was employed as a principal manager of Company until July 30, 2008 when he voluntarily quit his job. (R. p. 375, line 13 - p. 377, line 22). He filed this lawsuit six days later.

In or around 1984, Father decided to open a tire and auto service business in coastal South Carolina. Father had considerable experience in the tire business in the Miami, Florida, area where he lived at the time. Father had operated eight retail stores for Goodyear Tire & Rubber and was a partner in a truck tire center in the Miami area. (R. p. 1286, line 7 - p. 1288, line 17). When Son and Sister learned of Father's proposed South Carolina venture, both asked to be involved. Father, who would be funding the venture, required Sister and Son to pay \$10,000.00 each for a ten percent (10%) interest in the new entity. Son has never paid anything for his interest in Company other than the initial \$10,000.00 payment. (R. p. 346; line 18 - p. 347, line 21). Subsequently, Father acquired a location in Surfside Beach, South Carolina, and opened Mason Tire & Auto Service, Inc. (the "Surfside Store"). Initial shareholders were Father, Mother, Son, Sister, and related family members Mr. and Mrs. Sanderson and their daughter. Later, Mother and Father acquired the Sandersons' interest in the Surfside Store leaving Son and the Family Respondents as the only shareholders. (R. p. 694, lines 7-25). The Surfside store is located on leased land owned by Mother, Father and Mother's sister, Mrs. Sanderson.

After graduating from the University of Alabama with a Business Administration degree, Son worked for Ryder Truck rentals in the Miami area. After Father acquired a location for the Surfside store, Son moved to Surfside Beach to become the store manager. Father and Mother provided the start-up capital for the Surfside Store (with the exception of

the \$10,000.00 investment each by Son and Sister). Father initially held the title of President of the Company.² Until Father and Mother moved to the Surfside area in 1989, Father monitored the Surfside Store operations through frequent telephone calls and site visits. (R. p. 622, line 13 - p. 623, line 14; R. p. 695, line 1 - p. 696, line 22; R. p. 1289, lines 3-24). Sister also moved to the Surfside Beach area and worked in the business in bookkeeping/accounting and sales. Sister's husband Oswald St. Blanchard ("Ozzie") went to work at Mason Tire in 1984. (R. p. 620, line 2 - p. 622, line 1).

In or around 1989, the family decided to expand the Mason Tire business by opening a store in North Myrtle Beach, South Carolina ("North Myrtle Beach Store"). A separate entity, J&O Tire and Auto Service, Inc., was formed for the new store and was operated on leased land owned by Son and Ozzie individually.

In 1989, Father and Mother moved to the Surfside Beach area and Father began working in the business on a daily basis with plans to expand the Company's business into the commercial accounts area. Son remained in charge of general business operations serving as its general manager. Father, Sister, and Ozzie were active in the business as full time employees. Mother was likewise involved, but to a lesser degree.

Continued success led the Company to expand again in or about 1995 with the opening of a Mason Tire location in Pawley's Island, South Carolina (the "Pawley's Island Store"). The Pawley's Island Store is operated by an entity formed and named M&S Tire Company, Inc., operated on leased land owned by a separate company (Catson, LLC) owned by Father and Mother. (R. p. 250, line 1 - p. 252, line 22).

² The record is unclear as to precisely when Son was elected President, but the testimony and records

In 1988, Company was formed. All Mason Tire & Auto Service, Inc., J&O Tire & Auto Service, Inc. and M&S Tire Company, Inc. stock has been transferred to Company.

In 1999, Company opened an additional location in Myrtle Beach, South Carolina (the "Myrtle Beach Store"), which is operated by K&J Tire Company, Inc., on land leased from Goodyear Tire & Rubber Company. Company owned all of the stock in the four Mason Tire locations. (R. p. 253, line 16 - p. 254, line 21). Company's stock was owned by Mason family members, with Father and Mother owning 40% each and Son and Sister owning 10% each.

Son's relationship with the other family members was troubled and the trouble bled over into their business relationship. (R. p. 537, lines 10-20; R. p. 721, line 5 - p. 725, line 4). From time to time Son left the business unattended for extended periods of time without notice or justification. (R. p. 628, line 20 - p. 629, line 18; R. p. 699, line 6 - p. 702, line 24). In April 2001, Son left without notice resulting in an emergency meeting of the shareholders to provide for the continued operation of the business during his absence. Son ultimately returned to the business at Father's urging. At a meeting on May 21, 2001 (R. p. 781), the family's personal problems and the effect on the Company were discussed. All family members except Son agreed that family counseling was appropriate. Although ultimately, the family underwent counseling, Son's periodic absences from the business continued without notice. In each instance, primarily as a result of the Father's intervention, Son ultimately returned and resumed his position as President and general manager.

During a June, 2001 stockholders' meeting, Father expressed a desire to become less

indicate that by 2001 Son was operating as Company President.

involved in the daily business operations, with an eye toward retirement. He also expressed concern that, although the business was doing well, there was a great deal of “negativity” within the family and that the family members should be able to work together. Father warned the family members that if they were unable to work together, he could and would replace any one of them. (R. p. 786).

Over the next two years, and in view of Father’s desire for retirement, Father and Son and Accountant, assisted by Company’s attorney Edward Kelaheer, (“Attorney Kelaheer”), developed a strategy for Mother and Father’s exit from the business. Accountant, a public accountant from Miami, Florida, was a long time accountant and tax preparer for the Company and the family members, including Son. Additionally, Accountant was a friend and trusted advisor to all family members, including Son, on accounting business matters. In fact, he prepared Son’s personal tax returns through and ending the 2007 tax year.

On November 8, 2002, following meetings with Father, Son, and Accountant, Attorney Kelaheer forwarded documents to the Company shareholders which he had prepared in accordance with Father, Son and Accountant’s instructions. (R. p. 808). Attorney Kelaheer termed the documents “unusual”, expressing concern with some aspects of the documents. While the specific documents enclosed with Attorney Kelaheer’s letter were not introduced, the letter references three documents: (1) Gift letter; (2) Employment Agreement; and (3) A Pawley’s Island property lease.

Executed documents fitting that description, dated as of the end of 2002, were introduced (the “Retirement Documents”).³ (R. pp. 810-826). The Retirement Documents,

³ Father was 79 years of age at the time of trial.

had they been fully performed, would have accomplished Father and Mother's goal at that time of exiting from the Company, with the Company equally owned by Son and Sister.

The Retirement Documents essentially called for Company to provide Father and Mother with certain Company employee benefits for "consulting services," and for Company to pay additional rent on the Pawley's Island Store to Catson, LLC, owned by Father and Mother in return for "gifts" of Company stock to Son and Sister. The gift letter (R. pp. 813-814) calls for Mother and Father over time to give their Company stock to Son and Sister in equal amounts, anticipating, at that time, that ultimately, Mother and Father would have effected their exit from the Company with Son and Sister as equal co-owners.

Commencing in 2003, benefits and rents were paid and received under the Retirement Documents. Mother and Father "gave" an additional 20% each in the Company's stock to Son and Sister, and by the end of 2007 Son and Sister each owned 30% in Company stock and Father and Mother each owned 20% in Company stock. Rental payments under the Retirement Documents were terminated after Son left the Company, however, and Father resumed his status as a full time paid employee. (R. p. 725, line 5 – p. 726, line 5; R. p. 519, line 6 – p. 520, line 6).

Since its formation and through 2006, the Company generally grew and prospered in sync with the economy in general in coastal Horry and Georgetown counties. While Son managed the Company with input from the other family members during this period of time; Son caused periodic family discord and acted irresponsibly by abruptly leaving his job with periods of unexpected and unexplained absences, returning after his Father's urging. (R. p. 697, line 10 - p. 700, line 20).

Unknown to the Father, Mother and Sister, Son was engaged in actions, as President, seriously detrimental to the Company's and Shareholders' best interests. In 2003 and 2006, Son made significant fraudulent alterations to the inventory shown on Company's books. The 2003 inventory adjustment was approximately \$440,000.00 and in 2006 it was approximately \$300,000.00. These increases in inventory amounts filtered down to increases in the costs of goods sold expenses. These fraudulent entries affected the Company's 2003 and 2006 income tax returns by significantly decreasing the Company's federal and State income tax liabilities. (R. p. 440, line 2 – p. 445, line 25; R. pp. 1170-1188). In order to offset the inventory reduction for 2003 on the Company's books, Son prepared two promissory notes for \$220,000.00 each, made payable to himself and his Sister. (R. pp. 827; 828). (R. p. 362, line 3 – p. 368, line 7; R. p. 530, line 21 – p. 532, line 22). Son signed the notes as President and Ozzie signed as Vice President of Mason Tire; the notes were witnessed by Mother and Father. In 2006, Son caused a standard journal ticket to be issued reflecting notes payable to Son and Sister totaling \$300,000.00 (the same amount as the 2006 inventory journal adjustment). (R. p. 836) (R. p. 532, line 23 – p. 535, line 8; R. p. 539, line 11- p. 541, line 14). (R. p. 1190). Son proffered promissory notes supporting the 2006 journal ticket to Sister for execution, but she refused.

All parties (including Son) testified that Father, Mother and Sister were unaware that the fictitious notes and inventory adjustments resulted in an understatement of taxable income, and therefore the filed 2003 and 2006 Company tax returns were false and inaccurate. (R. p. 345, lines 4-24; R. p. 366, lines 7-11; R. p. 532, lines 4-22; R. p. 697, line 10 – p. 698, line 3). Son, through the filing of the 2006 return, was fully in charge of all

affairs, including the financial affairs, of Company. (R. p. 521, line 17 – p. 522, line 19; R. p. 532, line 4 – p. 535, line 13). The inventory adjustments and corroborative fictitious notes were part of a plan and scheme Son put in place to limit Company income to levels Son deemed “acceptable”. (R. p. 379, line 18 – p. 381, line 5). Accountant presented Son with the “option” to either the pay the taxes accurately reflected by the Company’s books and records or to limit the taxes paid by way of these accounting and reporting artifices. (R. p. 483, line 5 – p. 484, line 8; R. p. 523, line 5 – p. 532, line 22). Son opted to pay less taxes by manipulating the parts inventory accounts and reports. (R. p. 495, line 12- p. 496, line 17; R. p. 481, line 13- p. 484, line 13;). Accountant candidly testified he turned “a blind eye” to these practices. (R. p. 498, line 2 - p. 500, line 15).

In December, 2004, Ozzie suffered serious injuries in a motorcycle accident during a motorcycle “Event” in support of the Toys for Tots program that rendered him a quadriplegic. Ozzie retained a local attorney, Gene M. Connell, Jr. (“Attorney Connell”), to file a worker’s compensation claim against Company because Ozzie was participating in the event as a marketing activity on behalf of Company. Son contends that Father directed him to testify that Ozzie’s participation in the event was within the scope of his employment so that Ozzie would receive workers compensation benefits; Son also contends that such testimony would have constituted perjury. Father denies this allegation. (R. p. 718, lines 7 – 22). Both Father and Sister testified that Ozzie was acting within the scope of his employment at the time of the injury because he was participating in the event as a marketing activity on Company’s behalf. Documentary evidence corroborated that Ozzie’s participation on behalf of the business in the same event in years past and Son signed

minutes of the stockholders' meeting in November, 2005, reflecting a discussion of Ozzie's participation in the event (R. p. 829). Attorney Connell testified at trial that in his representation of Ozzie, it appeared that Ozzie was acting within the scope of his employment at the time of the accident; that the claim was vigorously contested; that his client prevailed at the initial level but the decision was reversed 2 to 1 at the Commission level; that the Commission's decision was appealed to the Circuit Court; and that a favorable settlement was reached before a Circuit Court decision was rendered. Attorney Connell further testified that he was unaware of any fraud in connection with the claim. (R. p. 571, line 12 – p. 576, line 14).

In 2006, Son determined that Company would be well served by opening an additional location between Myrtle Beach and Conway. The other family members were agreeable, so in the Fall of 2006 Company purchased property adjacent to S.C. Highway 544 between Myrtle Beach and Conway for the purpose of constructing a Mason Tire Conway location (the "Conway Store"). (R. p. 350, line 18 – p. 353, line 21). The Conway Store was leased for operation to BCJ Tires, LLC, ("BCJ Tires") an entity Son formed, with initial members consisting of Son, Sister and Son's friend Brian Stout. Although the Company had no ownership interest in BCJ Tires, it was operated under the name of Mason Tire & Auto Service. On August 3, 2007, without the knowledge or consent of any Respondent Family member, Son transferred \$93,500.00 of Company funds to BCJ Tires to fund its operation. (R. p. 1195). When Father learned of the circumstances of ownership and operational funding of BCJ Tires, he required Son to transfer Son and Sister's interests in BCJ Tires to Company. (R. p. 707, line 16 – p. 709, line 21). The BCJ Tires location has operated at a

loss since its inception, which loss has been sustained by Company. Company subsequently acquired Brian Stout's interest and sold a 52% interest in BCJ Tires to Accountant. BCJ Tires, currently owned 52% by Accountant and 48% by Company, continues to operate at a loss. The Conway Store location is the only real estate owned by Company.

The timing of the acquisition and construction of the Conway Store unfortunately occurred when the price of real estate was at its zenith. Son admitted that 2007 was a bad time to be opening BCJ Tires or any business and acknowledged it was one of the worst times to be operating a business in the United States of America since 1929. (R. p. 354, lines 9-18). Company continues to struggle not only with the operating loss for BCJ Tires, but also with the mortgage debt for the land and building, while the store's value has declined precipitously in the down market. (R. p. 427, line 5 – p. 429, line 22; R. p. 541, line 15 – p. 544, line 1).

In August, 2007, Son left the business abruptly and without justification or notice, remaining absent for virtually the entire month. (R. p. 628, line 20 - p. 629, line 18; R. p. 649, lines 6-24). On August 31, 2007, Attorney Wayne Byrd wrote to Mother, Father, and Sister on behalf of Son advising he had been retained by Son to represent his interests “....as an officer, director and minority shareholder of Mason Holding Company, Inc., and its wholly owned subsidiaries.” Based upon the information provided to him by Son, Attorney Byrd alleged that Mother, Father and Sister had “....committed illegal fraudulent and oppressive acts and have unduly prejudiced the corporations and [Son's interest therein].” Threatening litigation on behalf of Son, Attorney Byrd demanded the alleged unacceptable conduct and practices be stopped. (R. pp. 844-845). The letter makes no reference to or

acknowledgement of the fact that the acts complained of were taken while Son was, by all accounts, President of Company since 2001 and fully in charge of Company operations.

On September 27, 2007, Attorney Byrd, again on behalf of Son, wrote Accountant outlining various alleged financial and tax accounting irregularities which Accountant was accused of having “devised and fashioned.” While the alleged activities were substantially accurate, Attorney Byrd’s letter failed to recognize that the delineated activities that formed the basis of Son’s complaints were taken at Son’s direction and with his full knowledge and consent. (R. pp. 848-850). While Accountant may have indeed participated in the questioned tax practices, it is beyond dispute that Son was aware of, actively engaged in and furthered the very practices about which his attorney’s September 17, 2007, letter complains and which form the basis of certain claims in this action. (R. p. 659, line 4 – p. 660, line 8).

Following receipt of the Byrd letter, Accountant advised Sister, by email, that certain tax accounting and practices complained of in the Byrd letter (including the payment of certain personal expenses by Company) should be terminated. (R. p. 852). Accountant also requested each of the shareholders to agree to repay Company for personal expenses paid by Company. (R. p. 854). All stockholders agreed to repay the personal expenses and signed the agreement except Son who refused. (R. p. 388, line 4 – p. 389, line 21; R. p. 658, lines 5 – 25). (R. p. 854).

Attorney Byrd’s firm refunded Company the amount of \$10,000.00 which Son had paid Byrd’s law firm using a Company check (and Company funds) given for Son’s attorneys’ fees; Byrd’s letter acknowledges the firm represented Son’s interest and not the Company. (R. pp. 1164; 1165). Son, however, immediately transferred Company funds

from Company's corporate checking account to Son's own personal bank account to reimburse himself for the attorney's fees he paid to Byrd to represent him personally, in the amount of \$17,301.66. (R. p. 381, line 20- p. 383, line 25; R. pp. 1166; 1167).

On October 24, 2007, a shareholders meeting of the Mason family companies was held at Attorney Cliff Tall's law office, pursuant to notice, for the following purposes:

1. Selection of registered agent for Mason Tire and Auto, Inc., to be listed with the South Carolina Secretary of State.
 2. Review and ratification of corporate records which have been kept regarding past business.
 3. Selection of new accounting firm to assist the business, generally, and to supervise correction of past tax reporting.
 4. Election of Officers and Directors
- (R. p. 855).

Prior to the October 24 meeting, Son had returned from his August 2007 hiatus and resumed his role as President and Company General Manager. At the meeting the Company shareholders voted to retain local certified public accountant Timothy Duncan ("Duncan") to supervise the correction of the Company's past tax reporting. Father was elected President and Son was elected Vice President. The only change in Son's duties was that he was relieved of cash handling procedures; otherwise, Son continued to be in charge of the Company's operations and retained the same salary and perquisites including car, cell phone, credit card and insurance. (R. p. 356, line 12 – p. 357, line 15; R. p. 711, line 9 – p. 714, line 12).

Subsequent to the corporate meeting, Duncan undertook to assist Accountant in preparation of amended State and Federal tax returns for filing to correct the prior defects in filing. Amended returns were prepared for tax years for 2003 through 2006, including revisions requested by Duncan. Duncan was unwilling to sign the amended returns as Company's accountant, preferring that they be signed by Accountant since Accountant had filed the returns being amended. A shareholders' meeting was scheduled for December 7, 2007, for the purpose, *inter alia*, of mailing the amended returns. (R. p. 896).

By letter dated November 22, 2007, Father informed CPA Duncan that Company would be using Accountant's firm to prepare its 2007 corporate and shareholders individual income tax returns. Prior to that date, Son had visited Duncan and requested Duncan's assistance in making inventory adjustments similar to those adjustments Son had made in Company's 2003 and 2006 financial statements which had resulted in incorrect returns being filed. Duncan, amazed that Son was attempting to continue that practice, determined that he did not want to be involved in preparing or filing Company returns in any event. (R. p. 371, line 8 – p. 372, line 4; R. p. 597, line 2 – p. 600, line 9).

While Company President and General Manager, Son repeatedly created fabricated invoices for commercial tire "casings" from fictitious companies⁴. Son created fake invoices that indicated that the fictitious company had sold (and that the Company had received) tire casings. Son would then remove cash from the Company's cash register in an amount equal to the sum of the casing invoice prices for his personal use. The Company's records would reflect non-existent tire casing inventory and the books would be in balance because of Son's

⁴ A "casing" is a used commercial truck tire suitable for "recapping" and resale. (R. p. 248, line 8 – p. 249, line 9).

removal of cash from the Company register in an amount equivalent to the fictitious casing sum. Company employees testified that they personally observed Son remove money from the cash register drawer and place it in his pocket, and that the casing invoices in question contained names of nonexistent companies. (R. p. 604, line 18 – p. 608, line 5; R. p. 690, line 7 – p. 693, line 14). Son admitted engaging in this practice, but contended Accountant said it was acceptable so long as he split the cash equally with Sister (and which Accountant denied). (R. p. 384, line 17 – p. 387, line 21). Sister denied Son's testimony that he split the cash with her. (R. p. 648, lines 12-19). The other Mason family members were unaware of Son's tire casing scheme until the Fall of 2007. (R. p. 747, line 4 – p. 748, line 21; R. p. 710, line 10 – p. 711, line 12).

Upon returning to the family business after the August 2007 hiatus, Son continued to experience relationship problems with Father, Mother and Sister, prompting Father to give him a written reprimand on or about November 29, 2007. (R. p. 897). By that time, Father had been made aware of the tire casing scheme, the unauthorized distribution of \$93,500.00 of Company money to BCJ Tires, and the tax return improprieties as a result of Attorney Byrd's letters. (R. p. 707, line 16 – p. 711, line 19). In a separate letter dated November 29, 2007, Father advised Son as follows:

As Vice-President your job duties will remain the same as they have for the past twenty five years. The only exception will be check signing and transferring of funds, you are no longer responsible for those duties. Any journal tickets created by you must have the President's signature on them.

You will perform your job duties with accountability and quality job performance in a professional matter to all officers and employees of Mason Tire. This is a quality I expect from all officers of Mason Tire, nothing less will be tolerated.

Again, if you feel you cannot conduct yourself in such a matter as stated before in the letter you received from your mother and myself you will go on a permanent leave of absence until you can prove otherwise.

(R. p. 895).

In December of 2007, all shareholders and Accountant attended a meeting at the Surfside Store, held for the express purpose of signing and mailing the amended returns. The proposed amended returns for 2003, 2004, 2005, and 2006 were presented and discussed at the meeting (R. pp. 938-954). After considerable discussion (principally centered around the considerable cost to the Company of filing the amended returns and payment of the taxes required with such filing) Son, with the shareholders' consent, determined that the Company would not file the amended returns but would follow Accountant's suggestion that the prior underpayment of taxes by the Company be handled "another way". (R. p. 513, lines 2-12; R. p. 536, line 9 - p. 537, line 20; R. p. 625, line 20 - p. 626, line 21; R. p. 704, line 14 - p. 707, line 6). The "other way" devised by Accountant involved filing returns that overstated taxable income for future years, thereby essentially "reversing" the fictitious inventory adjustments made in previous years. Following the meeting, Company filed State and federal tax returns for subsequent years which overstated income for those years and paid taxes on the overstated income for those years. (R. pp. 1170-1188).

In July, 2008, Son informed Father that he planned to terminate Sandra Adams, Company bookkeeper, for allegedly stealing because she had failed to deduct the correct insurance premium amount from her paycheck. Father testified that his initial response was whether Sister should be allowed time to find someone to fill the position. Son, however, proceeded to immediately terminate Ms. Adams in Father's presence, although Ms. Adams

denied stealing.

Father looked into the matter further and realized the value and volume of work that Ms. Adams performed for Company and that the stealing allegation was not proven. Based on his review of the matter and its impact on Company, Father determined it would be more appropriate to place Ms. Adams on probation pending investigating of the allegation of stealing, with termination to follow if the allegation was found to be meritorious. When Father informed Son of his decision to reinstate Ms. Adams, Son responded: "If you do, I will bury you." (R. p. 714, line 12 – p. 717, line 7).

Son continued to act as general manager for the Company and as Vice President until July 30, 2008, when he sent Father a letter (authored by Attorney Byrd) alleging he (Son) had been constructively discharged and providing two weeks notice of his departure from the Company. (R. p. 901). Neither Father, nor anyone else with the Company, had solicited or caused Son's departure. Six days later, Son filed this action. When queried at trial about his departure, Son testified as follows:

- Q. And you said in terms of what you call wrongful termination, I think you testified yesterday that nobody fired you. Is that right?
- A. That's correct.
- Q. Nobody told you not to come back. Is that right?
- A. That's correct.
- Q. Nobody cut your pay?
- A. We established that, correct.
- Q. And you just simply didn't want to go back to work.
- A. I found it intolerable at that point.
- Q. You found it intolerable. So you didn't want to go back then, and you wouldn't go back today if they offered you your job back?
- A. That's correct.

(R. p. 376, line 24 – p. 377, line 14).

Between October of 2007 and Son's quitting of his employment on July 30, 2008,

Son continued to act as the Company's General Manager and Vice President. Other than the financial restrictions imposed on Son as outlined in Father's November 29, 2007, letter, Son's management authority and management practices continued unabated. (R. p. 895) (R. p. 711, line 21 – p. 714, line 7). Numerous Company employees testified they were unaware of any changes in Son's management authority prior to his quitting of his job and, further, that Son continued to principally supervise and direct all aspects of Company's business. (R. p. 601, line 16 – p. 602, line 15; R. p. 609, lines 4 – 15; R. p. 661, lines 3 – 19). For example, Son retained the bulk of Company's records in his private office under lock and key until his departure. Son reluctantly gave Father an office key after Father's third request, but directed Father that Sister (the Company's Secretary/Treasurer) was not to be given admittance. (R. p. 359, line 2 – p. 361, line 17; R. p. 717, line 8 – p. 718, line 6).

Following Son's departure, Father and Sister assumed Son's management responsibilities for Company. (R. p. 618, line 14 – p. 619, line 20; R. p. 725, line 20 – p. 728, line 19). Since Son's departure, Company has been operated largely in the normal course and scope of business. Just prior to trial, Son voluntarily tendered a written resignation as officer and/or director of Company and any of its subsidiary companies.

During the course of litigation, the shareholders, including Son, determined that Company would retain Laura DuRant, certified public accountant, to review the actions taken by Company to determine if Company's liability for the 2003 and 2006 tax returns had been properly resolved. Ms. DuRant determined that, in fact, the Company's tax liability for the returns filed in 2003 and 2006 had not been adequately resolved and that Company faced a potential tax liability, including potential fraud and other penalties approaching three-

quarters of a million dollars. (R. p. 436, line 23 – p. 445, line 25). (R. pp. 1170-1188). As a result of Ms. DuRant's opinion, Company engaged tax attorney Edward S. Bowers, Jr., to represent it. Mr. Bowers testified, on behalf of the Company, that he has made voluntary disclosure to the State and federal tax authorities regarding the Company's past tax practices and that the Company's total loss exposure as a result of its past tax practices is, as yet, undetermined. (R. p. 451, line 2 – p. 454, line 17). Attorney Bowers suggested that Company continue to engage Accountant, at least on a limited and temporary basis, pending a resolution of Company's tax liability with the taxing authorities. (R. p. 722, line 14 – p. 723, line 6).

After Son quit his employment, Mr. and Mrs. Mason made no payments pursuant to the Retirement Documents and gifted no stock to Son or Sister. (R. p. 725, line 5 – p. 726, line 5). Father and Sister have undertaken all of Son's job responsibilities and have increased their compensation commensurately with their increased work and responsibility.

Son's inability to work harmoniously with the other family members prompted or coincided with his periodic episodes of abandoning Company's business without notice. (R. p. 699, line 24 – p. 700, line 20; p. 721, line 5 – p. 722, line 14; R. p. 537, lines 10-20). Son repeatedly belittled and minimized the talents and efforts of other family members in Company's success. Alise Taylor, sales representative for Company's supplier, convincingly testified as to her discomfort when, in her presence, Son attempted to embarrass and humiliate Father concerning his lack of computer skills. Son accused his Farther, in her presence, of wanting to "stick your nose in everything." (R. p. 662, line 7 – p. 664, line 25).

Son consistently complained that Sister was overpaid in light of her level of

experience and lack of a college education. Son was quite generously rewarded with employee benefits and during perquisites his employment. Other family members received benefits and perquisites in a much lesser degree. The compensation and benefits paid to Father, Sister and Mother were not excessive either before or after Son's departure from the business. (R. p. 686, line 23 – p. 687, line 14). By comparison, Son was quite handsomely rewarded for his efforts even without taking into consideration any of the non-taxed cash he removed from the cash register through the casing scheme. In fact, Son's own expert opined that Company's President (Son) was over paid in 2004-2007 but that Father as President was significantly underpaid in 2008 after Son quit. (R. p. 430, line 22 – p. 432, line 6).

STANDARD OF REVIEW

In Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) the South Carolina Supreme Court provided the general framework for the appellate court's scope of review in civil cases as follows:

(1) In an action at law, referred to a master or special referee for final judgment, the appellate court will correct any error of law, but must affirm the master's or referee's factual findings unless there is no evidence that reasonably supports those findings.

(2) In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.

Son's only action in equity is his claim seeking to require Family Respondents to purchase his shares in Company. His remaining five causes of action are all actions at law.

ARGUMENT

1. THE SPECIAL REFEREE CORRECTLY HELD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC.⁵ BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT.

Facts do matter. That is the Son's threshold problem with his case and the reason why he is not entitled to the relief he seeks. Son's multiple claims of mistreatment by his Father, Mother and Sister simply are unsupported by the facts and record before the Court. What the record actually reflects is a profound tolerance of Father, Mother and Sister for Son's actions. Son was in virtually complete control of Company's operations until he quit in July of 2008. Between October of 2007 (when he was elected Vice-President instead of President) and 2008 when he quit, he remained in virtually complete control of Company, subject to a limited (and well justified) control of his money handling authority. Multiple company employees testified to their observations of Son's control and management of Company until he quit. Not a single one testified to any retaliation, humiliation or embarrassment visited on Son by the Family Respondents.

Significantly, a close review of Son's eighteen (18) item laundry list of matters which he asserts should persuade this Court to grant his request for extraordinary relief requiring the Mason Defendant to purchase his shares in Mason Holding Company, Inc. reveals each

⁵ Son's Fourth Cause of Action (Amended Complaint, R. p. 31); cites S.C. Code Ann. §33-14-300 (Rev. 2006) in requesting the Court order a purchase of his shares in Company. Because Company is a statutory close corporation (See Brief of Appellant, p. 3; R. p. 838), his request for relief is actually governed by S.C. Code Ann. §33-18-420 (Rev. 2006), which Code section provides that the extraordinary relief of a Court awarded share purchase is appropriate only if (1) the Court finds court action to protect shareholders is needed under §33-18-400; and, (2) the ordinary relief provided by §33-18-410 is inadequate or inappropriate. Such a showing has not been made in the instant action. The purchase of his shares in Company is the only relief requested by Son for the alleged shareholder abuse. Son did not amend his Complaint to seek relief under the appropriate code section (S.C. Code Ann. §33-18-420 (Rev. 2006)).

item to be either: (1) without material support in the record, (2) instigated, orchestrated, or participated in by Son, or (3) not germane to his request for relief. (See Appellant's Brief pp. 23-24). Moreover, even if any of Son's claims of mistreatment were found to have any record support, the extraordinary relief afforded by §33-18-420 is only appropriate if the Court determines ordinary relief provided by §33-18-410 is inadequate or inappropriate. Because the conduct alleged is central to Son's claim, each item on his list is addressed seriatim as follows:

Son's claims:

- Asking Joe to commit perjury to support a fraudulent worker's compensation claim regarding a significant injury to Ozzie St. Blanchard, perjury by Joe Sr. in support of the claim, and acts and displays of retaliation and hostility toward Joe when he refused to cooperate with the scheme.

Family Respondents Response: The claim has no support with the exception of Son's self-serving testimony in this action many years after the claim was made. Son's assertion that the claim was fraudulent is controverted by the testimony of Attorney Gene Connell, Father, Mother and Sister. Attorney Connell testified that Ozzie's worker's compensation claim was supported by Father's testimony, by documents showing that St. Blanchard was acting within the scope of his employment, and by the testimony of past and present employees of the Company. (R. p. 573, line 3 – p. 576; line 14).

- Preparation and execution of documents that mischaracterize the nature of the redemption or sale of Joe's parents' shares of the Company.

Family Respondents Response: Son was an active participant and he signed all of the Retirement Documents. (R. pp. 810-826). Son has received and accepted the benefit of the Retirement Documents in obtaining an additional 20% of Company stock (increasing his

interest from 10% to 30%). He has now asks the Court to award him the benefits of additional stock ownership under the Retirement Documents even though: (1) payment under these documents to Father and Mother stopped after Son quit his employment; (2) Father, at age 79, is still employed full time because Son quit; and (3) CPA Durant testified it is unlawful to mischaracterize the nature of payments to avoid income taxes. (R. p. 449, line 9- p. 450, line 7).

- Refusing to acknowledge Joe's proper share ownership in the Company and to deliver the remaining share for 20% of the Company due to him.

Family Respondents Response: See preceding response. Also, Son is admittedly the owner of only a thirty percent (30%) interest and nothing contained in his original Complaint or his Amended Complaint can fairly be construed to ask the Court to determine he is entitled to an additional twenty percent (20%) interest in Company. Son's Brief on Appeal does not address this omission.

- The inclusion of consideration for the purchase of Joe's parents' shares in the form of a provision allowing them to select the Company's accountant (Levine) and then their exercising that provision to hire an incompetent accountant for the Company and to retain that accountant for years after Joe discovered and brought to the attention of the Company and the other Respondents the fact that Levine's accounting and tax services were incompetent and inappropriate.

Family Respondents Response: See preceding two responses. Moreover, Son was the Company's President until October of 2007 and handled all accounting and financial matters during that time. Accountant Levine had served both the Company and the individuals, including Son, as personal accountant for years. Son knowingly signed false and incorrect Company tax returns as its President in 2003 and 2006. Son prepared false journal tickets and a promissory note to himself and Sister (which Sister would not sign) as a cover-up for

the tax fraud. Son even suggested a similar scheme to CPA Duncan for the 2007 tax year which Duncan refused. Son would not agree to file the corrected 2003 and 2006 tax returns at the December 2007 meeting and supported retaining Accountant Levine's services to correct the problems "another way". Father, Mother and Sister, not Son, are responsible for reporting the improper tax practices to the taxing authorities. Significantly, Son is the only shareholder to refuse to repay Company for the inappropriate practice of payment of personal expenses pointed out in attorney Byrd's letter. The practices complained of by Son after voluntarily quitting his employment were instituted and carried out by Son while he was Company's President. Finally, attorney Bowers advised Company to continue to retain Levine on a limited basis until the issues with the Internal Revenue Service ("IRS") and the South Carolina Department of Revenue ("SCDOR") have been resolved in light of his knowledge of what had taken place over the years.

- Retaliating against Joe for demanding that the Company amend its tax returns, terminate Levine, and adopt appropriate accounting and tax practices by, among other things, wrongfully refusing those demands, immediately terminating Joe's role as President of the Company, prohibiting Joe from further roles in certain banking and financial matters of the Company, limiting Joe's access to information about the Company's tax and accounting practices, and other acts of retaliation and public and private displays of hostility towards Joe.

Family Respondents Response: See preceding response. Son was at the helm of the Company and very much involved with the tax improprieties and with the Company's continued reliance on Accountant in filing its return and "corrective returns." Son is the one who refused to reimburse the Company for improper Company's payment of personal expenses. Son would not agree to the filing of amended tax returns (reviewed and recommended by CPA Duncan) in December of 2007. Any evidence of retaliation against

Son is not found in the record. Son kept his job even in light of the discovery of the tax problems, the casings scheme, the BCJ Tire money diversion and improperly reimbursing himself for his attorney fees with Company funds (even after attorney Byrd's firm returned the Company check for fees as inappropriate). (R. pp. 1166-1167). Except for limitations on his access to check writing, Son maintained control of the business until he quit.

- Asking Joe for offers to purchase the other shares of the Company and negotiating and declining those offers in bad faith.

Family Respondents Response: Son had made it clear since 2001 that it is his desire to either be bought out or to be the sole owner of Company. This lawsuit is simply another means to try to get what he has wanted all along. Father, Mother and Sister had no obligation to buy or to sell and did not solicit any offers. The record is void of any evidence of bad faith. For that matter, there is no credible evidence of a good faith offer to purchase. See next response.

- Asking Joe to pursue third party offers to buy the Company but then, in bad faith, unreasonably rejecting and refusing to negotiate or pursue an offer to purchase the Company for \$3 Million.

Family Respondents Response: The alleged "offer" to purchase the Company for \$3 Million dollars was nothing more than an e-mail solicited by Son without any investigation by the putative purchaser. (See testimony of Steve Allison, R. p. 296, line 4 - p. 299, line 12). Even assuming the offer had any real basis, there is no bad faith resulting from lack of interest in the offer.

- Submitting a low-ball valuation based on inaccurate information and based on improper methods.

Family Respondents Response: The Family Respondents, the Appellant's Brief and the Record are unclear what this refers to. There is no record evidence to support this allegation.

- Making a low-ball offer to purchase Joe's shares

Family Respondents Response: See preceding response.

- Refusing to acknowledge the annual values of the Company computed by Levine.

Family Respondents Response: The Family Respondents are unclear as to what this refers to and why it would be germane to the issues. Son contends Levine is incompetent and his services inappropriate.

- Failing to conduct a shareholder meeting since the termination of Joe's employment with the Company in 2008.

Family Respondents Response: During this period after Son quit and until trial, the case was in litigation and the normal business of the Company was conducted, Son was an officer and a 30% shareholder and could have called a meeting at any time if so inclined. Company, a statutory close corporation, is not required to hold an annual meeting unless requested by a shareholder (S.C. Code Ann. §33-18-230(b) (Rev. 2006)). Moreover, a meeting of the shareholders was held during this period for the purpose of considering the retention of CPA Laura DuRant in regard to the Company's tax issues.

- Failing to pay any dividends whatsoever since terminating Joe as President in 2007.

Family Respondents Response: Dividends were not paid while Son was President. Since starting the BCJ Tire business in 2007 and buying the land for the Conway store, Company funds have been committed to pay for BCJ related losses, tax liabilities, and the expenses and defense of this litigation. Business has experienced a decline since 2007 due to the Great Recession. Even Son has acknowledged that this period was a difficult period for business. Moreover, Son was a willing participant and architect of many of the decisions that have impacted the Company's bottom line.

- Mismanaging the Company since Joe's wrongful discharge and allowing sales and profits to decline during a period when other similar businesses have enjoyed increasing sales and profits.

Family Respondents Response: There is no credible record evidence of Company mismanagement by the Family Respondents or that similar businesses have enjoyed increasing sales and profits; moreover Joe was not wrongfully discharged but voluntarily quit. Significantly, virtually every business in America has been affected by the Great Recession commencing in 2007. Moreover, Son's Complaint alleging mismanagement was filed only a few days after he quit.

- Paying significant amounts of Company funds to lawyers and experts to defend allegations of serious wrongdoing committed by the individual Family Respondents.

Family Respondents Response: Family Respondents agree the Company has incurred significant expense in defending Son's claims and assert and that such expenses have been and are appropriate Company expenses. See response above as to allegations of wrongdoing.

- Siphoning off and wasting Company assets by paying bonuses, excessive compensation, and granting substantial pay increases to the individual Family Respondents despite the fact that the market value of their skills and services do not warrant that compensation and despite their mismanagement of the Company, the Company's declining revenues and profits, and the fact that no dividends have been paid during the same multi-year period.

Family Respondents Response: This contention is controverted by the record testimony of both Son's expert and the Family Respondents' expert. Significantly, Son's expert testified that Son was overpaid in 2004-2007 and that officer compensation (including Father and Sister) was significantly below market commencing in 2008 when Son quit. (R. p. 430, line 6 – p. 432, line 10). Father and Sister had to step up and take over all management duties

after Son quit. Management compensation has, in fact, been below 2007 levels since Son quit.

- Buying Kathy a new Cadillac despite their mismanagement of the Company and the Company's declining revenues and profits.

Family Respondents Response: Supplying a vehicle to officers as part of their compensation package was a program started by Son years previously while he was President and officers would receive replacement vehicles periodically on a rotating basis. The Cadillac was bought for Father as a part of this program. Father did not like the car, so he had Sister exchange vehicles with him. (R. p. 630, line 7 – p. 631, line 5).

- Repeated acts of hostility and retaliation against Joe as a result of his actions and efforts to refuse to act wrongfully and to attempt to resolve serious problems with the Company's tax and accounting practices.

Family Respondents Response: Son is the one who refused to reimburse the Company for personal expenses paid by the Company. Son refused to have Company file the amended 2003 and 2006 returns as reviewed by Tim Duncan. Son asked Tim Duncan to continue the previous tax filing scheme. Son is the one who instituted and participated in the problematic tax and accounting procedures. No witness other than Son testified to any act of hostility or retaliation toward Son.

- Depriving Joe of all financial value of his ownership of shares in the Company – and the value in the Company that he devoted almost 25 years of his life building – by wrongfully discharging him from the Company by constant humiliation and acts of retaliation and failing to pay him any compensation or dividends since then.

Family Respondents Response: Joe quit. The value of his interest in the Company remains. The extraordinary tax liabilities (caused by Son), the Great Recession, the BCJ Tire expense (caused by Son) and lawsuit expenses (caused by Son) have seriously impacted the

Company's finances. Son is the one who must accept the responsibility for quitting his job and leaving a Company which had been very generous to him. The Family Respondents are the ones who retained CPA Durant and Attorney Bowers to remedy the false tax return filed by Son in 2003 and 2006. There is no credible evidence in this record of acts of humiliation or retaliation against Son by Father, Mother or Sister.

Son's Brief on appeal cites Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) and Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012) in its discussion of the circumstances under which shareholder relief of some form might be appropriate. In both Kiriakides and Ballard, our Supreme Court affirmed trial court determinations that shareholder relief was appropriate. The Ballard Court, while noting that an action for stockholder oppression is equitable in nature, also pointed out that the equitable standard for review neither relieves an appellant of the burden to establish error on the part of the trial court in its findings nor does it require the appellate court to disregard the findings of the trial judge. In fact, the Supreme Court specifically recognized that the trial judge is the one "...who was in a better position to determine the credibility of the witness." (Ballard, supra, at 593, 733 S.E.2d at 109).

The Special Referee in the instant action heard witness testimony and received evidence over a five day period. He had an opportunity to hear the testimony and observe the demeanor of eighteen witnesses, including family members and co-workers of Appellant, CPAs, attorneys and expert witnesses. His Order, in so many words, noted his opinion as to the credibility of the witness on certain matters. The facts as found by the Special Referee in this case are amply supported by the record evidence. These facts fall far short of entitling

Son to any relief, much less the extraordinary relief which he seeks.

Finally, the Court in Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009) made it clear that the equitable defense of unclean hands is available in a shareholder oppression action in equity. In the case at bar, Son is the person by far most responsible for the matters about which he now complains.

2. THE SPECIAL REFEREE CORRECTLY DETERMINED THAT SON HAD MADE NO CLAIM TO, AND WAS NOT ENTITLED TO, AN ADDITIONAL 20% INTEREST IN COMPANY FROM MOTHER AND FATHER BECAUSE SUCH CLAIM WAS NOT PLEAD AND HAS NO MERIT.

The Trial Court found as follows regarding Son's claim of entitlement to an additional 20% interest in Company from Mother and Father.

During trial, Son asserted the position that while he was the record owner of a 30% interest in Company, he was entitled to an award of an additional 20% interest in the Company (a total ownership of 50%) under the terms of the Retirement Documents. Aside from the fact that such a claim is completely absent from Plaintiff's Amended Complaint, it is clear that the provisions of the Retirement Documents were not complied with, i.e., Father was not able to retire in light of Son's conduct, and additional rent payments to Father for the Pawley's Island Store were ceased. Moreover, under no circumstance could this Court engage in the enforcement of a series of agreements which clearly, on their face, were illegal and unenforceable.

(R. p. 116).

Son's Amended Complaint makes no reference to a claim of entitlement to an additional 20% of Company's stock from Mother and Father. (R. pp. 31-45). Son's Brief on appeal does not address this significant omission. Assuming, arguendo, the issue is properly before this Court, the Trial Court's finding that the Retirement Documents were not complied with after Son quit (i.e., Father is not retired and the additional rental payments on the Pawleys Island store were stopped) is amply supported by the record. Son received the

benefit of the Retirement Documents from 2002 (when he signed the Retirement Documents) until he quit. His interest in the Company was increased during that period from 10% to 30%. Son now is asking this Court to enforce the terms of the Retirement Documents even though they have not been fully executed and they are undoubtedly questionable (if not unlawful) from a tax standpoint, and his pleading seeks no such relief.

3. THE ISSUE OF THE VALUATION OF SON'S STOCK IN COMPANY WAS NOT REACHED BY THE LOWER COURT AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT.

The Trial Court did not reach the valuation issue because it determined Son was not entitled to any shareholder protection relief, much less the specific extraordinary share purchase remedy provided by South Carolina Code Ann. §33-18-420.

Having failed on his claims below, Son now asks this Court to determine not only that the Trial Court's decision that shareholder relief was not appropriate under these facts is in error, but also to: (1) determine the ordinary relief afforded statutory close corporation shareholders by South Carolina Code Ann. §33-18-410 is inadequate or inappropriate; (2) determine the extraordinary relief afforded by §33-18-420 should be provided; and (3) determine the fair value of Son's shares under §33-18-420(b)(1) and the terms for any Court mandated purchase thereunder.

The Family Respondents submit, for the reasons expressed herein, the Trial Court correctly determined that the requested shareholder relief was not justified or appropriate under the facts. They further respectfully submit that even should this Court disagree with the Trial Court's ruling, the Trial Court should have the first opportunity to decide whether ordinary relief under §33-18-410 is adequate and appropriate. If the Trial Court should

determine that only the relief afforded by §33-18-420 is adequate and appropriate it would then have the opportunity to pass on the valuation issue as well as the issue of terms of sale as provided in §33-18-420(b)(2). As posited, Son is asking this Court to overturn the Trial Court's decision and then to "bypass" the Trial Court and rule upon multiple issues not considered or passed upon by the Trial Court.

In apparent recognition of the weakness of his claim that he has been the victim of shareholder oppression, Son argues (for the first time) that a forced buyout of his share might be appropriate even where there is no breach of fiduciary duty, fraud or oppression (Brief of Appellant, p. 21). The case law cited in support of this argument is an unpublished opinion which does not even mention §33-18-420. Son's claim is not supported either by the facts in the record or by South Carolina law applicable to statutory close corporations.⁶ A stock interest in a close corporation is inherently of more limited marketability than other forms of investment. To require the remaining shareholders to purchase Son's interest simply because he has become disaffected and in the absence of any showing of oppression by his parents or Sister is totally inconsistent with Son's pleadings, the facts and established statutory law.

Not only does Son now argue for relief absent any showing of oppression, he incredibly asserts that such relief shall be granted without consideration of any applicable minority discount. (Brief of Appellant, P. 28). Son asserts the mandated purchase of his

⁶ The Official Comment to §33-18-400, Court Action to Protect Shareholders, states as follows: "Relief available under sections 40 through 43 (Sections 33-18-400 through 33-18-430) is circumscribed to minimize the danger of abuse by shareholders. No relief of any kind may be ordered unless the court affirmatively finds that one or more of the specific conditions listed in section 40(a) (Section 33-18-400(a) – fraud, oppression, unfairly prejudicial conduct, deadlock, or grounds for involuntary dissolution – exist. The petitioner has the burden of proof on this issue."

interest shall be at "fair value" (i.e., without discount) as opposed to "fair market value". Son is not entitled to be rewarded for his misconduct and damage he has caused the Company.

If this Appellate Court disagrees with the Trial Court on the entitlement of Son to some form of shareholder relief, it should remand the matter to the Trial Court for its determination as to remedy.

4. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT BREACH ANY DUTY OWED TO SON BY VIRTUE OF THE STATUS AS OFFICERS, DIRECTORS OR MAJORITY SHAREHOLDERS.

Appellant's brief correctly characterizes an action for breach of fiduciary duty as an action at law (Brief of Appellant, P. 17); accordingly, the standard of review is that the trial judge's findings will be upheld unless without evidentiary support." Jordan v. Holt, 362 S.C. 205, 608 S.E.2d 131 (2005).

The duty owed shareholders by officers and directors is set forth in S.C. Code Ann. §33-8-300 (as to directors) and S.C. Code Ann. §33-8-420 (as to officers). The statutes provide in pertinent part:

"(a) A director shall discharge his duties as a director ... (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders."

S.C. Code Ann. §33-8-300(a) (Rev. 2006).

"(a) An officer with discretionary authority shall discharge his duties under that authority: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders."

S.C. Code Ann. §33-8-420(a) (Rev. 2006).

The Special Referee held that: (1) Son had failed to establish a breach of any duty owing of owing by Father, Mother or Sister by reason of their shares as officers, directors, or (collectively) majority shareholders; and (2) the gravamen of Son's cause of action alleging breach of duty was for injury to the Company and not to Son individually (Final Order, pp. 114-115). See Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) for the general rule that any actions against officers and directors for losses suffered by a corporation shall be brought as a shareholder derivative action.

The only specific instances of breach of fiduciary duty mentioned in Son's brief are: (1) Son is no longer employed by the Company; (2) the Family Respondents have given themselves raises and bonuses; (3) a Cadillac was provided for Sister and (4) a dividend has not been paid. (Brief of Appellant, P. 40). For the reasons previously expressed in this brief in response to Son's 18 item laundry list, none of the issues evidence or constitute a breach of the Family Respondents' statutory duties to Company or to its shareholders. Son is not receiving employment benefits because he voluntarily quit; the Family Respondents have stepped up to the plate and assumed the duties Son previously performed and are compensating themselves appropriately. The car complained of was actually purchased for Father as part of an officer compensation and benefit program instituted by Son. Sister ended up with the car because Father did not like it. Dividends have never been paid and are particularly inappropriate at this time given the Company's financial issues relating to (1) IRS and SCDOR liability; (2) the Great Recession; (3) operating losses and expenses related to the BCJ Tire store and the Conway store land mortgage; and (4) the time and expense

associated with the defense of the lawsuit. Except for Item 2, Son was a participant or promoter of these financial obstacles facing the Company.

5. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT ACCOUNTANT LEVINE NEITHER AIDED NOR ABETTED ANY BREACH OF FIDUCIARY DUTY BECAUSE THERE WAS NO BREACH OF DUTY BY THE FAMILY RESPONDENTS.

The record evidence supports Special Referee's finding that Son failed to establish that the Family Respondents breached any fiduciary duty owed to him. See pages 36-37 of Family Respondents' Brief, which are incorporated herein. See Vortex Sports Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (2008).

6. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT CONSPIRE TO WRONGFULLY DISCHARGE SON AND DEPRIVE HIM OF THE VALUE OF HIS STOCK OWNERSHIP IN COMPANY.

Appellant's action alleging conspiracy is an action at law and the standard of review is whether there is any competent evidence to support the Special Referee's findings thereabout. The Special Referee held that Son's actions alleging civil conspiracy against the Family Respondents failed for a complete lack of proof either of liability or of damages (R. pp. 111, 113, 114). To prove a claim for civil conspiracy, a plaintiff must show a combination of two or more persons for the purpose of injuring plaintiff and causing plaintiff special damages. Hubbard & Felix, South Carolina Law of Torts, 404-408 (3d. ed. 2004). Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct.App. 2012).

The record evidence establishes that Son bears the primary responsibility for all of his present complaints. Son is the one who decided to file false and inaccurate Company tax returns in 2003 and 2006. Son decided to cover his tracks with fictitious promissory notes

and false inventory adjustments. Son was President of Company until October, 2007 and responsible for the tax practices complained of in Attorney Byrd's September 17, 2007 letter to Accountant (R. pp. 848-850). Son is the only family member who refused to repay the personal expenses paid by Company for the shareholders as addressed in the October 18, 2007, letter (R. p. 854). Son used Company funds without shareholder authorization to fund BCJ Tires. Son instituted and personally profited from the casings scheme. Son abandoned Company without notice for extended periods on several occasions, returning only when Father pleaded with him. Son instituted the policy of providing automobile use to Company management. Son never paid a dividend while President. Son was overpaid as his own expert testified. Son was instrumental in the decision not to file amended tax returns in December of 2007. Son voluntarily quit his job. Because Son quit, the Family Respondents had to step in and take over management of the Company.

The Family Respondents, through it all, tolerated Son's behavior. In October 2007, Son was elected Vice-President and his ability to access Company funds was limited because of the discovery of the casings scheme, the BCJ money, and the tax issues. This action was reasonable and prudent to protect Company given Son's past course of conduct. Not only does the record lack any credible evidence of effort to injure Son, actually the reverse is true. If the Family Respondents are to be faulted for their conduct toward Son, it should be for their excessive tolerance.

7. BECAUSE THE RECORD EVIDENCE ESTABLISHES THAT SON VOLUNTARILY QUIT HIS EMPLOYMENT, THE SPECIAL REFEREE PROPERLY HELD THAT SON HAD FAILED TO ESTABLISH THAT HE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY.

Son is no longer employed by Company because he voluntarily quit. Son, having no

contract of employment, was employed at the will of Company. Son could (and in fact) did quit at any time. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) See also Lawson v. South Carolina Dep't of Corr., 340 S.C. 346, 532 S.E.2d 259 (2000) (public policy exception applicable in cases when employer requires employee to violate the law or the reason for the employee's termination is a violation of a criminal law). While South Carolina recognizes a "public policy" exception to its employment at-will doctrine, Son has failed to make the requisite showing – that Son's termination violated a clear mandate of public policy. Id. Such an exception may be established, for example, when an employer requires an at-will employee, as a condition of retaining employment, to violate the law.

There is no basis in the record for the Son's claims that his employment by the Company was wrongfully terminated or that he was constructively discharged. While the record establishes a number of bases for which Son's employment could have justifiably been terminated (i.e., unexplained absences from the job without notice, utilization of Company funds to fund BCJ Tires without consent, exposing Company to significant tax liability, the casings scheme and utilization of Company funds to fund personal expenses such as attorneys fees, to name a few), the simple fact is that Son was neither terminated nor wrongfully discharged. He quit. Son's unequivocal testimony on this point was that he quit and would not return. (R. p. 376, line 24- p. 377, line 14). Prior to his leaving, Son's compensation was not reduced or diminished in any respect. The limitations placed on Son's access to Company money prior to his quitting were amply justified given his course of conduct in misusing those funds. Any damage which the Son may have sustained as a result

of leaving his employment with Company is solely the result of Son's voluntary decision to quit his job. The record evidence overwhelmingly establishes the love and patience of a Mother and Father for their Son, both by their testimony and by their actions in tolerating Son's dysfunctional, dishonest and abusive behavior (R. p. 727, line 7 – p. 728, line 19; R. p. 747, line 10 – p. 748, line 21).

Accordingly, the trial judge's finding that no basis exists for Son's claims that his employment with Company was wrongfully terminated or constructively discharged should be affirmed.

The record evidence in the instant action is devoid of any such testimony or other evidence from Son, or any other witnesses, that Son was required to violate a statute or other public policy mandate as a condition of employment.

The credible record testimony establishes that Son's claim of workers compensation fraud by the Family Respondents is without basis. Witness testimony, including the testimony of Attorney Connell, and the Company's records refutes Son's claim that the workman's compensation claim was fraudulent.

8. THE SPECIAL REFEREE PROPERLY HELD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME.

The record evidence is uncontroverted that Son implemented a scheme involving fictitious invoices whereby he personally pocketed Company funds. Son admits he removed cash from the Company money drawer and pocketed it after preparing fictitious invoices for tire casings to cover his tracks with the tax authorities. (R. p. 384, line 17 – p. 387, line 6). Son does not know the amount he took, but Company provided proof of at least \$11,716.32

taken by Son through this scheme. (R. pp. 1151-1162). Incredibly, Son now claims this tax fraud was appropriate so long as he split the proceeds with Sister. Sister denies participating in the scheme. Mother and Father deny any knowledge of the scheme prior to investigation by Mother after being placed on notice by an email from a former employee in August of 2007. (R. pp. 710, line 10 – p. 711, line 25; R. pp. 747, line 4 –p. 748, line 7). Moreover, Son filed no reply to the Company's Amended Answer and Counterclaim seeking reimbursement for Company funds converted by Son.

9. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM.

On September 21, 2007, Son obtained a Company check and used it to pay for his personal representation by the Turner Padgett Law Firm (R. p. 1163). The Turner Padgett firm returned the check to Son along with a letter advising Son that because the firm was representing him individually, it was inappropriate for the Company to pay his fees. (R. p. 1165). Son then transferred Company funds amounting to \$17,306.66 to his personal account to reimburse himself for the fees he paid to Turner Padgett for personal representation. (R. pp. 1166, 1167; R. p. 381, line 20 – p. 383, line 16).

Son's Amended Complaint (R. pp. 31-45) seeks no relief on Company's behalf. This is understandable given that in August or September of 2007, when the three Attorney Byrd letters were written, Son was Company's President and managing officer and had been so since at least 2001. (R. pp. 844-850). Moreover, Son filed no reply to the Company's Amended Answer and Counterclaim seeking reimbursement of Son's improper transfer of Company funds for payment of his personal attorney's fees.

10. THE SPECIAL REFEREE PROPERLY DETERMINED THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS COULD BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN.

Company's Amended Answer and Counterclaim includes a claim against Son for damages resulting to Company from Son's filing of false and inaccurate tax returns. (R. pp. 46-58). Son did not file a Reply to this pleading.

The Special Referee properly held that this claim was not ripe for adjudication on the date of trial because the amount of damages had not been determined and that Company could pursue its claim when the damages were determined. (R. p. 117).

Abundant record evidence establishes that Son knowingly filed false and inaccurate tax returns in 2003 and 2006. At the time of trial the tax authorities had been placed on notice of the inaccurate filings, but final determination of Company's tax bill resulting had not been made. CPA DuRant prepared a report and testified that the amount would be significant. The Court properly held that Son should be held accountable for any damages to Company proximately resulting from his actions. In such an action, Son can assert any defenses as to the amount of damages as he may see fit. The burden remains on Company to establish the amount of damages attributable to Son's actions.

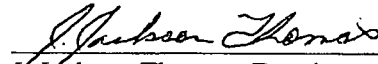
Son's Brief on Appeal asserts error by the Trial Court in failing to find the defenses of statute of limitations, waiver, estoppel, laches, and the doctrine of in pari delicto precluded judgment on Company's counterclaims. We note initially that Son did not file an Answer or Reply to Company's Amended Answer and Counterclaims. We further note that Son's Answer to Company's original Answer and Counterclaims did include the defense of waiver,

estoppel and laches, but did not include any reference to a statute of limitations defense or the doctrine of in pari delicto.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Special Referee's Orders in this case should be affirmed on appeal in all respects.

Respectfully submitted,



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INC.

August 26, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman
Special Referee

Case No.: 2008-CP-26-6169

RECEIVED

AUG 27 2013

SC Court of Appeals

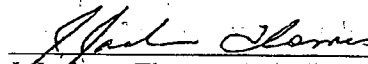
Joseph E. Mason, Jr., ...Appellant

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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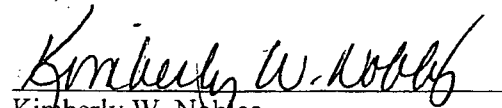
PROOF OF SERVICE

I certify that I have served the Certificate of Counsel of Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 27, 2013, addressed to Appellant's attorney of record, Robert Y. Knowlton, Esquire, and other counsel of record as follows:

Robert Y. Knowlton, Esquire
Haynsworth Sinkler Boyd, P.A.
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Columbia, South Carolina 29211

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The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211


Kimberly W. Nobles
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August 27, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman
Special Referee

RECEIVED

AUG 27 2013

SC Court of Appeals

Case No.: 2008-CP-26-6169

Joseph E. Mason, Jr., ...Appellant

v.

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

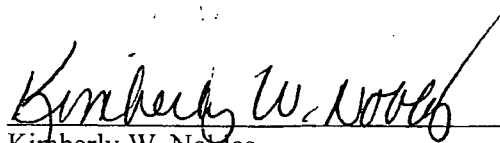
PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 27, 2013, addressed to Appellant's attorney of record, Robert Y. Knowlton, Esquire, and other counsel of record as follows:

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A handwritten signature in black ink, reading "Kimberly W. Nobles", written over a horizontal line.

Kimberly W. Nobles
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August 27, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph E. Mason, Jr., Appellant,

v.

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

Appellate Case No. 2012-212146

Appeal From Horry County
Ralph P. Stroman, Special Referee

Opinion No. 5300
Heard September 8, 2014 – Filed March 4, 2015

AFFIRMED

Robert Yates Knowlton, Sr. and Elizabeth Halligan
Black, both of Haynsworth Sinkler Boyd, PA, of
Columbia, for Appellant.

John M. Leiter, of Law Offices of John M. Leiter, PA, of
Myrtle Beach, for Respondent Irwin Levine; Emma Ruth
Brittain and J. Jackson Thomas, both of Thomas &
Brittain, P.A., of Myrtle Beach, for Respondents Joseph
E. Mason, Sr., Catherine L. Mason, Kathy St. Blanchard,
and Mason Holding Company, Inc.

KONDUROS, J.: In this shareholder dispute case, Joseph E. Mason, Jr. (Son)
appeals the special referee's decision granting judgment on his causes of action

including breach of contract, breach of fiduciary duty, wrongful termination, and civil conspiracy in favor of Catherine L. Mason (Mother), Joseph E. Mason, Sr. (Father), Kathy St. Blanchard (Daughter) (collectively, the Masons), Mason Holding Company, Inc. (the Company), and Irwin Levine (Accountant) (collectively, Respondents). He also asserts the special referee erred in not ordering the repurchase of his shares of the Company. He further contends the special referee erred in finding for the Masons and the Company on their counterclaims. We affirm.

FACTS/PROCEDURAL HISTORY

The Company operates five tire and auto service stores in Horry and Georgetown Counties. It is a statutory close corporation without a board of directors. For many years, Father had operated eight retail stores for Goodyear Tire & Rubber Company and was a partner in a truck tire center in Miami, Florida, where he and Mother resided. In 1984, Father decided to start a tire and auto service business in the greater Myrtle Beach area. Son and Daughter wanted to be involved; and each contributed \$10,000 for a ten percent interest in return. Son graduated from the University of Alabama with a degree in business administration and started working for Ryder Truck Rental in Florida in 1983. After the location was acquired for the first store, Son moved to Surfside Beach to open the first store and be the store manager. Daughter and her husband, Oswald St. Blanchard (Ozzie), also moved to the area to work at the store. Daughter did bookkeeping and sales. Mother and Father moved to the area in 1989 to work on expanding the business into commercial accounts. Around 1989, Accountant started working for the Company as its accountant. He had previously worked for Mother as an accountant in Florida. Accountant was not a certified public accountant, a CPA, but was a PA, a public accountant. He lived in Florida and did not have a license to practice accountancy in South Carolina. He had prepared the Company's tax returns since 1989 and also served as family members' personal accountant.

In 1989, the family opened a store in North Myrtle Beach. In 1995, they opened a store in Pawleys Island. In 1998, the Company was formed and ownership of the individual stores was transferred to the Company. At that time, Father owned 520 shares, Mother owned 160, Son owned 160, Daughter owned 90, and Ozzie owned 70. In 1999, the Company opened an additional store in Myrtle Beach. The buildings and land where the Company's stores were located were owned by separate entities owned by members of the Company. By 2001, Son was president of the Company.

On December 18, 2004, Ozzie was severely injured in a motorcycle accident and as a result became a quadriplegic. The accident occurred on a Saturday while Ozzie was riding in a Toys for Tots ride. Ozzie was wearing his uniform and had represented the Company in this capacity before. Ozzie had appeared in commercials for the Company and was "the face" of the Company. Son believed Ozzie was not entitled to workers' compensation because he was not at work when the accident occurred and his claim would increase the Company's insurance premiums. The matter was litigated, and the single commissioner of the Workers' Compensation Commission determined Ozzie was acting within the course and scope of his employment when the accident occurred and found the claim compensable. The Appellate Panel reversed the single commissioner in a two to one decision. The matter was appealed to the circuit court, but before the circuit court reached a decision, the parties settled the claim.

Son testified Father had told him they needed to make sure Ozzie got workers' compensation benefits for the accident. Son believed Father was asking him to perjure himself and indicated he told Father he could not do that. Son felt the disagreement was the turning point in his relationship with the rest of the family. Father testified he did not ask Son to lie and Son only worried about it costing the Company a lot of money. Father believed Ozzie was working in the course and scope of employment. Father indicated Ozzie was not working at one of their stores that day but he was working for the company by appearing at the Toys for Tots event. The minutes from a stockholder meeting of the Company following the accident as well as Father's deposition during the workers' compensation proceeding state Father and other employees saw Ozzie at one of the stores on the day of the accident while he was picking up business cards and coupons. The special referee found Son's testimony on this matter to be unbelievable.

Mother and Father began thinking about retirement and developed a retirement plan. Initially, they planned for Son and Daughter to purchase Mother's and Father's shares. However, the parties decided for tax purposes Mother and Father would incrementally give Son and Daughter shares in the Company with Son and Daughter each owning half the shares by December 31, 2011. Also as part of the retirement plan, on January 1, 2003, an LLC owned by Mother and Father, which owned the property for one of the store's locations, executed a lease with the Company for \$90,000 annually for a term of nineteen years. The lease was only for the building because a prior lease agreement was in effect for the land. Additionally, on December 31, 2002, Mother, Father, Daughter, and Son entered into an employment contract lasting until December 31, 2022, to pay Mother and Father a total of \$10,400 per year as well as benefits including health insurance, a

gasoline credit card, and a company car. Accountant testified they were trying to minimize the impact on social security income and self-employment taxes. Father testified the second lease was created in order to pay Father the same amount he had been receiving previously though salary. In 2003, Mother and Father began receiving the payments from the employment contract and through their LLC under the lease. By 2007, in keeping with the retirement plan, Son and Daughter each had a 30% share of stock in the Company. Father testified he stopped giving his and Mother's shares in the Company to Son when Son brought this lawsuit.

In 2006, Son wanted to open an additional location. He and a friend along with Daughter owned the store, called Mason Tire & Auto Service, through an entity called BCJ Tires, LLC. The Company owned the property and building and leased it to BCJ Tires. The Company had no ownership interest in BCJ Tires. On August 3, 2007, Son transferred \$93,500 from the Company to BCJ Tires without Mother or Father's knowledge. When Father learned about the money, he had Son and Daughter transfer their interests in BCJ Tires to the Company. Accountant later acquired Son's friend's shares and some of the Company's shares, resulting Accountant owning a majority interest in BCJ Tires. The store operates at a loss.

An employee for the Company testified that at times, Son did not come to work and gave no explanation. Father testified Son had been absent from the business several times and no one knew where he was. Daughter also testified Son would sometimes "walk off the job" but he was always allowed to return. Father indicated he convened an emergency shareholder meeting because of Son's unexplained absences. Son testified he had sometimes worked from home but always had been in touch with the Company and never had stopped running the Company.

On August 18, 2007, Son offered to purchase all but 5% of Daughter's 25% interest in the Company for \$625,000 or to sell 25% of his interest in the Company for \$987,500. He testified they had numerous discussions about different options of shareholders being bought out because they were not getting along. He testified he offered Daughter \$1 million for her shares, but she turned it down. Son then requested Father buy his shares, but Father turned him down. Son indicated Father told him if he was unhappy he could quit. Daughter also offered Son \$1 million for his shares, but according to Son, the offer later "evaporated."

On August 31, 2007, attorney Wayne Byrd sent a letter to the Masons advising them he had been retained by Son to represent his interests as an officer, director, and minority shareholder in the Company. On September 17, 2007, following a

meeting with the parties, Byrd sent a letter to the Masons' attorney ordering them to stop paying for the members' personal expenses, reduce Daughter's salary, and terminate Ozzie. Byrd also sent a letter to Accountant indicating he had learned of "various serious financial and tax accounting irregularities which [he] ha[d] devised and fashioned." All of the shareholders except Son signed an agreement to repay the Company for personal expenses. Son testified he refused to sign it because previously, all the shareholders had approved those expenses. On September 28, 2007, Byrd's law firm refunded the Company for the Company's check Son had used to pay his fee because it was representing him individually. However, Son then transferred to himself from the Company the amount he owed Byrd, \$17,301.66.

On October 24, 2007, a shareholders meeting was held, and Father was elected president and Son was elected vice president. Son was no longer in charge of the financial aspects of the Company but his salary and other responsibilities remained the same. Son continued working until July 2008.

On December 7, 2007, the Company held a shareholders meeting to sign the amended tax returns. Accountant testified Son insisted the amended tax returns not be filed and the Masons went along with it despite their unhappiness about it. Father testified that at the meeting Son stated that if they would not file those amended tax returns and instead handled it another way, he would stay with the Company and Father agreed. Son testified that at the meeting, the Masons were screaming at him and he said the Company should do whatever was necessary to fix the tax returns. Son testified Accountant stated the Company could fix the returns by doing something else with the revenue instead of amending the returns. Son testified he knew of the amended tax returns but did not see them before he brought the lawsuit.

In December 2007, Son told Father that Steve Allison offered to buy the Company for \$3 million. Father testified he did not consider it a serious offer because he did not believe Allison knew any details about the Company. Father indicated he called Allison and informed him he was not interested in selling the Company at that time. Allison testified he was president of a company that owned car oil change shops and in December 2007 he was interested in buying the Company based on his observations of the Company over thirteen years. Allison offered \$3 million because Son believed from prior conversations with Father he would accept that amount.

Sandra Adams worked as a bookkeeper for the Company. In July 2008, Son determined from some discrepancies in the monthly payments for an insurance policy Adams was stealing from the Company and informed Father and Daughter he was going to fire her. Father testified he and Daughter expressed concern that Son not fire her right away due to the workload it would place on Daughter until Adams could be replaced. Son stated that he was going to do the firing immediately, and Father said he would support him. Son fired Adams, but Father decided to rehire Adams because he thought they needed to look into the matter further. Father indicated that when he told Son, Son said, "I'll bury you." Father rehired Adams and put her on probation. He testified it was unproven whether Adams was stealing and she was still employed by the Company. The special referee found Father's testimony on the matter credible and determined Father's "actions were consistent with the Company's best interest and the decision was a valid business judgment."

On August 5, 2008, Son filed a complaint against the Masons and the Company, asserting causes of action for breach of contract, breach of fiduciary duty, civil conspiracy, relief pursuant to sections 33-14-300 to -330 of the South Carolina Code¹, wrongful termination of employment-constructive discharge, and wrongful termination-violation of public policy. On September 23, 2009, Son filed an amended complaint adding Accountant as a defendant and adding a cause of action against him for aiding and abetting breach of fiduciary duty. The Masons and the Company filed an answer asserting affirmative defenses and counterclaims against Son for breach of fiduciary duty and conversion.² The parties consented to the case being referred to the special referee. The special referee conducted a five-day trial on the case.

The conversion counterclaim was based on an alleged casing³ scheme. Son testified he would fabricate the name of a company, write a receipt for truck tires from that company, and take cash out of the drawer in that amount. He indicated he would later split that money with Daughter. He testified Accountant told him this was acceptable as long as he split the money with Daughter. Accountant testified he did not tell Son how to create fictitious invoices. An employee of the Company testified that between 2003 and 2007 he had noticed cash missing from

¹ Under this cause of action, Son requested the court order a purchase of his shares in the Company at fair value.

² Accountant filed a separate answer.

³ A casing is a used commercial tire that has the capability of being recapped for sale.

the drawer and an invoice for casings but there were no casings. He testified he noticed Son taking money out of the cash drawer and would see the invoice audit at the end of the day.

In 2003 and 2006, Son made adjustments to the records for the Company that increased the inventory and created a corresponding credit note payable to Son and Daughter. The note for 2003 was \$440,000 and for 2006 it was \$300,000. Son and Ozzie signed the 2003 note and it was witnessed by Mother and Father. Daughter did not sign either note and testified she did not know about the notes until Son asked her in 2007 to sign two promissory notes and she refused. Son indicated the family all knew about the inventory adjustments and it was Accountant's idea to decrease the Company's tax liability. Accountant testified he told Son about both the proper way to fix the inventory problem and the way he ultimately handled it. Accountant testified Son decided to make the 2003 adjustment in order to decrease the Company's tax liability. Accountant testified that at the time, only Son and himself knew about the 2003 adjustment and Accountant did not know about the 2006 adjustment until after Son had made it. Son testified he had relied on Accountant's advice that the adjustments were proper and he did not know about the "severity" of the adjustments until Byrd informed him. Laura Durant, a CPA retained by the Masons and the Company for trial, testified the adjustments had no basis in reality and had a significant effect on the income tax returns. Son testified he signed the tax returns from 1984 until 2007, specifically in 2003 and 2006. Son testified he did not know the tax returns were fraudulent because he relied on Accountant and he did not think the Masons knew the returns were fraudulent until 2007. Accountant testified he did not tell the Masons the tax returns were fraudulent. He testified he accepted the way Son had handled the excess inventory and filed the tax returns because of his close relationship with the family. The special referee found Accountant's testimony regarding making inventory adjustments and creating fictitious notes substantially more credible than Son's despite the fact that his filing of the tax returns was professionally inappropriate.

David Timothy Duncan, an accountant hired by the Company, testified he was involved with reviewing amended tax returns for the Company in 2007. He decided to not file the amended returns and returned them to Accountant. Duncan testified that while he was considering the amended returns, Son talked to him about inventory adjustments and Duncan advised him against it.

Son testified no one fired him, told him not to come back, or cut his pay. He found working at the Company intolerable and thought the other shareholders wanted

him to quit. He stated that although the Company did not reduce his pay or benefits; the Masons embarrassed him in front of other employees.

The special referee found for Respondents on all of Son's causes of action.⁴ The special referee found "it is beyond dispute in my opinion that Son was aware of and actively engaged in and furthered the very practices about which his attorney[']s September 17, 2007 letter complains and which form the basis of some of the claims in this action." The special referee also determined nothing in the record indicated the Masons deviated from the appropriate standard of conduct. The special referee determined nothing indicated the Masons' conduct towards Son was oppressive or unfairly prejudicial and they had not breached their fiduciary duty. The referee further found because Son presented no evidence of a breach by the Masons, his claim for his shares to be repurchased must fail. He found,

Son's dissatisfaction with his lack of employment by [the] Company, as well as with diminution of the value of his shares due to significant tax liability and the unfortunate business decision to expand the Company's operation . . . are matters that were principally due to and occasioned by the conduct and decisions of Son.

He noted that Son's request for his shares to be purchased was an equitable one and Son's unclean hands from his conduct prevented him from relying on an action for stockholder oppression or breach of fiduciary duty.

The special referee found "[t]he inaccuracies in the tax returns and any damages that flow from these falsities would affect the corporation in its entirety, not Son specifically. Therefore, Son's suit was improper in that it was not filed as a derivative action." The special referee also stated, "Contrary to the holding in *Brown v. Stewart*⁵, Son has sued . . . Father, Mother[,] and [Daughter] under [sections 33-8-300 and -420 of the South Carolina Code (2006)]."

⁴ The special referee issued one order for the actions regarding the Masons and the Company and another for the action against Accountant.

⁵ *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684-85 (Ct. App. 2001) ("If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder. It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*,

The special referee found for the Masons and the Company on their counterclaims for conversion regarding the casings scheme and Son's payment of his attorney's fees and awarded them \$11,716.32 and \$17,301.66 respectively. The special referee determined the cause of action for damages arising from the filing of false tax returns was not ripe for adjudication because the amount of damages was undetermined at the time.

Son filed a Rule 59(e), SCRCP, motion, requesting the special referee delete or clarify the portion of the order relating to the counterclaim regarding the tax obligations. The special referee denied the motion. This appeal followed.

STANDARD OF REVIEW⁶

"[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review to exact." *Wheeler v. Estate of Green*, 381 S.C. 548, 554, 673 S.E.2d 836, 839-40 (Ct. App. 2009). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville Cnty.*, 380 S.C. 528, 534, 670 S.E.2d 663, 666-67 (Ct. App. 2009). "When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). "The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review." *Id.* at 17-18, 640 S.E.2d at 495.

LAW/ANALYSIS

or as their interests were submerged in the corporation whose assets were thus dissipated." (citation and internal quotations marks omitted)).

⁶ Son urges this court to use caution in applying the standard of review because the orders from which this appeal is taken were prepared by Respondents. *See In re Luhr Bros.*, 157 F.3d 333, 338 (5th Cir. 1998) ("[I]n cases such as the instant one, where the district court's Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party's proposed findings and conclusions, with minimal revision, we should approach such findings with 'caution.'").

I. Judicial Dissolution/Repurchase of Shares

Son argues the special referee erred in denying him relief under the judicial dissolution provisions governing South Carolina corporations. He asserts the special referee should have ordered a buyout of his shares. We disagree.

"Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

It should be noted that although cases generally have discussed the two[-]issue rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the two[-]issue rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Id. at 346, 692 S.E.2d at 904 (internal quotation marks omitted). "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

"A corporate dissolution is an action in equity." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). "A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation marks omitted). "In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." *Florence Cnty. Sch. Dist. # 2 v. Interkal, Inc.*, 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002); *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (Ct. App. 1998) ("[W]e are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility.").

Sections 33-18-400 to -430 of the South Carolina Code (2006) apply to close corporations.

(a) Subject to satisfying the conditions of subsections (c) and (d), a shareholder of a statutory close corporation may petition the circuit court for any of the relief described in [s]ection 33-18-410, 33-18-420, or 33-18-430 if:

(1) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner, whether in his capacity as shareholder, director, or officer of the corporation;

... or

(3) there exist grounds for judicial dissolution of the corporation under [s]ection 33-14-300⁷.

(b) A shareholder must commence a proceeding under subsection (a) in the circuit court of the county where the corporation's principal office or, if none in this State, its registered office is located. The jurisdiction of the court in which the proceeding is commenced is plenary and exclusive.

(c) If a shareholder has agreed in writing to pursue a nonjudicial remedy to resolve disputed matters, he may not commence a proceeding under this section with respect to the matters until he has exhausted the nonjudicial remedy.

S.C. Code Ann. § 33-18-400 (2006).

⁷ Those grounds include "(ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)" and "(iv) the corporate assets are being misapplied or wasted." S.C. Code Ann. § 33-14-300(2) (2006),

(a) If the court finds that any grounds for relief described in [s]ection 33-18-400(a) exist, it may order one or more of the following types of relief:

- (1) the performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers of or any other party to the proceeding;
- (2) the cancelation or alteration of any provision in the corporation's articles of incorporation or bylaws;
- (3) the removal from office of any director or officer;
- (4) the appointment of any individual as a director or officer;
- (5) an accounting with respect to any matter in dispute;
- (6) the appointment of a custodian to manage the business and affairs of the corporation;
- (7) the appointment of a provisional director who has all the rights, powers, and duties of an elected director to serve for the term and under the conditions prescribed by the court;
- (8) the payment of dividends;
- (9) the award of damages to any aggrieved party.

(b) If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding.

S.C. Code Ann. § 33-18-410 (2006).

(a) If the court finds that the ordinary relief described in [s]ection 33-18-410(a) is or would be inadequate or inappropriate, it may order the corporation dissolved under [s]ection 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b).

- (b) If the court orders a share purchase, it shall:
- (1) determine the fair value of the shares, considering among other relevant evidence the going concern value of the corporation, any agreement among some or all of

the shareholders fixing the price or specifying a formula for determining share value for any purpose, the recommendations of any appraisers appointed by the court, and any legal constraints on the corporation's ability to purchase the shares;

(2) specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the corporation's other creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on the seller;

(3) require the seller to deliver all his shares to the purchaser upon receipt of the purchase price or the first installment of the purchase price;

(4) provide that after the seller delivers his shares he has no further claim against the corporation, its directors, officers, or shareholders, other than a claim to any unpaid balance of the purchase price and a claim under any agreement with the corporation or the remaining shareholders that is not terminated by the court;

(5) provide that, if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under [s]ection 33-18-430; and

(6) provide that the corporation or remaining shareholders release or enter into an agreement to indemnify the seller from any personal liability for obligations of the corporation the seller has personally guaranteed.

S.C. Code Ann. § 33-18-420 (2006).

(a) The court may dissolve the corporation if it finds:

(1) there are grounds for judicial dissolution under [s]ection 33-14-300; or

(2) all other relief ordered by the court under [s]ection 33-18-410 or 33-18-420 has failed to resolve the matters in dispute.

(b) In determining whether to dissolve the corporation, the court shall consider among other relevant evidence the financial condition of the corporation but may not

refuse to dissolve solely because the corporation has accumulated earnings or current operating profits.

S.C. Code Ann. § 33-18-430 (2006).

In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), [the supreme court] established how a court should determine whether majority shareholders have acted oppressively within the meaning of section 33-14-300. . . . In establishing the proper considerations for finding oppression, [the court] observed that the terms oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case. [The court] also noted this was a fact-sensitive review and should therefore be determined through a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior. Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders.

Ballard, 399 S.C. at 594, 733 S.E.2d at 110 (second omission by court) (citations and internal quotation marks omitted).

In *Ballard*, the court noted that the minority shareholder, "like [the minority shareholders] in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment." *Id.* at 595, 733 S.E.2d at 110. The court noted, "This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends." *Id.* at 596-97, 733 S.E.2d at 111 (citing Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 758 (Apr. 2000) (noting that "the close corporation investor typically looks to salary rather than dividends for a share of the business returns because the (e)arnings of a close corporation often are

distributed in major part in salaries, bonuses and retirement benefits" (internal quotation marks omitted))).

Common freeze out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination. In a public corporation, the minority shareholder can escape such abuses by selling his shares; there is no such market, however, for the stock of a close corporation. The primary vulnerability of a minority shareholder is the specter of being locked in, that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.

Kiriakides, 343 S.C. at 604-05, 541 S.E.2d at 267 (footnotes, citations, and internal quotation marks omitted).

"The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances." *Id.* at 598, 541 S.E.2d at 263 (internal quotation marks omitted). "The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation." *Id.* (internal quotation marks omitted).

Although the terms oppressive and unfairly prejudicial are not defined in section 33-14-300, the comment to [section] 33-18-400 [of the South Carolina Code] (1990), which allows shareholders in a statutory close corporation to petition for relief on the grounds of oppressive, fraudulent, or unfairly prejudicial conduct provides:

No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.

Kiriakides, 343 S.C. at 598, 541 S.E.2d at 263-64 (internal quotation marks omitted). "[I]llegal or fraudulent conduct is not required under section 33-14-300(2)(ii) The 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 (last alteration by court) (internal quotation marks omitted). "Prior to 1963, dissolution could be based only upon illegal, fraudulent or oppressive conduct. In an attempt to afford minority shareholders greater protection, the legislature amended the statute in 1963 to include unfairly prejudicial conduct." *Kiriakides*, 343 S.C. at 597 n.17, 541 S.E.2d at 263 n.17 (internal quotation marks omitted). "The statute, as amended, broadens the scope of actionable conduct by providing the frozen-out minority shareholder a right of action based on conduct by the majority shareholders which might not rise to the level of fraud." *Id.* (internal quotation marks omitted).

The *Kiriakides* court found:

[W]e do not believe the Legislature intended a court to judicially order a corporate dissolution *solely* upon the basis that a party's reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

Id. at 599, 541 S.E.2d at 264 (internal quotation marks omitted).

[S]ection 33-14-300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the *actions* of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any

shareholder. Given the language of our statute, a reasonable expectations approach is simply inconsistent with our statute.

Kiriakides, 343 S.C. at 600, 541 S.E.2d at 265 (internal quotation marks omitted).

"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379. "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (internal quotation marks omitted). "The decision to grant equitable relief is in the discretion of the trial judge." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379. "[T]he equitable defense of unclean hands is available in a shareholder derivative action." *Straight v. Goss*, 383 S.C. 180, 207, 678 S.E.2d 443, 458 (Ct. App. 2009). In *Straight*, the court found the minority shareholder's "own inequitable conduct came directly to bear on the transactions of which [he] now complains." *Id.* at 208, 678 S.E.2d at 458. The court found "the special referee did not err in holding the doctrine of unclean hands precluded [the minority shareholder] from recovering against the [majority shareholders]." *Id.*

In this case, the special referee ruled that Son's suit was improper because it should have been filed as a derivative action.⁸ The special referee's conclusions of law 6, 7, and 8 all relate to this determination. The special referee does not specify to which causes of action this decision applies. The referee does specifically state

⁸ Generally, suits to recover assets of the corporation must be brought as derivative actions. See *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). An individual shareholder may bring a direct suit against the corporation only when his or her "loss [is] personal and not a loss of the corporation." *Todd v. Zaldo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991). However, "[u]nder [sections 33-18-400 to -430 of the South Carolina Code (2006)], in closely held corporations, a minority stockholder can maintain an action for managerial misconduct and other forms of oppression by majority stockholders." *Davis v. Hamm*, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989).

"[t]he inaccuracies in the tax returns and any damages that flow from these falsities would affect the corporation in its entirety, not . . . Son specifically. Therefore, Son's suit was improper in that it was not filed as a derivative action." Son does not address the special referee's finding his suit should have been filed as a derivative action. Therefore, this ruling is the law of the case under the two-issue rule.

As to the merits, this court can make its own findings of fact while keeping in mind the special referee saw and heard the witnesses' testimonies. Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and benefited from those activities. He received the benefits from his casing scheme. He was not re-elected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other the stockholders enjoyed, such as a company car and a gas credit card. He was the one stockholder who refused to repay the Company for personal expenses such as housekeeping services. Additionally, most of the testimony in the record indicates he had knowledge that adjusting the Company's inventory to diminish its tax liability was fraudulent. Based on all of this, the special referee did not err in finding he was not an oppressed shareholder. Accordingly, we affirm the special referee's decision to not order the Company buy Son's shares.⁹

II. Amount of Shares Owned

Son contends he has physical possession of thirty percent of the Company's shares and is entitled to another twenty percent, which Mother and Father have refused to deliver. He maintains the special referee erred in determining he was not entitled to the twenty percent of the stock because the agreement providing for such was "illegal and unenforceable." We disagree.

"An action for breach of contract is an action at law." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "An illegal contract is unenforceable. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566

⁹ Accordingly, we need not address Son's arguments regarding valuation. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

S.E.2d 863, 866-67 (Ct. App. 2002) (citation and internal quotation marks omitted). The court "will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. W. Oil Co.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) (internal quotation marks omitted).

Son's claim to the stock arises out of the retirement agreement and gift letter he had with Mother and Father. The special referee noted Son's claim was not included in his amended complaint. Further, it found the provisions of the document were not complied with as Father could not retire in light of Son's conduct and the additional rent payments were stopped. Additionally, the special referee determined it could not enforce "agreements which clearly, on their face, were illegal and unenforceable."

Son's argument on appeal does not address the special referee's ruling his claim was not pled. As to the agreement's illegality, he simply argues that the result is inequitable. Accordingly, we affirm this issue under the two-issue rule. See *Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). Further, the evidence supports the special referee's finding Son stopped complying with the terms of contract. Therefore, we affirm the special referee's decision.

III. Fiduciary Duty

Son alleges the special referee erred in concluding the Masons did not breach their fiduciary duty to him. We disagree.

"[A] claim of breach of fiduciary duty is an action at law" *Jordan*, 362 S.C. at 205, 608 S.E.2d at 131. "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (citation omitted).

Controlling shareholders owe a fiduciary duty to minority shareholders. *Clearwater Trust v. Bunting*, 367 S.C. 340, 347, 626 S.E.2d 334, 337 (2006).

"The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by [sections] 33-8-300 and -420." *Id.* at 350, 626 S.E.2d at 339.

- (a) An officer with discretionary authority shall discharge his duties under that authority:
- (1) in good faith;
 - (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.
- (b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
- (1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or
 - (2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

S.C. Code Ann. § 33-8-420 (2006).

"[U]nder South Carolina case law, a breach of this fiduciary duty must be pursued through a derivative, and not an individual, action." *Rivers v. Wachovia Corp.*, 665 F.3d 610, 617 (4th Cir. 2011).

"The fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a stockholder's derivative action . . ." *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (omission by court) (internal quotation marks omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Id.* (internal quotation marks omitted). "If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id.* at 49, 557 S.E.2d at 684-85 (internal quotation marks omitted). "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." *Id.* at 50, 557 S.E.2d at 685.

Because this is an issue of law, we must affirm the special referee's findings unless no evidence supports them. The record contains evidence Son perpetrated the fraudulent activities. Although Son testified he acted with Accountant's guidance and did not know his actions were not proper or legal, the special referee did not find Son's testimony credible in these matters. Several people, including others not named as parties in this suit, testified the Masons did not know Son was taking actions that were fraudulent. Further, because the fraudulent tax returns impact all of the shares equally, Son should have filed a derivative action. As the testimony supports the special referee's decision, we affirm this issue.

IV. Aiding and Abetting

Son contends the special referee erred in failing to find Accountant aided and abetted the Masons in breaching their fiduciary duties to the shareholders of the company. We disagree.

Initially, Accountant contends Son did not perfect his appeal as to Accountant because he did not name Accountant as a respondent or attach a copy of the order regarding his cause of action against Accountant to his notice of appeal. Although he added Accountant as a respondent when he filed his amended notice of appeal within thirty days of the order, he did not attach a copy of the order relating to Accountant until he filed his second amended notice of appeal, which was more than thirty days after the underlying order had been filed. We disagree.

"Service of the notice of intent to appeal is a jurisdictional requirement, and the [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Conner v. City of Forest Acres*, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002). "Clerical errors in a notice of appeal do not destroy the appeal." *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). In *Charleston Lumber Co.*, the court rejected the respondent's attempt to have the appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of cases tried together. *Id.* at 477-78, 458 S.E.2d at 435-36. In *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000), the court found that although the appellant "did not 'technically' appeal from the trial court's original order by referring to it in the Notice of Appeal, the [appellant] did attach a copy of the order to the Notice." The court found the appellant's omission was "of a clerical nature only and this [c]ourt has jurisdiction to hear the appeal." *Id.* In both *Weatherford*, 340 S.C. at 578, 532 S.E.2d at 313, and *Charleston Lumber*, 318 S.C. at 478, 458 S.E.2d at 436, the

court noted the respondents were not prejudiced by the determination the court had jurisdiction over the appeal.

In *Conner*, 348 S.C. at 460-62, 560 S.E.2d at 609-10, the supreme court found the appellant's correction to her notice of appeal by adding two parties originally listed as defendants as respondents was not a clerical error; thus, the court determined notice to the two parties was untimely, requiring their dismissal from the appeal. The court noted the appellant waited nearly five months after filing the appeal to name the two parties as respondents and correspondence between the appellant and the court regarding the caption of the notice of appeal should have alerted her to the mistake much earlier. *Id.* at 462, 560 S.E.2d at 610.

In this case, Chief Judge Few issued an order on March 4, 2013, denying Accountant's motion to dismiss. However, in that order he stated, "[N]othing in this order prevents [Accountant] from raising this issue in his brief for the assigned panel to consider along with the merits of this appeal."

Unlike *Conner*, Son added Accountant as a respondent within the thirty days for filing an appeal. Although Son waited longer than thirty days to include the order relating the Accountant, he did add the order more timely than the appellant in *Conner*. We find the appeal was proper because Accountant at least had notice he was a party to the appeal within the time required to file an appeal from the special referee's decision.

The elements for a cause of action of aiding and abetting a breach of fiduciary duty are[] (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach.

Gordon v. Busbee, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (citation and internal quotation marks omitted).

As discussed above, the special referee did not err in determining the Masons did not breach their fiduciary duty to Son. Accordingly, because no breach of fiduciary occurred, Accountant could not have knowingly participated in a breach of that duty. Therefore, we affirm this issue.

V. Civil Conspiracy

Son argues the special referee erred in failing to find the Masons engaged in a civil conspiracy to loot the Company at the expense of Son. We disagree.

An action for civil conspiracy is normally an action at law. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, the character of an action as legal or equitable depends on the relief sought. When equitable relief is sought in an action in tort[,] the action is one in equity." *Soden*, 333 S.C. at 574, 511 S.E.2d at 382.

"The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Id.* at 567, 633 S.E.2d at 511 (alteration by court) (internal quotation marks omitted).

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . . An action for civil conspiracy is an action at law; the trial judge's findings will be upheld on appeal unless they are without evidentiary support.

Id. (omission by court) (citations and internal quotation marks omitted).

The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. [A]n unlawful act is not a necessary element of the tort. Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.

Id. at 567-68, 633 S.E.2d at 511 (alteration by court) (citations and internal quotation marks omitted).

The special referee found:

If the value of Son's stock has indeed been impaired, Son need not look further than his own actions in filing false and inaccurate tax returns, diverting Company funds through the casing scheme, payment of personal expenses (including attorney[']s fees) from Company funds and working on an expansion of the Company business to include (for the first time) Company ownership of land and building from which the Conway Store is operated, and diverting Company funds for operation of a non-company owned entity (BCJ Tires).

The special referee also found Son did not establish "any special damages arising out of the alleged conspiracy." Son did not allege anything in his complaint distinct from his other causes of action in his claim for civil conspiracy. He did state the Masons had "conspired to cause special damages to [Son] in such a way that [Son] will not receive the fair value of his stock in the [Company] or the opportunity to effectively manage the business affairs of the [Company]."

Son requests actual and punitive damages for the civil conspiracy. Accordingly, this is an action at law, and this court should affirm if the evidence supports the special referee's findings. Because the evidence, including the testimony provided by the Masons, Accountant, and others, supports the special referee's findings, we affirm this issue.

VI. Constructive Discharge

Son argues the Masons violated public policy and wrongfully and constructively discharged Son from his employment with the Company. We disagree.

"An action for breach of contract is an action at law." *Electro-Lab of Aiken*, 357 S.C. at 367, 593 S.E.2d at 172. An action for damages for wrongful discharge is action at law. *Wallace v. Milliken & Co.*, 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991). *But see id.* ("An employee, discharged in retaliation for instituting a Workers' Compensation Claim, is entitled to lost wages and reinstatement. Reinstatement is equitable relief, payment of back wages being merely an integral

part of the remedy. Moreover, lost wages are deemed restitution, itself an equitable remedy." (citations omitted)).

"Where the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). "Under the public policy exception to the at-will employment doctrine . . . an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013) (internal quotation marks omitted).

[T]he public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law. . . . In a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible.

Ludwick, 287 S.C. at 225, 337 S.E.2d at 216.

Mother, Father, Sister, and other employees testified that Son stopped working voluntarily. The special referee found the evidence was uncontroverted that Son stopped working voluntarily. As an action for breach of contract is an action at law and evidence supports the special referee's findings, we affirm.

VII. Counterclaims

Son argues the special referee erred in awarding judgment to the Masons and the Company on their counterclaims. We disagree.

"An action for conversion is an action at law." *Moore v. Benson*, 390 S.C. 153, 162, 700 S.E.2d 273, 278 (Ct. App. 2010). "Therefore, we review the record to determine if any evidence supports the [special referee's] finding." *Id.*

Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Money may be the subject of

conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.

Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009) (citation omitted).

We affirm the special referee's decision to award the Masons and the Company damages for their counterclaim for conversion for Son's paying his attorney with the Company's funds. Son retained the attorney to represent himself, not the Company. Additionally, the special referee did not err in finding for the Masons and the Company as to their counterclaim for Son's casing scheme. Based on the testimony, Son recorded fake inventory and then paid himself for it. Accordingly, the special referee did not err in finding for the Masons and the Company on their conversion claim for the casing scheme. As to the claims for damages as a result of Son's filing false tax returns, the special referee did not err in finding a claim for the damages from the filing of false returns could be brought later. The amount of damages could not be determined at the time because the Internal Revenue Service had not yet made a determination as to how much the Company owed in back taxes and fees.

VIII. Attorney's Fees

Son contends he is entitled to attorney's fees and expenses. We disagree. Son argues because he should have won his action at trial, he is entitled to attorney's fees. Because we affirm the special referee's decisions, we have no reason to award Son attorney's fees.

CONCLUSION

We affirm the special referee's orders.

HUFF and SHORT, JJ., concur.



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

Opinion No. 5300

COURT OF APPEALS OF SOUTH CAROLINA

412 S.C. 28; 770 S.E.2d 405; 2015 S.C. App. LEXIS 34

September 8, 2014, Heard

March 4, 2015, Filed

SUBSEQUENT HISTORY: Rehearing denied by
Mason v. Mason, 2015 S.C. App. LEXIS 74 (S.C. Ct.
App., Apr. 29, 2015)

PRIOR HISTORY: [*1] Appeal From Horry County.
Appellate Case No. 2012-212146. Ralph P. Stroman,
Special Referee.

DISPOSITION: AFFIRMED.

COUNSEL: Robert Yates Knowlton, Sr. and Elizabeth
Halligan Black, both of Haynsworth Sinkler Boyd, PA, of
Columbia, for Appellant.

John M. Leiter, of Law Offices of John M. Leiter, PA, of
Myrtle Beach, for Respondent Irwin Levine; Emma Ruth
Brittain and J. Jackson Thomas, both of Thomas &
Brittain, P.A., of Myrtle Beach, for Respondents Joseph
E. Mason, Sr., Catherine L. Mason, Kathy St. Blanchard,
and Mason Holding Company, Inc.

JUDGES: KONDUROS, J. HUFF and SHORT, JJ.,
concur.

OPINION BY: KONDUROS

OPINION

KONDUROS, J.: In this shareholder dispute case,

Joseph E. Mason, Jr. (Son) appeals the special referee's
decision granting judgment on his causes of action
including breach of contract, breach of fiduciary duty,
wrongful termination, and civil conspiracy in favor of
Catherine L. Mason (Mother), Joseph E. Mason, Sr.
(Father), Kathy St. Blanchard (Daughter) (collectively,
the Masons), Mason Holding Company, Inc. (the
Company), and Irwin Levine (Accountant) (collectively,
Respondents). He also asserts the special referee erred in
not ordering the repurchase of his shares of the Company.
He further contends the special referee [*2] erred in
finding for the Masons and the Company on their
counterclaims. We affirm.

FACTS/PROCEDURAL HISTORY

The Company operates five tire and auto service
stores in Horry and Georgetown Counties. It is a statutory
close corporation without a board of directors. For many
years, Father had operated eight retail stores for
Goodyear Tire & Rubber Company and was a partner in a
truck tire center in Miami, Florida, where he and Mother
resided. In 1984, Father decided to start a tire and auto
service business in the greater Myrtle Beach area. Son
and Daughter wanted to be involved, and each
contributed \$10,000 for a ten percent interest in return.
Son graduated from the University of Alabama with a
degree in business administration and started working for
Ryder Truck Rental in Florida in 1983. After the location
was acquired for the first store, Son moved to Surfside

Beach to open the first store and be the store manager. Daughter and her husband, Oswald St. Blanchard (Ozzie), also moved to the area to work at the store. Daughter did bookkeeping and sales. Mother and Father moved to the area in 1989 to work on expanding the business into commercial accounts. Around 1989, Accountant started [*3] working for the Company as its accountant. He had previously worked for Mother as an accountant in Florida. Accountant was not a certified public accountant, a CPA, but was a PA, a public accountant. He lived in Florida and did not have a license to practice accountancy in South Carolina. He had prepared the Company's tax returns since 1989 and also served as family members' personal accountant.

In 1989, the family opened a store in North Myrtle Beach. In 1995, they opened a store in Pawleys Island. In 1998, the Company was formed and ownership of the individual stores was transferred to the Company. At that time, Father owned 520 shares, Mother owned 160, Son owned 160, Daughter owned 90, and Ozzie owned 70. In 1999, the Company opened an additional store in Myrtle Beach. The buildings and land where the Company's stores were located were owned by separate entities owned by members of the Company. By 2001, Son was president of the Company.

On December 18, 2004, Ozzie was severely injured in a motorcycle accident and as a result became a quadriplegic. The accident occurred on a Saturday while Ozzie was riding in a Toys for Tots ride. Ozzie was wearing his uniform and had represented [*4] the Company in this capacity before. Ozzie had appeared in commercials for the Company and was "the face" of the Company. Son believed Ozzie was not entitled to workers' compensation because he was not at work when the accident occurred and his claim would increase the Company's insurance premiums. The matter was litigated, and the single commissioner of the Workers' Compensation Commission determined Ozzie was acting within the course and scope of his employment when the accident occurred and found the claim compensable. The Appellate Panel reversed the single commissioner in a two to one decision. The matter was appealed to the circuit court, but before the circuit court reached a decision, the parties settled the claim.

Son testified Father had told him they needed to make sure Ozzie got workers' compensation benefits for the accident. Son believed Father was asking him to

perjure himself and indicated he told Father he could not do that. Son felt the disagreement was the turning point in his relationship with the rest of the family. Father testified he did not ask Son to lie and Son only worried about it costing the Company a lot of money. Father believed Ozzie was working in the [*5] course and scope of employment. Father indicated Ozzie was not working at one of their stores that day but he was working for the company by appearing at the Toys for Tots event. The minutes from a stockholder meeting of the Company following the accident as well as Father's deposition during the workers' compensation proceeding state Father and other employees saw Ozzie at one of the stores on the day of the accident while he was picking up business cards and coupons. The special referee found Son's testimony on this matter to be incredible.

Mother and Father began thinking about retirement and developed a retirement plan. Initially, they planned for Son and Daughter to purchase Mother's and Father's shares. However, the parties decided for tax purposes Mother and Father would incrementally give Son and Daughter shares in the Company with Son and Daughter each owning half the shares by December 31, 2011. Also as part of the retirement plan, on January 1, 2003, an LLC owned by Mother and Father, which owned the property for one of the store's locations, executed a lease with the Company for \$90,000 annually for a term of nineteen years. The lease was only for the building because a [*6] prior lease agreement was in effect for the land. Additionally, on December 31, 2002, Mother, Father, Daughter, and Son entered into an employment contract lasting until December 31, 2022, to pay Mother and Father a total of \$10,400 per year as well as benefits including health insurance, a gasoline credit card, and a company car. Accountant testified they were trying to minimize the impact on social security income and self-employment taxes. Father testified the second lease was created in order to pay Father the same amount he had been receiving previously though salary. In 2003, Mother and Father began receiving the payments from the employment contract and through their LLC under the lease. By 2007, in keeping with the retirement plan, Son and Daughter each had a 30% share of stock in the Company. Father testified he stopped giving his and Mother's shares in the Company to Son when Son brought this lawsuit.

In 2006, Son wanted to open an additional location. He and a friend along with Daughter owned the store,

called Mason Tire & Auto Service, through an entity called BCJ Tires, LLC. The Company owned the property and building and leased it to BCJ Tires. The Company had no ownership [*7] interest in BCJ Tires. On August 3, 2007, Son transferred \$93,500 from the Company to BCJ Tires without Mother or Father's knowledge. When Father learned about the money, he had Son and Daughter transfer their interests in BCJ Tires to the Company. Accountant later acquired Son's friend's shares and some of the Company's shares, resulting Accountant owning a majority interest in BCJ Tires. The store operates at a loss.

An employee for the Company testified that at times, Son did not come to work and gave no explanation. Father testified Son had been absent from the business several times and no one knew where he was. Daughter also testified Son would sometimes "walk off the job" but he was always allowed to return. Father indicated he convened an emergency shareholder meeting because of Son's unexplained absences. Son testified he had sometimes worked from home but always had been in touch with the Company and never had stopped running the Company.

On August 18, 2007, Son offered to purchase all but 5% of Daughter's 25% interest in the Company for \$625,000 or to sell 25% of his interest in the Company for \$987,500. He testified they had numerous discussions about different options of [*8] shareholders being bought out because they were not getting along. He testified he offered Daughter \$1 million for her shares, but she turned it down. Son then requested Father buy his shares, but Father turned him down. Son indicated Father told him if he was unhappy he could quit. Daughter also offered Son \$1 million for his shares, but according to Son, the offer later "evaporated."

On August 31, 2007, attorney Wayne Byrd sent a letter to the Masons advising them he had been retained by Son to represent his interests as an officer, director, and minority shareholder in the Company. On September 17, 2007, following a meeting with the parties, Byrd sent a letter to the Masons' attorney ordering them to stop paying for the members' personal expenses, reduce Daughter's salary, and terminate Ozzie. Byrd also sent a letter to Accountant indicating he had learned of "various serious financial and tax accounting irregularities which [he] ha[d] devised and fashioned." All of the shareholders except Son signed an agreement to repay the Company

for personal expenses. Son testified he refused to sign it because previously, all the shareholders had approved those expenses. On September 28, 2007, Byrd's [*9] law firm refunded the Company for the Company's check Son had used to pay his fee because it was representing him individually. However, Son then transferred to himself from the Company the amount he owed Byrd, \$17,301.66.

On October 24, 2007, a shareholders meeting was held, and Father was elected president and Son was elected vice president. Son was no longer in charge of the financial aspects of the Company but his salary and other responsibilities remained the same. Son continued working until July 2008.

On December 7, 2007, the Company held a shareholders meeting to sign the amended tax returns. Accountant testified Son insisted the amended tax returns not be filed and the Masons went along with it despite their unhappiness about it. Father testified that at the meeting Son stated that if they would not file those amended tax returns and instead handled it another way, he would stay with the Company and Father agreed. Son testified that at the meeting, the Masons were screaming at him and he said the Company should do whatever was necessary to fix the tax returns. Son testified Accountant stated the Company could fix the returns by doing something else with the revenue instead of [*10] amending the returns. Son testified he knew of the amended tax returns but did not see them before he brought the lawsuit.

In December 2007, Son told Father that Steve Allison offered to buy the Company for \$3 million. Father testified he did not consider it a serious offer because he did not believe Allison knew any details about the Company. Father indicated he called Allison and informed him he was not interested in selling the Company at that time. Allison testified he was president of a company that owned car oil change shops and in December 2007 he was interested in buying the Company based on his observations of the Company over thirteen years. Allison offered \$3 million because Son believed from prior conversations with Father he would accept that amount.

Sandra Adams worked as a bookkeeper for the Company. In July 2008, Son determined from some discrepancies in the monthly payments for an insurance policy Adams was stealing from the Company and

informed Father and Daughter he was going to fire her. Father testified he and Daughter expressed concern that Son not fire her right away due to the workload it would place on Daughter until Adams could be replaced. Son stated that he [*11] was going to do the firing immediately, and Father said he would support him. Son fired Adams, but Father decided to rehire Adams because he thought they needed to look into the matter further. Father indicated that when he told Son, Son said, "I'll bury you." Father rehired Adams and put her on probation. He testified it was unproven whether Adams was stealing and she was still employed by the Company. The special referee found Father's testimony on the matter credible and determined Father's "actions were consistent with the Company's best interest and the decision was a valid business judgment."

On August 5, 2008, Son filed a complaint against the Masons and the Company, asserting causes of action for breach of contract, breach of fiduciary duty, civil conspiracy, relief pursuant to *sections 33-14-300 to -330 of the South Carolina Code*¹ wrongful termination of employment-constructive discharge, and wrongful termination-violation of public policy. On September 23, 2009, Son filed an amended complaint adding Accountant as a defendant and adding a cause of action against him for aiding and abetting breach of fiduciary duty. The Masons and the Company filed an answer asserting affirmative defenses and counterclaims against Son for breach [*12] of fiduciary duty and conversion.² The parties consented to the case being referred to the special referee. The special referee conducted a five-day trial on the case.

1 Under this cause of action, Son requested the court order a purchase of his shares in the Company at fair value.

2 Accountant filed a separate answer.

The conversion counterclaim was based on an alleged casing³ scheme. Son testified he would fabricate the name of a company, write a receipt for truck tires from that company, and take cash out of the drawer in that amount. He indicated he would later split that money with Daughter. He testified Accountant told him this was acceptable as long as he split the money with Daughter. Accountant testified he did not tell Son how to create fictitious invoices. An employee of the Company testified that between 2003 and 2007 he had noticed cash missing from the drawer and an invoice for casings but there were

no casings. He testified he noticed Son taking money out of the cash drawer and would see the invoice audit at the end of the day.

In 2003 and 2006, Son made adjustments to the records for the Company that increased the inventory and created a corresponding credit note payable to Son [*13] and Daughter. The note for 2003 was \$440,000 and for 2006 it was \$300,000. Son and Ozzie signed the 2003 note and it was witnessed by Mother and Father. Daughter did not sign either note and testified she did not know about the notes until Son asked her in 2007 to sign two promissory notes and she refused. Son indicated the family all knew about the inventory adjustments and it was Accountant's idea to decrease the Company's tax liability. Accountant testified he told Son about both the proper way to fix the inventory problem and the way he ultimately handled it. Accountant testified Son decided to make the 2003 adjustment in order to decrease the Company's tax liability. Accountant testified that at the time, only Son and himself knew about the 2003 adjustment and Accountant did not know about the 2006 adjustment until after Son had made it. Son testified he had relied on Accountant's advice that the adjustments were proper and he did not know about the "severity" of the adjustments until Byrd informed him. Laura Durant, a CPA retained by the Masons and the Company for trial, testified the adjustments had no basis in reality and had a significant effect on the income tax returns. [*14] Son testified he signed the tax returns from 1984 until 2007, specifically in 2003 and 2006. Son testified he did not know the tax returns were fraudulent because he relied on Accountant and he did not think the Masons knew the returns were fraudulent until 2007. Accountant testified he did not tell the Masons the tax returns were fraudulent. He testified he accepted the way Son had handled the excess inventory and filed the tax returns because of his close relationship with the family. The special referee found Accountant's testimony regarding making inventory adjustments and creating fictitious notes substantially more credible than Son's despite the fact that his filing of the tax returns was professionally inappropriate.

3 A casing is a used commercial tire that has the capability of being recapped for sale.

David Timothy Duncan, an accountant hired by the Company, testified he was involved with reviewing amended tax returns for the Company in 2007. He

decided to not file the amended returns and returned them to Accountant. Duncan testified that while he was considering the amended returns, Son talked to him about inventory adjustments and Duncan advised him against it.

Son testified [*15] no one fired him, told him not to come back, or cut his pay. He found working at the Company intolerable and thought the other shareholders wanted him to quit. He stated that although the Company did not reduce his pay or benefits, the Masons embarrassed him in front of other employees.

The special referee found for Respondents on all of Son's causes of action.⁴ The special referee found "it is beyond dispute in my opinion that Son was aware of and actively engaged in and furthered the very practices about which his attorney[s] September 17, 2007 letter complains and which form the basis of some of the claims in this action." The special referee also determined nothing in the record indicated the Masons deviated from the appropriate standard of conduct. The special referee determined nothing indicated the Masons' conduct towards Son was oppressive or unfairly prejudicial and they had not breached their fiduciary duty. The referee further found because Son presented no evidence of a breach by the Masons, "his claim for his shares to be repurchased must fail. He found,

Son's dissatisfaction with his lack of employment by [the] Company, as well as with diminution of the value of his shares [*16] due to significant tax liability and the unfortunate business decision to expand the Company's operation . . . are matters that were principally due to and occasioned by the conduct and decisions of Son.

He noted that Son's request for his shares to be purchased was an equitable one and Son's unclean hands from his conduct prevented him from relying on an action for stockholder oppression or breach of fiduciary duty.

4 The special referee issued one order for the actions regarding the Masons and the Company and another for the action against Accountant.

The special referee found "[t]he inaccuracies in the tax returns and any damages that flow from these falsities would affect the corporation in its entirety, not Son specifically. Therefore, Son's suit was improper in that it

was not filed as a derivative action." The special referee also stated, "Contrary to the holding in *Brown v. Stewart*⁵ Son has sued . . . Father, Mother[,] and [Daughter] under [sections 33-8-300 and -420 of the South Carolina Code (2006)]."

The special referee found for the Masons and the Company on their counterclaims for conversion regarding the casings scheme and Son's payment of his attorney's fees and awarded them \$11,716.32 and \$17,301.66 [*17] respectively. The special referee determined the cause of action for damages arising from the filing of false tax returns was not ripe for adjudication because the amount of damages was undetermined at the time.

5 *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684-85 (Ct. App. 2001) ("If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder. It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." (citation and internal quotations marks omitted)).

Son filed a Rule 59(e), SCRCP, motion, requesting the special referee delete or clarify the portion of the order relating to the counterclaim regarding the tax obligations. The special referee denied the motion. This appeal followed.

STANDARD OF REVIEW⁶

6 Son urges this court to use caution in applying the standard of review because the orders from which this appeal is taken were prepared by Respondents. See *In re Luhr Bros.*, 157 F.3d 333, 338 (5th Cir. 1998) ("[I]n cases such as the instant one, where the [*18] district court's Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party's proposed findings and conclusions, with minimal revision, we should approach such findings with 'caution.'").

"[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of

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review to exact." *Wheeler v. Estate of Green*, 381 S.C. 548, 554, 673 S.E.2d 836, 839-40 (Ct. App. 2009). "The character of the action is generally ascertained from the body of the complaint; but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville Cnty.*, 380 S.C. 528, 534, 670 S.E.2d 663, 666-67 (Ct. App. 2009). "When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). "The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review." *Id.* at 17-18, 640 S.E.2d at 495.

LAW/ANALYSIS

I. Judicial Dissolution/Repurchase of Shares

Son argues the special referee erred in denying him relief under the judicial dissolution provisions governing South Carolina corporations. He asserts the special referee should have ordered a buyout of his shares. [*19] We disagree.

"Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

It should be noted that although cases generally have discussed the two[-]issue rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the two[-]issue rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Id. at 346, 692 S.E.2d at 904 (internal quotation marks omitted). "[A]n unappealed ruling, right or wrong, is the

law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

"A corporate dissolution is an action in equity." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). "A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation marks omitted). "In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in [*20] accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." *Florence Cnty. Sch. Dist. # 2 v. Interkal, Inc.*, 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002); see also *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (Ct. App. 1998) ("[W]e are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility.").

Sections 33-18-400 to 430 of the South Carolina Code (2006) apply to close corporations.

(a) Subject to satisfying the conditions of subsections (c) and (d), a shareholder of a statutory close corporation may petition the circuit court for any of the relief described in [s]ection 33-18-410, 33-18-420, or 33-18-430 if:

(1) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner, whether in his capacity as shareholder, director, or officer of the corporation;

... or

(3) there exist grounds for judicial dissolution of the corporation under [s]ection 33-14-300⁷

(b) A shareholder must commence a proceeding under subsection (a) in the circuit court of the county where the corporation's principal office or, if none in this State, its registered office is located. The jurisdiction of the court in which the proceeding is commenced [*21] is plenary and exclusive.

(c) If a shareholder has agreed in writing to pursue a nonjudicial remedy to resolve disputed matters, he may not commence a proceeding under this section with respect to the matters until he has exhausted the nonjudicial remedy.

S.C. Code Ann. § 33-18-400 (2006).

(a) If the court finds that any grounds for relief described in [s]ection 33-18-400(a) exist, it may order one or more of the following types of relief:

(1) the performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers of or any other party to the proceeding;

(2) the cancelation or alteration of any provision in the corporation's articles of incorporation or bylaws;

(3) the removal from office of any director or officer;

(4) the appointment of any individual as a director or officer;

(5) an accounting with respect to any matter in dispute;

(6) the appointment of a custodian to manage the business and affairs of the corporation;

(7) the appointment of a provisional director who has all the rights, powers, and duties of an elected director to serve for the term and under the conditions prescribed by the court;

(8) the payment of dividends;

(9) the award of damages to any [*22] aggrieved party.

(b) If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding.

S.C. Code Ann. § 33-18-410 (2006).

(a) If the court finds that the ordinary relief described in [s]ection 33-18-410(a) is or would be inadequate or inappropriate, it may order the corporation dissolved

under [s]ection 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b).

(b) If the court orders a share purchase, it shall:

(1) determine the fair value of the shares, considering among other relevant evidence the going concern value of the corporation, any agreement among some or all of the shareholders fixing the price or specifying a formula for determining share value for any purpose, the recommendations of any appraisers appointed by the court, and any legal constraints on the corporation's ability to purchase the shares;

(2) specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the [*23] purchase obligation to the rights of the corporation's other creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on the seller;

(3) require the seller to deliver all his shares to the purchaser upon receipt of the purchase price or the first installment of the purchase price;

(4) provide that after the seller delivers his shares he has no further claim against the corporation, its directors, officers, or shareholders, other than a claim to any unpaid balance of the purchase price and a claim under any agreement with the corporation or the remaining shareholders that is not terminated by the court;

(5) provide that, if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under [s]ection 33-18-430; and

(6) provide that the corporation or remaining shareholders release or enter into an agreement to indemnify the seller from any personal liability for obligations of the corporation the seller has personally guaranteed.

S.C. Code Ann. § 33-18-420 (2006).

(a) The court may dissolve the corporation if it finds:

(1) there are grounds for judicial dissolution under [s]ection 33-14-300; or

(2) all other relief ordered by the court under [s]ection 33-18-410 [*24] or 33-18-420 has failed to resolve the matters in dispute.

(b) In determining whether to dissolve the corporation, the court shall consider among other relevant evidence the financial condition of the corporation but may not refuse to dissolve solely because the corporation has accumulated earnings or current operating profits.

S.C. Code Ann. § 33-18-430 (2006).

In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), [the supreme court] established how a court should determine whether majority shareholders have acted oppressively within the meaning of section 33-14-300. . . . In establishing the proper considerations for finding oppression, [the court] observed that the terms oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case. [The court] also noted this was a fact-sensitive review and should therefore be determined through a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior. Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,]. . . failure to enforce contracts for the benefit of the [*25] corporation[, and] withholding information from minority shareholders.

Ballard, 399 S.C. at 594, 733 S.E.2d at 110 (second omission by court) (citations and internal quotation marks omitted).

those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)" and "(iv) the corporate assets are being misapplied or wasted." S.C. Code Ann. § 33-14-300(2) (2006);

In *Ballard*, the court noted that the minority shareholder, "like [the minority shareholders] in *Kiriakides*, similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment." *Id.* at 595, 733 S.E.2d at 110. The court noted, "This result is especially significant because returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends." *Id.* at 596-97, 733 S.E.2d at 111 (citing Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, 758 (Apr. 2000) (noting that "the close corporation investor typically looks to salary [*26] rather than dividends for a share of the business returns because the (e)arnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits" (internal quotation marks omitted))).

Common freeze out techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Often, these tactics are used in combination. In a public corporation, the minority shareholder can escape such abuses by selling his shares; there is no such market, however, for the stock of a close corporation. The primary vulnerability of a minority shareholder is the specter of being locked in, that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.

7 Those grounds include "(ii) the directors or

Kiriakides, 343 S.C. at 604-05, 541 S.E.2d at 267

(footnotes, citations, and internal quotation marks omitted).

"The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances." *Id.* at 598, 541 S.E.2d at 263 (internal quotation [*27] marks omitted). "The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation." *Id.* (internal quotation marks omitted).

Although the terms oppressive and unfairly prejudicial are not defined in section 33-14-300, the comment to [section] 33-18-400 [of the South Carolina Code] (1990), which allows shareholders in a statutory close corporation to petition for relief on the grounds of oppressive, fraudulent, or unfairly prejudicial conduct provides:

No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants.

Kiriakides, 343 S.C. at 598, 541 S.E.2d at 263-64 (internal quotation marks omitted). "[I]llegal or fraudulent conduct is not required under section 33-14-300(2)(ii) The 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 (last alteration by court) (internal quotation marks omitted). "Prior to 1963, dissolution could be based [*28] only upon illegal, fraudulent or oppressive conduct. In an attempt to afford minority shareholders greater protection, the legislature amended the statute in 1963 to include unfairly prejudicial conduct." *Kiriakides*, 343 S.C. at 597 n.17, 541 S.E.2d at 263 n.17 (internal quotation marks omitted). "The statute, as amended, broadens the scope of actionable conduct by providing the frozen-out minority shareholder a right of action based on conduct by the majority shareholders which might not rise to the level of fraud." *Id.* (internal

quotation marks omitted).

The *Kiriakides* court found:

[W]e do not believe the Legislature intended a court to judicially order a corporate dissolution *solely* upon the basis that a party's reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices [*29] of family businesses.

Id. at 599, 541 S.E.2d at 264 (internal quotation marks omitted).

[S]ection 33-14-300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the *actions* of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder. Given the language of our statute, a reasonable expectations approach is simply inconsistent with our statute.

Kiriakides, 343 S.C. at 600, 541 S.E.2d at 265 (internal quotation marks omitted).

"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Soden*, 333 S.C. at 568, 511

S.E.2d at 379. "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks [*30] relief." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (internal quotation marks omitted). "The decision to grant equitable relief is in the discretion of the trial judge." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379. "[T]he equitable defense of unclean hands is available in a shareholder derivative action." *Straight v. Goss*, 383 S.C. 180, 207, 678 S.E.2d 443, 458 (Ct. App. 2009). In *Straight*, the court found the minority shareholder's "own inequitable conduct came directly to bear on the transactions of which [he] now complains." *Id.* at 208, 678 S.E.2d at 458. The court found "the special referee did not err in holding the doctrine of unclean hands precluded [the minority shareholder] from recovering against the [majority shareholders]." *Id.*

In this case, the special referee ruled that Son's suit was improper because it should have been filed as a derivative action.⁸ The special referee's conclusions of law 6, 7, and 8 all relate to this determination. The special referee does not specify to which causes of action this decision applies. The referee does specifically state "[t]he inaccuracies in the tax returns and any damages that flow from these falsities would affect the corporation in its entirety, not . . . Son specifically. Therefore, Son's suit was improper in that it was not filed as a derivative action." Son does not address the special referee's finding his suit should [*31] have been filed as a derivative action. Therefore, this ruling is the law of the case under the two-issue rule.

8 Generally, suits to recover assets of the corporation must be brought as derivative actions. See *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). An individual shareholder may bring a direct suit against the corporation only when his or her "loss [is] personal and not a loss of the corporation." *Todd v. Zalzo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991). However, "[u]nder [sections 33-18-400 to -430 of the South Carolina Code (2006)], in closely held corporations, a minority stockholder can maintain an action for managerial misconduct and other forms of oppression by majority stockholders." *Davis v. Hamm*, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989).

As to the merits, this court can make its own findings of fact while keeping in mind the special referee saw and heard the witnesses' testimonies. Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and benefited from those activities. He received the benefits from his casing scheme. He was not re-elected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other the stockholders enjoyed, such as a company car and a gas credit card. He was the one stockholder [*32] who refused to repay the Company for personal expenses such as housekeeping services. Additionally, most of the testimony in the record indicates he had knowledge that adjusting the Company's inventory to diminish its tax liability was fraudulent. Based on all of this, the special referee did not err in finding he was not an oppressed shareholder. Accordingly, we affirm the special referee's decision to not order the Company buy Son's shares.⁹

9 Accordingly, we need not address Son's arguments regarding valuation. See *Fitch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Amount of Shares Owned

Son contends he has physical possession of thirty percent of the Company's shares and is entitled to another twenty percent, which Mother and Father have refused to deliver. He maintains the special referee erred in determining he was not entitled to the twenty percent of the stock because the agreement providing for such was "illegal and unenforceable." We disagree.

"An action for breach of contract is an action at law." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "An illegal contract is unenforceable. The general rule is that courts will not enforce a contract [*33] which is violative of public policy, statutory law, or provisions of the Constitution." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002) (citation and internal quotation marks omitted). The court "will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy."

Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) (internal quotation marks omitted).

Son's claim to the stock arises out of the retirement agreement and gift letter he had with Mother and Father. The special referee noted Son's claim was not included in his amended complaint. Further, it found the provisions of the document were not complied with as Father could not retire in light of Son's conduct and the additional rent payments were stopped. Additionally, the special referee determined it could not enforce "agreements which clearly, on their face, were illegal and unenforceable."

Son's argument on appeal does not address the special referee's ruling his claim was not pled. As to the agreement's illegality, he simply argues that the result is inequitable. Accordingly, we affirm this issue under the two-issue rule. See *Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because [*34] the unappealed ground will become the law of the case."). Further, the evidence supports the special referee's finding Son stopped complying with the terms of contract. Therefore, we affirm the special referee's decision.

III. Fiduciary Duty

Son alleges the special referee erred in concluding the Masons did not breach their fiduciary duty to him. We disagree.

"[A] claim of breach of fiduciary duty is an action at law" *Jordan*, 362 S.C. at 205, 608 S.E.2d at 131. "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (citation omitted).

Controlling shareholders owe a fiduciary duty to minority shareholders. *Clearwater Trust v. Bunting*, 367 S.C. 340, 347, 626 S.E.2d 334, 337 (2006). "The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by [sections] 33-8-300 and - 420." *Id.* at 350, 626 S.E.2d at 339.

(a) An officer with discretionary authority shall discharge his duties under

that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders. [*35]

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

S.C. Code Ann. § 33-8-420 (2006).

"[U]nder South Carolina case law, a breach of this fiduciary duty must be pursued through a derivative, and not an individual, action." *Rivers v. Wachovia Corp.*, 665 F.3d 610, 617 (4th Cir. 2011).

"The fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a stockholder's derivative action" *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (omission by court) (internal quotation marks omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Id.* (internal quotation marks omitted). "If misconduct by the management [*36] of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id.* at 49, 557 S.E.2d at 684-85 (internal quotation marks omitted). "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." *Id.* at 50, 557 S.E.2d at 685.

Because this is an issue of law, we must affirm the special referee's findings unless no evidence supports them. The record contains evidence Son perpetrated the fraudulent activities. Although Son testified he acted with Accountant's guidance and did not know his actions were not proper or legal, the special referee did not find Son's testimony credible in these matters. Several people, including others not named as parties in this suit, testified the Masons did not know Son was taking actions that were fraudulent. Further, because the fraudulent tax returns impact all of the shares equally, Son should have filed a derivative action. As the testimony supports the special referee's decision, we affirm this issue. [*37]

IV. Aiding and Abetting

Son contends the special referee erred in failing to find Accountant aided and abetted the Masons in breaching their fiduciary duties to the shareholders of the company. We disagree.

Initially, Accountant contends Son did not perfect his appeal as to Accountant because he did not name Accountant as a respondent or attach a copy of the order regarding his cause of action against Accountant to his notice of appeal. Although he added Accountant as a respondent when he filed his amended notice of appeal within thirty days of the order, he did not attach a copy of the order relating to Accountant until he filed his second amended notice of appeal, which was more than thirty days after the underlying order had been filed. We disagree.

"Service of the notice of intent to appeal is a jurisdictional requirement, and the [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Conner v. City of Forest Acres*, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002). "Clerical errors in a notice of appeal do not destroy the appeal." *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). In *Charleston Lumber Co.*, the court rejected the respondent's attempt to have the appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of [*38] cases tried together. *Id.* at 477-78, 458 S.E.2d at 435-36. In *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000), the court found that although the appellant "did not 'technically' appeal from the trial court's original order by referring to it in the Notice of Appeal, the [appellant] did attach a copy of the order to the Notice." The court found

the appellant's omission was "of a clerical nature only and this [c]ourt has jurisdiction to hear the appeal." *Id.* In both *Weatherford*, 340 S.C. at 578, 532 S.E.2d at 313, and *Charleston Lumber*, 318 S.C. at 478, 458 S.E.2d at 436, the court noted the respondents were not prejudiced by the determination the court had jurisdiction over the appeal.

In *Conner*, 348 S.C. at 460-62, 560 S.E.2d at 609-10, the supreme court found the appellant's correction to her notice of appeal by adding two parties originally listed as defendants as respondents was not a clerical error; thus, the court determined notice to the two parties was untimely, requiring their dismissal from the appeal. The court noted the appellant waited nearly five months after filing the appeal to name the two parties as respondents and correspondence between the appellant and the court regarding the caption of the notice of appeal should have alerted her to the mistake much earlier. *Id.* at 462, 560 S.E.2d at 610.

In this case, Chief Judge Few issued an order on March 4, 2013, denying Accountant's motion to dismiss. However, in that order he stated, [*39] "[N]othing in this order prevents [Accountant] from raising this issue in his brief for the assigned panel to consider along with the merits of this appeal."

Unlike *Conner*, Son added Accountant as a respondent within the thirty days for filing an appeal. Although Son waited longer than thirty days to include the order relating to the Accountant, he did add the order more timely than the appellant in *Conner*. We find the appeal was proper because Accountant at least had notice he was a party to the appeal within the time required to file an appeal from the special referee's decision.

The elements for a cause of action of aiding and abetting a breach of fiduciary duty are[] (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach.

Gordon v. Busbee, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (citation and internal quotation marks omitted).

As discussed above, the special referee did not err in

412 S.C. 28; 770 S.E.2d 405;
2015 S.C. App. LEXIS 34, *39

determining the Masons did not breach their fiduciary duty to Son. Accordingly, because no breach of fiduciary occurred, Accountant could not have knowingly participated in a breach of that duty. Therefore, [*40] we affirm this issue.

V. Civil Conspiracy

Son argues the special referee erred in failing to find the Masons engaged in a civil conspiracy to loot the Company at the expense of Son. We disagree.

An action for civil conspiracy is normally an action at law. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, the character of an action as legal or equitable depends on the relief sought. When equitable relief is sought in an action in tort[,] the action is one in equity." *Soden*, 333 S.C. at 574, 511 S.E.2d at 382.

"The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Id.* at 567, 633 S.E.2d at 511 (alteration by court) (internal quotation marks omitted).

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. [*41] . . . An action for civil conspiracy is an action at law; the trial judge's findings will be upheld on appeal unless they are without evidentiary support.

Id. (omission by court) (citations and internal quotation marks omitted).

The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or

combination per se. [A]n unlawful act is not a necessary element of the tort. Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.

Id. at 567-68, 633 S.E.2d at 511 (alteration by court) (citations and internal quotation marks omitted).

The special referee found:

If the value of Son's stock has indeed been impaired, Son need not look further than his own actions in filing false and inaccurate tax returns, diverting Company funds through the casing scheme, payment of personal expenses (including attorney[]s fees) from Company funds and working on an expansion of the Company business to include (for the first time) Company ownership of land and building from which the Conway Store is operated, and diverting Company funds for [*42] operation of a non-company owned entity (BCJ Tires).

The special referee also found Son did not establish "any special damages arising out of the alleged conspiracy." Son did not allege anything in his complaint distinct from his other causes of action in his claim for civil conspiracy. He did state the Masons had "conspired to cause special damages to [Son] in such a way that [Son] will not receive the fair value of his stock in the [Company] or the opportunity to effectively manage the business affairs of the [Company]."

Son requests actual and punitive damages for the civil conspiracy. Accordingly, this is an action at law, and this court should affirm if the evidence supports the special referee's findings. Because the evidence, including the testimony provided by the Masons, Accountant, and others, supports the special referee's findings, we affirm this issue.

VI. Constructive Discharge

Son argues the Masons violated public policy and wrongfully and constructively discharged Son from his employment with the Company. We disagree.

"An action for breach of contract is an action at law." *Electro-Lab of Aiken*, 357 S.C. at 367, 593 S.E.2d at 172. An action for damages for wrongful discharge is action at law. *Wallace v. Milliken & Co.*, 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991). But see *id.* ("An employee, discharged [*43] in retaliation for instituting a Workers' Compensation Claim, is entitled to lost wages and reinstatement. Reinstatement is equitable relief, payment of back wages being merely an integral part of the remedy. Moreover, lost wages are deemed restitution, itself an equitable remedy." (citations omitted)).

"Where the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). "Under the public policy exception to the at-will employment doctrine . . . an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013) (internal quotation marks omitted).

[T]he public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law. . . . In a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible.

Ludwick, 287 S.C. at 225, 337 S.E.2d at 216.

Mother, Father, Sister, and other employees testified that Son stopped working voluntarily. The special referee [*44] found the evidence was uncontroverted that Son stopped working voluntarily. As an action for breach of contract is an action at law and evidence supports the special referee's findings, we affirm.

VII. Counterclaims

Son argues the special referee erred in awarding judgment to the Masons and the Company on their counterclaims. We disagree.

"An action for conversion is an action at law." *Moore v. Benson*, 390 S.C. 153, 162, 700 S.E.2d 273, 278

(Ct. App. 2010). "Therefore, we review the record to determine if any evidence supports the [special referee's] finding." *Id.*

Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.

Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009) (citation omitted).

We affirm the special referee's decision to award the Masons and the Company damages for their counterclaim for conversion for Son's paying his attorney with the Company's funds. Son retained the attorney to represent himself, not the Company. Additionally, the special referee did not err in finding for the Masons [*45] and the Company as to their counterclaim for Son's casing scheme. Based on the testimony, Son recorded fake inventory and then paid himself for it. Accordingly, the special referee did not err in finding for the Masons and the Company on their conversion claim for the casing scheme. As to the claims for damages as a result of Son's filing false tax returns, the special referee did not err in finding a claim for the damages from the filing of false returns could be brought later. The amount of damages could not be determined at the time because the Internal Revenue Service had not yet made a determination as to how much the Company owed in back taxes and fees.

VIII. Attorney's Fees

Son contends he is entitled to attorney's fees and expenses. We disagree. Son argues because he should have won his action at trial, he is entitled to attorney's fees. Because we affirm the special referee's decisions, we have no reason to award Son attorney's fees.

CONCLUSION

We affirm the special referee's orders.

HUFF and SHORT, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr.,

Appellant,

v.

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

Respondents.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant Joseph E. Mason, Jr. ("Son") petitions the Court for a rehearing of the opinion filed in this case on March 4, 2015. In that opinion, the Court concluded that Son was not entitled to a forced purchase of his shares or other relief under the corporate dissolution statutes and affirmed the special referee's rulings that Son was not entitled to additional shares in Mason Holding Company, Inc. (the "Company"), was not entitled to recovery under his tort claims, and that the Mason Defendants 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 overlooked or misapprehended the following points.¹

¹ Son incorporates his earlier briefs by reference.

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SC Court of Appeals

Argument for Rehearing

In concluding that Son failed to address the special referee's finding that his suit should have been filed as a derivative action and the ruling is the law of the case under the two-issue rule, the Court overlooked Son's argument in his Final Appellant's Brief (pp. 39-40) that Son's claims were properly asserted as individual claims because he was injured in his individual capacity by way of being the only person who has been excluded from employment with the Company and deprived of all value of his shares. The Court further overlooked or misapprehended Son's argument and the text of the statutes providing that claims for a forced purchase of shares under the corporate dissolution statutes are claims by a shareholder in an individual capacity and not in a derivative capacity on behalf of the corporation.

Although it recites the basic rules for statutory corporate dissolution claims, including the principles that a finding of illegal or fraudulent conduct by the majority is not required and that "[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 v. Roberson*, 399 S.C. 588, 595, 733 S.E.2d 107, 110 (2012), the Court's opinion fails to apply these principles in this case. Fundamentally, Son has been deprived of all value of his shares since 2008. Even if the Court concludes that Son engaged in inappropriate conduct, this Court overlooked the principle that 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>

and attached hereto (the Business Court held that, despite “his own misconduct,” “Plaintiff is entitled to a court ordered buyout for the ‘fair value’ of his shares...”).²

The Court 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, but the Court overlooked or misapprehended that 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. The Court further overlooked or misapprehended that even if a party engages in tortious misconduct, it 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 Court 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 gave deference to credibility determinations set forth in those orders.

In affirming the special referee’s rulings against Son on his tort claims, the Court overlooked the fact that Son properly asserted the claims in his individual capacity (and not derivatively) because he had been harmed in his individual capacity and in a manner different from other Company shareholders. Further, the Court also overlooked the overwhelming evidence that the defendants combined to force Son out of the Company

² 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.*

and deprive him of all value of his shares in the Company that he devoted over 25 years of his working life building.

The Court concluded that Son is barred under the two-issue rule from pursuing his claim that he owns an additional 20% of the shares of the Company because he did not address the issue of whether the claim was set forth in his Amended Complaint. In doing so, the Court overlooked or misapprehended the special referee's order in that there is no specific holding that Son could not pursue the claim because it was not specifically pleaded. Further, as argued below, the issue was a supplemental development after the filing of the amended complaint because shares were to be delivered annually, the issue was tried by consent and without objection, 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.)

In affirming the special referee's ruling that the Mason Defendants were entitled to judgment against Son for \$17,301.66 as a result of Son's reimbursement of attorneys' fees paid to Byrd's law firm, the Court overlooked the facts that Son solicited the advice from that firm as 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 several years). 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 Defendants, and, after entering into the father's "retirement" agreements, the funds were split with Sister.

The Court's opinion allows the Mason Defendants 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. The Court overlooked the facts that this remedy was not sought before or during trial, the Mason Defendants were indisputably on notice of the potential claim since 2008, the reason the amount the IRS would require to be paid was unknown was because the Mason Defendants elected not to inform the IRS until more than 3 years later in 2011, and the amount of taxes due substantially increased as a result of that period of the Mason Defendants' intentional failure to report.

Conclusion

For these reasons and those contained in his Appellant's Brief and Reply Brief, Appellant Joseph E. Mason, Jr. urges the Court to grant rehearing in this matter.

Respectfully submitted,

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March 19, 2015

DM: 4007544 v.1

2014-05-15-02

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROBERT HANEKAMP,

Plaintiff

v.

ATLAS TECHNOLOGIES, INC.,

TASL, INC., DAVID DIEHL, and

BRIAN MILLER

Defendants.)

) THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO. 2011-CP-10-1243

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**ORDER GRANTING
SUMMARY JUDGMENT
AS TO DEFENDANTS'
COUNTERCLAIMS**

This matter came before the Court at a hearing held on April 30, 2014 involving the (a) Motion for Summary Judgment as to counterclaims of Defendants Atlas Technologies, Inc. ("Atlas"), TASL, Inc. ("TASL"), Brian M. Miller ("Miller") and David Diehl ("Diehl") (all sometimes collectively referred to as "Defendants") and (b) Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and S.C. Code Ann. §15-36-10 (Sanctions), both filed on March 24, 2014 pursuant to S.C. R. CIV. PRO. 56. Defendants seek an Order of this Court awarding summary judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions). This Court finds that Plaintiff has breached his fiduciary duty to Defendants; committed fraud, converted Atlas funds to his personal use, that plaintiff has been unjustly enriched and owes Defendants restitution, and has violated S.C. Code Ann. §33-18-410 (b) and S.C. Code Ann. §15-36-10, et. seq. Defendants also have sought a Court ordered buyout of Plaintiff's shares in Defendants Atlas and TASL as an alternative to dissolution of the Defendant corporations.

Plaintiff faces a trapped investment from which he can no longer derive any benefit. Based on the evidence presented in this case and the multiple affidavits filed by Defendants', as well as the excerpts of the deposition of the Plaintiff, I find that reconciliation between the Plaintiff and the Defendants is unrealistic and that a forced buy-out of Plaintiff's shares in both Atlas and TASL by the Defendants is the appropriate remedy in this case. Despite his own misconduct, as detailed throughout the record in this case, I find that Plaintiff is entitled to a court ordered buyout for the "fair value" of his shares in Atlas and TASL decreased by offsets for the amount of money converted to Plaintiff's personal use and money that Defendants paid in unnecessary legal fees, experts' fees [Dixon Hughes Goodman], and costs due to Plaintiff's vexatious conduct and frivolous filings and arguments in this litigation.

Present at the hearing held on April 30, 2014 were the Defendants Brian M. Miller and David Diehl represented by Richard S. Rosen, Esq. and John E. Rosen, Esq. of Rosen, Rosen & Hagood, LLC. The Plaintiff did not appear at the hearing despite receiving proper notice. Plaintiff signed a certified mail return receipt sent by John E. Rosen, Esq. on March 24, 2014. Plaintiff also participated in the

email exchanges in late March and early April 2014 between Defendants' counsel, Plaintiff and Caroline Niland, my law clerk, for the purpose of scheduling a hearing on Defendants' motions.. After Ms. Niland asked the parties on April 1, 2014 if Wednesday, April 30, 2014 at 10 a.m. was suitable for all parties, Mr. Hanekamp responded: "Ms. Niland, Currently, I am unable to attend this hearing. Thank you, Rob." *Id.* In response to Ms. Niland's email of April 7, 2014 at 9:39 a.m., EDT, stating that "it would be very helpful to give us dates that you would be available to attend this hearing. Please advise with some possible dates by **this Friday, April 11**. Please be aware that if you do not provide dates, a hearing will be set on this matter..." *Id.* Mr. Hanekamp replied, "Ms. Niland, I do not have the ability to return to Charleston at the moment, therefore, I am unable to provide my availability. I understand. Blessings Rob." *Id.*

After having reviewed the pleadings, affidavits, exhibits, and other documents of record and considering the arguments of counsel, I find that there are no genuine issues of material fact in this case precluding the entry of judgment in favor of the Defendants as a matter of law. For the reasons stated herein-below, this Court finds that the Defendants' motions should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

This Court makes the following findings of fact:

This Motion comes after Plaintiff pursued a baseless Motion for Summary Judgment, a Second Motion for Receiver, a Second Motion for Leave to Amend his Complaint, an Amended Motion for Temporary Injunction and Restraining Order regarding advancement of Defendants' attorney's fees and costs by the corporations, as well as a Motion for Sanctions, Rule to Show Cause, to Compel, and for Commission of Out-of-State Subpoenas.

Plaintiff, since this case started over three (3) years ago, has filed three (3) Motions seeking appointment of a custodian or receiver including the most recent Motion for Summary Judgment filed in February of this year. All of these Motions have been denied. Judge Dennis pointed out at a hearing on August 3, 2011 that the first motion for receiver and/or custodian should never have been filed as there was no evidence to support it after Stephan V. Futeral, Esq., explained to the court that he hoped his discovery would give him the evidence needed to pursue the motion. See Transcript of Hearing August 3, 2011, pp. 2-4; 17-19.

The Court heard arguments on July 23, 2012 and ruled on the following motions in an Order dated October 24, 2012, with the exception of Plaintiff's Motion for Injunction regarding advancement of Defendants' attorney's fees and costs by the corporations, which motion was denied in an Order dated October 10, 2012. This Court denied the Second Motion for a Receiver and granted the Second Motion for Leave to Amend. Counsel for the parties advised the Court that they reached an agreement as to Plaintiff's motions for a rule to show cause, for the commission of out-of-state subpoenas, to compel discovery, to compel depositions in San Diego and Defendants' Motions to strike, for temporary restraining order/preliminary injunction/sanctions and for a protective order, and counsel published the agreement to the court at the July 23, 2012 hearing, all which became part of the October 24, 2012 Order. Plaintiff had not to date, more than one (1) year later, filed a Second Amended Complaint.

Subsequently, after Plaintiff's counsel, Stephan V. Futeral, Esq., received all discovery and subpoenaed documents as per the October 24, 2012 Order, he moved to be relieved as counsel for Plaintiff, which relief was granted by an Order dated December 5, 2012. Plaintiff was granted thirty (30) days to find new counsel. Plaintiff *pro se* sent this Court a letter on January 12, 2013, seeking additional time to find new counsel. On the same day, Plaintiff sent out invalid subpoenas as more fully set forth in Defendants' Motion to Quash dated January 29, 2012, seeking the same information he had already received on previous occasions.

This Court issued an Order on January 14, 2013, allowing Plaintiff until February 15, 2013 to retain

new counsel or proceed *pro se*. In that time period, Plaintiff, while presumably seeking new counsel, filed a Motion for Summary Judgment which had no basis and sought a receiver for a third time. See Transcript of Hearing February 20, 2013, pp. 12-13. This Court issued an Order on February 27, 2013 denying Plaintiff's Motion for Summary Judgment as well as Defendants' Motions for Rule to Show Cause and for Sanctions and Attorney's Fees.

Plaintiff found a third attorney, Bruce Miller, Esquire, who was granted reasonable time to become familiar with the case and who briefly represented Plaintiff until he too filed a Consent Motion to be relieved as counsel for Plaintiff on July 18, 2013. In the short time Bruce Miller represented Plaintiff, the parties held a status conference with this Court on June 20, 2013, which resulted in a consent scheduling order dated June 21, 2013, whereby the following would occur: (i) the Plaintiff would obtain a valuation by his own expert of Defendant Atlas by September 1, 2013, (ii) the parties would have until October 1, 2013 to mediate the case, and then (iii) if mediation failed, the parties would commence discovery on October 1, 2013 and have a date certain for a trial in February or March 2014. Plaintiff has not acted on the order he sought as he has not obtained a valuation of his own. Bruce Miller's Motion to be relieved as counsel for Plaintiff was granted on August 9, 2013.

Plaintiff, having had three (3) previous attorneys, David A. Collins, Esq., Stephan V. Futeral, Esq., and Bruce Miller, Esq. has been proceeding *pro se*. See Deposition of Robert Hanekamp, Page 7. Throughout this litigation, Plaintiff has been engaged in a pattern of reckless conduct as the record in this case makes clear.

This Court granted summary judgment in favor of Defendants on all of Plaintiff's causes of action in its Order of December 23, 2013. Defendants assert counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs); and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions).

Defendant Atlas is a defense contracting firm doing work for the United States Government and that provides information technology, network engineering and software products and services. Defendant Brian Miller and Plaintiff Robert Hanekamp met at Naval Air Station in Bermuda. Defendant Miller met Defendant Diehl prior to moving to South Carolina and worked together at Scientific Research Corporation and then Defendant Miller established himself as an IT consultant for a program known as The Automated Digital Network System ("ADNS"), a shipboard based network communications program. Mr. Miller was then asked to install ADNS and make it functional on the U.S.S. Normandy, a new and innovative application of the program. Due to Mr. Miller's success in getting ADNS to function on naval warships, the ADNS program was able to survive such that Defendants and Plaintiff had discussions about forming a company to work on ADNS installation, application and consulting. Atlas was incorporated on October 13, 1997. Brian Miller was able to convey his existing subcontracts to establish the initial revenue stream until the successfully bid and won a contract to perform ADNS system integration on the Enterprise Battle Group. Depo. of Hanekamp, p. 13. In addition to the government contracting work, Plaintiff and Defendants often discussed work involving the potential application and development of these systems for commercial products and services, thereby trying to diversify their workload. Depo. of Hanekamp, pp. 268-271.

Defendant Miller owns fifty percent (50%) of the shares of Atlas, Defendant Diehl owns twenty five percent (25%) and Plaintiff owns twenty five percent (25%). Together, Defendants Miller and Diehl comprise seventy five percent (75%) of the ownership of Atlas. Atlas is a statutory close corporation without a board of directors. See S.C. Code Ann. § 33-18-210. Defendant Miller owns thirty three and thirty three hundredths percent (33.33%) of the shares of TASL, Defendant Diehl owns thirty three and thirty four hundredths percent (33.34%) and Plaintiff owns thirty three and thirty three hundredths percent (33.33%) of the shares of TASL. Defendant TASL was incorporated on November 22, 1999, and its business consists of owning and managing two parcels of commercial real estate that are leased to Defendant Atlas. Defendants Miller and Diehl together own sixty six and sixty seven hundredths percent (66.67%) of TASL shares. There have been zero (0) allegations made regarding

any misconduct in the management of TASL. TASL is a statutory close corporation in which the Articles of Incorporation and Bylaws provide for a board of directors but the shareholder management agreement excludes one and provides that management of the corporation will be conducted by the shareholders.

Plaintiff was hired by Atlas in 1998 initially as a junior level technician at the Charleston office with a salary of \$50,000.00. See Affidavit of Brian M. Miller, ¶ 8; Affidavit of David Diehl, ¶ 10. His performance as an employee was satisfactory until 2003, when Plaintiff decided to move to San Diego, California, giving Defendants a mere one weeks' notice of his decision. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. Plaintiff claims that he was tasked with opening the San Diego office for Atlas but cannot point to a specific conversation, correspondence, document or any evidence that supports his contention. Depo. of Hanekamp, pp. 347-348. Plaintiff and Defendants had often talked about opening offices in other locations – Washington, D.C., Washington State, San Diego, and others, but it came as a surprise to Defendants that Plaintiff took it upon himself to move to San Diego. Miller Aff., ¶ 8; Diehl Aff., ¶ 10; Depo. of Hanekamp, pp. 347-348. Apparently, Plaintiff had a romantic relationship with a woman who lived in San Diego and who was his girlfriend. Depo. of Hanekamp, pp. 38-40, 42 (name and identifying information redacted). In order to preserve their longstanding friendship with Plaintiff, Defendants retroactively agreed to allow Plaintiff to establish an Atlas office in San Diego despite the fact that Plaintiff had never been employed by Atlas in a managerial position. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. It soon became apparent that Plaintiff was not qualified to manage the San Diego office and Defendants were forced to transfer the General Manager from Atlas' Virginia office to San Diego to manage operations. Miller Aff., ¶ 9; Diehl Aff., ¶ 11; Depo. of Hanekamp, pp. 46-48.

Plaintiff failed to properly manage the San Diego office such that it experienced cost overruns on task orders performed by Atlas San Diego. Miller Aff., ¶ 6; Diehl Aff., ¶ 6; Hughes Aff., ¶ 8. Plaintiff also mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372. According to Ana Susi, the Plaintiff in that case and Mr. Hanekamp's assistant, the atmosphere of the Atlas San Diego office was out of control, had no organization, none of the employees had ever had sexual harassment training, there was no HR presence, many employees used extreme foul language, and a lot of physical activity was inappropriate. Deposition of Ana Susi, Pages 266-269. Plaintiff admitted that one of his employees of the San Diego office had a legitimate complaint. Depo. of Hanekamp, p. 381.

In 2008, Plaintiff's security credentials were revoked meaning that he no longer had access to any government customers' facilities where Atlas was required under contract to perform work. Miller Aff., ¶ 10; Diehl Aff., ¶ 14. Thereafter, Plaintiff again unilaterally decided to move, this time to Hawaii, without seeking authorization from Atlas. Miller Aff., ¶ 10; Diehl Aff., ¶ 15. While in Hawaii, Plaintiff charged a multitude of personal expenses to the corporation and then tried to misrepresent them to Atlas' accounting office as legitimate business expenses. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff even admitted that all of his expenses incurred in Hawaii were personal expenses that he tried to pass off as legitimate including meals, rent, gifts and a Nissan Truck. Depo. of Hanekamp, pp. 58-62; 64-74.

This drain on resources, compounded with the damage caused by Plaintiff's inadequate management, resulted in substantial losses to Atlas. Miller Aff., ¶ 9; Diehl Aff., ¶ 11. Additionally, Plaintiff's incompetence and unprofessional conduct harmed the reputation and goodwill of the company, threatening even greater losses. Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-15. Defendants informed Plaintiff that the company needed an onsite manager to properly manage Atlas' workload, customer relationships and properly supervise office personnel. Depo. of Hanekamp, pp. 98-121; 354-372.

In 2009, Defendant Miller, despite having abundant cause to terminate Plaintiff's employment, agreed to, under certain conditions, create the position of CCO, to allow Plaintiff to work this position from 9

Hawaii, and to give Plaintiff a \$15,000.00 raise in salary if Plaintiff would perform certain tasks. The proposed offer required Plaintiff to facilitate a smooth transition -- to introduce, integrate and openly support a new General Manager to take Plaintiff's position. While Defendants admit that Miller and Plaintiff discussed the foregoing arrangement, Plaintiff failed to perform the conditions precedent to achieving such a deal. Depo. of Hanekamp, pp. 363-366. Plaintiff "squatted" in the General Manager position and did not find and perform the foregoing tasks with a new GM. Brian Miller Aff., August 1, 2011, ¶ 23; Depo. of Hanekamp, pp. 342-344; 363-365. Defendants deny that an enforceable contract ever existed in this regard or that they breached it.

Although still employed by Atlas, Plaintiff's performance continued to deteriorate. Plaintiff acknowledged in an email exchange with Defendants in June 2010 that he was insubordinate, incompetent, unprofessional and that he took full responsibility for all that he had done and deserved to be fired, but asked for another chance. Miller Aff., ¶ 6; Diehl Aff., ¶ 7. Defendants Miller and Diehl tried to provide Plaintiff with a dignified exit from the company given their longstanding friendship with Plaintiff. Miller Aff., ¶¶ 6, 18; Diehl Aff., ¶¶ 8, 23. Atlas received additional complaints of inappropriate behavior in the workplace from two (2) more San Diego Employees in February 2010. Finally, for the many reasons set forth herein, Plaintiff's employment was terminated in June 2010. Miller Aff., ¶¶ 18, 23; Diehl Aff., ¶ 23.

Prior to and following his termination, many attempts were made to reach a mutually agreeable solution as to the acquisition of Plaintiff's shares by Defendants Miller and Diehl. Miller Aff., ¶ 21; Diehl Aff., ¶ 26. However, Plaintiff simply refused to respond to any of these offers. Miller Aff., ¶ 21; Diehl Aff., ¶ 26. In fact, Plaintiff and Defendants agreed to have a valuation done for Atlas and utilized the CPA firm recommended by Plaintiff's then attorney David A. Collins Esq. Affidavit of James K. Kuyk, Esq., ¶ 7; Miller Aff., ¶ 21; Diehl Aff., ¶ 26; Affidavit of Dr. Perry Woodside, ¶¶ 2- 10. Plaintiff never made a demand on Defendants despite this valuation being performed and never produced a valuation of his own. Rather than make any attempt to resolve these issues, Plaintiff filed this lawsuit. Miller Aff., ¶ 21, Diehl Aff., ¶ 26. The parties to this case engaged in a ten (10) hour mediation on March 27, 2012 but to no avail.

The Defendants seek summary judgment as to their counterclaims based on the fact that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. The Court has reviewed and relied on excerpts of Plaintiff's deposition and numerous Affidavits in the record including those of: (1) James K. Kuyk, Esq., (2) Brian M. Miller, (3) David Diehl, (4) Victor K. Kliossis, CPA, (5) Greg W. Isley, (6) Peter Shortsleeves, (7) Elizabeth D. Hughes, (8) B. Perry Woodside, III, Ph.D., (9) Bill Walter, CPA, (10) Cynthia E. Coldren, (11) Chad Phillips, (12) Brent Hettick, (13) Andrew J. Oleksiak, (14) Steven Pigott, (15) Brian J. Ball, and (6) John E. Rosen, Esq.

II. CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

Defendants' asserted counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions).

A. Summary Judgment Standard.

In Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App.), rev'd on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993), the South Carolina Court of Appeals explained the standard for granting summary judgment as follows:

In deciding a Rule 56 motion, the court must view the facts and inferences therefrom in the light most favorable to the nonmoving party. Summary Judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions and affidavits show

that there is no genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.

Id. at 313, 411 S.E.2d at 673 (citations omitted)(emphasis added).

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Baughman v. Am. Tel & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Therefore, summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate cases. See Galliard v. Fleet Mortgage Corp., 880 F. Supp. 1085 (S.C.D.C. 1995).

B. Breach of Fiduciary Duty, Misrepresentation/fraud, Conversion, Unjust Enrichment, Constructive Fraud, and Accounting.

i. Breach of Fiduciary Duty

In order to prove breach of fiduciary duty, Defendants must show that wrongful conduct of the Plaintiff, with whom the Court finds that they have a fiduciary relationship, caused Defendants damage. Plaintiff was terminated for abandoning his post, incompetence, and failing to document his personal expenditures. Plaintiff also siphoned money out of the company to fund another company owned by his then live-in girlfriend. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff contributed to a dysfunctional atmosphere in Atlas' San Diego office such that the company was subjected to a sexual harassment suit involving hundreds of thousands of dollars in attorney's fees and costs. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372.

Plaintiff, by virtue of his being a shareholder of Atlas, a statutory close corporation **without** a board of directors, by virtue of his being a Vice President of Atlas, by virtue of his being the General Manager and in charge of the San Diego, California office of Atlas since October 2003, and by virtue of the special relationship between him and Defendants, each reposing trust and confidence in the other regarding corporate affairs over which they had knowledge, owes fiduciary duties and obligations to Defendants. Through Plaintiff's own admission, by virtue of his allegations of a breach thereof in his initial Complaint and Amended Complaint, there exists a fiduciary duty between Plaintiff and Defendants, one that Defendants honored and Plaintiff did not. See, e.g. Amended Complaint, ¶¶ 64-68.

Plaintiff, from approximately December 23, 2008 to July 7, 2009, "telecommuted" to work in Atlas' San Diego, California office from Captain Cook, State of Hawaii, primarily by email, telephone and video conference, unbeknownst to Defendants. By virtue of unilaterally moving to Hawaii, only to "telecommute" to work, Plaintiff abandoned his post and failed to fulfill his duties as General Manager of the San Diego office of Defendant Atlas, which job required his physical presence to manage Atlas accounts, relationships and personnel.

Plaintiff, contemporaneously with his abandonment of his duties as General Manager, engaged in a ¹¹

scheme to defraud Atlas by using the corporate credit card to pay rental payments for his own personal residence in Captain Cook, Hawaii and authorized payments from Atlas' funds to "csanpietro", a PayPal account, later known as Ekololo, LLC, which he represented were for legitimate business purposes. In fact, "csanpietro", later known as Ekololo, LLC; was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend. The funds were actually intended for their personal land development project and possibly other business dealings for their personal benefit. Plaintiff misrepresented that he was actually living in San Diego and properly managing Atlas's San Diego operation. He actually was living in Hawaii. Plaintiff deceived and defrauded Defendants and covered up Plaintiff's actual residence in Hawaii for fear of legitimate repercussions. Plaintiff engaged in this deceitful, illegal, fraudulent and self dealing arrangement for his own personal benefit, so that he could live on the island of Hawaii, Hawaii while deceiving Defendants into believing that he was fulfilling his duties at Atlas' San Diego office. See Depo. of Hanekamp, pp. 58-62, 323; Affidavit of Brian Miller dated August 1, 2011, ¶ 11, 12; Affidavit of David Diehl, dated August 1, 2011, ¶ 16; Affidavit of Cynthia Coldren ¶ 7.

The unrefuted evidence in this case demonstrates that Plaintiff is guilty of siphoning money from Atlas for his own personal use. See Depo. of Hanekamp, pp. 58-62; Affidavits of Brian M. Miller (original and supplemental), David Diehl (original and supplemental), and Cynthia Coldren (original and supplemental), and Elizabeth D. Hughes. Plaintiff concedes this fraud in an email chain with Defendants dated August 19-20, 2010. See Hanekamp Depo. Exhibit 74 (See also Miller Aff., Exhibit D). Plaintiff purchased a Nissan truck with Atlas funds only to title the vehicle in his own name and then sell it to a third party on Craig's List and retain the proceeds for his personal use. Depo. of Hanekamp pp. 75-78; 148-155. Plaintiff either failed to properly document his expenses or intentionally misrepresented that such expenses were legitimate business expenses when in fact they were not. See Second Supplemental Affidavit of Cynthia Coldren, dated March 21, 2014, ¶¶ 5 - 8.

Plaintiff mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372; Miller Aff., ¶ 10; Diehl Aff., ¶ 15. That litigation revealed a sexually charged atmosphere in the San Diego office for which Plaintiff was the direct supervisor. The problems were either ignored by Plaintiff or unknown to him due to his consistent absence from the office while living in Hawaii. Ana Susi Depo., Pages 267-269; 270 ("the atmosphere of the Atlas San Diego office was out of control...had no organization...none of the employees had ever had sexual harassment training...there was no HR presence... many used of extreme foul language, and a lot of physical activity was inappropriate.")(Q: "Do you contend that Mr. Hanekamp acted inappropriately toward you during your employment at Atlas? A: Yeah...") That lawsuit, other problems, including those with critical customer relationships (See, e.g. Depo. of Hanekamp, Exhibits 42, 45, 49, 60, 61, 62) personnel and cost overruns on task orders performed by Atlas San Diego prompted Defendant Miller to demand that San Diego have an onsite manager in 2009. Depo. of Hanekamp, pp. 98-121, 354-372. Plaintiff lost his credentials to access an important client installation, thereby making it impossible for him to properly manage Atlas' relationship with the customer or properly supervise the work being performed. See Miller Aff., ¶ 23; Depo. of Hanekamp, pp. 98-121. Plaintiff also mismanaged client relationships such that Defendant Miller had to travel to San Diego several times to repair the damage Plaintiff caused to Atlas' relationships with those customers. Depo of Hanekamp, pp. 355-372; Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-13.

Plaintiff, in preferring his own personal interests to that of Defendants, breached his fiduciary duties to Defendants. As a foreseeable, direct and proximate result of Plaintiff's breaches of his fiduciary duties and obligations, Defendants have been damaged in the amount of One Hundred and Two Thousand Four Hundred and Fifty Seven and 61/100 Dollars (\$102,457.61). Plaintiff was given a credit of \$29,220.79 as the amount that was treated as a shareholder distribution to Mr. Hanekamp due to his failure to follow Atlas protocols and properly document certain expenses. See Kliosis Supp. Aff., filed July 20, 2012. As a result of that credit, Defendants have suffered a net loss of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82). See Coldren Sec. Supp. Aff., ¶ 8.

ii. Misrepresentation/Fraud

In order to prove misrepresentation, Defendants must show that (1) factual representations and omissions made by Plaintiff to Defendants as alleged above were (2) false and misleading and (3) were material, and (4) were known by Plaintiff or his agents to be false or were made in the absence of reasonable grounds to believe in the truth of the representations; (5) were intended that they should be acted upon by Defendants; (6) with Defendants being ignorant of the representations' falsity; (7) with the Defendants relying on the truth of the representations; (8) while having a right to rely thereon; and (9) the Defendants suffering actual damages as a consequent, proximate injury of Plaintiff's misconduct and by reason of Plaintiff's fraud.

Plaintiff engaged in conduct which amounts to a false representation, conduct which he calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which the Plaintiff knew to be true at the time the representations were made. Plaintiff intended that such conduct would be acted upon by the Defendants, and the Plaintiff had actual or constructive knowledge of the real facts. The Defendants lacked knowledge, and the means of knowledge, of the truth as to the facts in question, and justifiably relied upon the Plaintiff's conduct. Defendants relied on the Plaintiff's conduct to their detriment and prejudice which caused Defendants injury.

Plaintiff falsely represented:

- a. That he was residing in San Diego, California, and properly supervising Atlas' operations there when in fact he was residing on the island of Hawaii, Hawaii;
- b. That payments made by Plaintiff to "csanpietro", a PayPal account, later known as Ekololo, LLC, from Atlas' funds were for legitimate business purposes, when, in fact, "csanpietro", later known as Ekololo, LLC, was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend intended for their personal land development project and possibly other business dealings for their personal benefit;
- c. That he purchased a company automobile with corporate funds when, in fact, he used Atlas' corporate funds to purchase same in his own name without authorization;
- d. That he was purchasing goods from Costco for corporate purposes when in fact he was using the corporate credit card to purchase his personal groceries from Costco;
- e. That he was properly supervising Atlas' personnel and carrying out his duties as shareholder, Vice President and General Manager of Atlas' San Diego, California office throughout 2008 and 2009 when in fact he was living in Hawaii and "telecommuting" to San Diego;
- f. That he was able to access Atlas' client installations and facilities to carry out his duties when, in fact, he had lost such privileges due to his own misconduct;
- g. That he has had valid and justifiable reasons to withhold his personal financial statements and tax returns from Atlas' and TASL's lenders when, in fact, he has refused to do so in order to extort concessions from Defendants; And
- h. he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the Defense Contracting Auditing Agency as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, pp. 264-265);

Plaintiff made several admissions throughout this litigation that were contrary to allegations he

previously made in this lawsuit, including, but not limited to:

a. Admitting he lived in a vacation home with his girlfriend in Hawaii while he paid for it and characterized it as "business rent".

b. Admitted, that he had a meal with a romantic interest at the Pamplermousse Grill on May 10, 2010 for \$203.67 and that such a meal was not a legitimate business expense. Depo. of Hanekamp, pp. 285-287, Day 2;

c. Never wanted to dissolve Atlas even though he sought that relief. See Depo. of Hanekamp, pp. 324-325;

Plaintiff's representations were false or made with reckless disregard for their truth or falsity. Plaintiff's misrepresentations and omissions were material. Plaintiff intended to deceive Defendants by making such statements and representations. Plaintiff intended for Defendants to rely on Plaintiff's false statements, misrepresentations, and omissions. Defendants were ignorant as to the falsity of Plaintiff's misrepresentations. Defendants had the right to rely on the representations of Plaintiff. Defendants reasonably and justifiably relied upon such statements and representations to their detriment by, among other things, continuing to pay him salary and benefits and had a right to so rely. Defendants suffered damages as a direct and proximate result of Plaintiff's fraud and are entitled to actual damages in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82)[net amount after credit of \$29,220.79] plus punitive damages. See Coldren Sec. Supp. Aff., ¶ 8. Plaintiff has proffered no credible evidence to refute the facts presented to the Court that Plaintiff converted funds in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82)[net amount after credit of \$29,220.79].

iii. Conversion

Defendants' counterclaim for conversion requires them to prove: (1) an interest of the Plaintiff in the thing converted; (2) the Plaintiff converted the property to his own use; and (3) the use was without Defendants' permission. Plaintiff has converted assets of Atlas and TASL as discussed in detail above. The Plaintiff's actions and theft and other unauthorized exercise of the rights of ownership over the credit cards, cash, assets and other properties of the Defendants Atlas and TASL, to the exclusion of the Defendants' rights in and ownership of their assets, as hereinabove set forth, constitutes a conversion of Defendant's assets in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82)[net amount after credit of \$29,220.79] plus punitive damages. See Coldren Sec. Supp., ¶ 8. As a direct and proximate result of the Plaintiff's actions and conversions of Defendants' cash, credit cards and property, Defendants have been damaged and are entitled to the return of all cash and properties, in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82)[net amount after credit of \$29,220.79].

As set forth in the Second Supplemental Affidavit of Atlas' Finance Director, Cynthia Coldren, dated March 21, 2014, Plaintiff: (1) submitted credit card expenses from 2008-2010 that Atlas paid for totaling \$12, 538.33 as legitimate, reimbursable business expenses but did not provide any supporting documentation; (2) purchased a Nissan Titan truck in 2009 in Hawaii for which Atlas incurred a loan for \$11,769.00; (3) used the Atlas credit card to pay Ekololo, LLC and PayPal*CSanPietro a total of \$14, 800.00; (4) incurred from 2007-2009 many other expenses while in Hawaii that were reported as legitimate business expenses in the amount of \$63, 335.28. The grand total of these expenses is \$102,457.61. In the summer of 2009, Atlas realized that Plaintiff was failing to follow Atlas protocols to properly document his expenses by producing receipts for legitimate business expenses. Atlas' accountant appropriately accounted for \$29, 220.75 in improper expenses incurred by Plaintiff as a shareholder distribution on Plaintiff's account.

iv. Unjust Enrichment/Quantum Meruit/Restitution

Defendants counterclaim for unjust enrichment requires them to prove: (1) a benefit conferred upon the Defendants by Plaintiff; (2) realization of that benefit by the Defendants; and (3) retention by the Defendants of the benefit under conditions that would make it unjust to retain it without paying its value. Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868, 872 (2000).

Plaintiff misappropriated corporate cash and credit cards for his own personal benefit and for that of his friends and cohorts as discussed in detail, supra, including but not limited to, paying for groceries at Costco with the corporate credit card, cash paid to "csanpietro", a PayPal account, later known as Ekololo, LLC or other "vendors", such as "Little Reatta" and Kona Pacific Farms that Plaintiff represented as legitimate, using corporate funds to supposedly purchase a corporate automobile but which Plaintiff registered in his own name, making a multitude of purchases in Hawaii using the corporate credit card, claiming they were for the purpose of opening a Hawaii office, when in fact Plaintiff later admitted in an email, dated August 19, 2009, that there was never an intent to start an Atlas office in Hawaii. Defendants conferred a valuable benefit upon the Plaintiff which he has realized in full. Defendants are entitled to the return of the monies Plaintiff misappropriated and/or restitution of all cash, capital, and/or funding that it contributed to the success of the Atlas San Diego office which Plaintiff converted, wasted, stolen or misappropriated.

C. Defendants are allowed to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act).

This Court has previously determined that no oppressive conduct toward a minority shareholder has occurred in this case. See This Court's Order dated December 28, 2013. Nevertheless, the Court is statutorily authorized to require a buyout pursuant to S.C. Code Ann. 33-14-310(d)(4) and (e) which provide as follows:

(d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:

(4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

(e) The relief authorized in subsection (d) **may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.**

Id. (emphasis added)

"[A] court should have broad discretion to fashion the most appropriate remedy to resolve the dispute." See official Cmt., S.C. Code Ann. § 33-18-410 (1976) (Emphasis added). This Court has been involved with this case for over three (3) years and has held 4 hearings (not including Judge Dennis' hearing of August 3, 2011 for a total of 5 hearings). The case was originally filed in March of 2011 before it was transferred to this Court in August of 2011. This Court has determined that, under the circumstances of this case, an Order allowing Defendants to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" pursuant to S.C. Code Ann. §33-14-310(d)(4) and (e) [and §33-18-420¹] is appropriate, with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). S.C. Code Ann. § 33-14-420(b) (2006) provides the terms under which such a buyout should be accomplished.

While Hendley v. Lee, 676 F. Supp. 1317, 1319 (D.S.C. 1987) is a South Carolina U.S. District Court case, it is instructive here. In Hendley, Plaintiffs, Dixon L. Hendley and Ryan D. Hendley, brought an action against Terry L. Lee, Defendant, pursuant to S.C. Code Ann. § 33-21-150, et seq., (1976), as amended, seeking judicial intervention in the affairs of a deadlocked corporation engaged in the business of providing housekeeping and maintenance service to industrial plants. The Court recognized that in addition to allowing an order of forced dissolution [under predecessor statute to 33-18-400], the statute empowers a court to grant other relief, including ordering the purchase of the shares of any shareholder, either by the corporation or by other shareholders. § 33-21-155(a)(4) [the predecessor statute since repealed]. Actions arising under the [prior] statute are proceedings in equity. Hendley (citing Ward v. Ward Farms, Inc., 283 S.C. 568, 324 S.E.2d 63 (1984)). The South Carolina District Court ordered a share buyout as a result of a deadlock between the shareholders and required the shareholders with financial wherewithal to purchase the other party's shares after review of the parties' relative financial positions. The Court ordered that the Hendleys were in a better position to purchase Lee's shares. Personal financial statements were submitted by all of the parties and the Hendleys had much greater financial strength than Lee, the Hendleys together being worth approximately ten (10) times as much as Lee. To require Lee to purchase the Hendley stock would require him to commit several times his net worth, while to require the Hendleys to purchase the Lee stock would require them to commit approximately twenty five (25%) percent of their net worth. Id.

The situation in Hendley is analogous to the present case. Plaintiff is financially strapped, having faced three (3) foreclosures in the last few years and is likely unable to buyout the Defendants. See American Savings Bank v. Robert Paul Hanekamp, et al., 3CC11-1-0183K, 3CC11-1-0184K (HI 2010); NDEX West, LLC v. Robert P. Hanekamp (CA 2012)(ended in short sale 2013). The situation among the shareholders of Atlas and TASL is untenable such that absent requiring a dissolution, which is not justified by the facts of this case as the Order of December 28, 2013 makes clear, the only logical remedy to this situation is for the majority shareholders, Defendants, who are financially capable, to buyout the Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). It would be manifestly unjust to give Plaintiff a windfall because he was a destructive force in the corporation and responsible for pursuing a litigation strategy intended to devalue the corporation and injure the Defendants. Likewise, it is unworkable to allow Plaintiff to remain as a shareholder of either Atlas or TASL.

I find that the "fair value" of Plaintiff's twenty five percent (25%) ownership of the outstanding shares in Atlas is Two Hundred and Eighty Four Thousand Two Hundred and Fifty and No/100 Dollars (\$284,250.00) based on the report prepared by B. Perry Woodside, III, Ph.D. of Dixon Hughes Goodman entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report dated May 10, 2011, as amended as of May 12, 2012 (the "Revised Report").

I find that the "fair value" of Plaintiff's thirty three and 33/100 percent (33.33%) ownership of the outstanding shares in TASL is One Hundred and Twelve Thousand Seven Hundred and Ninety One and 21/100 Dollars (\$112,791.21) based on the county appraisals for TASL's real estate holdings less the amount of debt outstanding plus cash on hand. This amount reflects TASL's "net equity" in the property that it owns in Virginia and South Carolina. TASL has \$79,150.50 in cash.

Plaintiff has taken actions in this case that are arbitrary, vexatious and in bad faith in violation of S.C. Code Ann. §33-18-410(b). He disclosed confidential and proprietary information such as Atlas' "Multiple" to the public either negligently, or with the intent of injuring the Defendants. Depo. of Hanekamp, pp. 235-236. The Multiple, or "multiplier is the ratio of indirect costs to direct costs and the methods used to calculate indirect expense rates and their results are highly confidential and proprietary information that, if known by a competitor, can provide them with a competitive advantage where preparing their prices for bids for U.S. Government contracts." Affidavit of Bill Walter, ¶ 5;

Depo. of Hanekamp, pp. 235-36. Plaintiff has engaged in a variety of disruptive activities as previously detailed in Defendants' Motion for a Temporary Restraining Order, Preliminary Injunction and Sanctions, filed on June 28, 2012, Motion for Rule to Show Cause and Contempt filed on January 29, 2013, and a variety of other motions and legal memoranda on file with the Court.

I find that Defendants should be allowed to buy Plaintiff's shares in Atlas and TASL for their "fair value" of Three Hundred and Ninety Seven Thousand and Forty One and 21/100 Dollars (\$397,041.21) as offset by:

(1) The amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82);

(2) The amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, incurred in this proceeding of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars (\$52,898.98), due to Plaintiff's actions being arbitrary, vexatious and in bad faith. See S.C. Code Ann. §33-18-410(b); and

(3) Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars (\$204,102.75) in attorneys fees for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended. See Affidavit of John E. Rosen, Esq.

Plaintiff violated S.C. Ann. § 33-18-410 (b) and S.C. Ann. § 15-36-10 in a variety of particulars, including but not limited to:

(1) Naming TASL as a Defendant in the litigation but never making a single allegation of any misconduct or wrongdoing associated with TASL;

(2) Failing to produce a valuation or offer any evidence to rebut or question the valuation report prepared by Dixon Hughes Goodman, entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report, as amended by that certain Memo dated March 27, 2012 (collectively, the "Revised Report");

(3) Filing two (2) unsubstantiated motions for the appointment of a receiver and dissolution of Atlas after being admonished by the Court to produce evidence to support his motions or face sanctions, which motions were filed frivolously, as Plaintiff later admitted in his deposition that he never wanted Atlas dissolved or to have a receiver appointed (See Depo. of Hanekamp. pp. 324-325);

(4) Filing a frivolous motion for summary judgment seeking appointment of a receiver for a third (3rd) time while the parties were in a Court ordered abeyance, an abeyance sought by Plaintiff so that he could secure a third attorney to represent him;

(5) Disclosing confidential and proprietary information of Defendants, in particular their billing rates known as the "Multiple", through court filings in violation of the Consent Confidentiality Order entered into by the parties (See, E.g., Hanekamp Supp. Aff., p. 2);

(6) Filing a second frivolous Motion for Sanctions, Motion to Compel and Motion for Rule to Show Cause, in which Plaintiff misrepresented the understandings and agreements between the parties with respect to several issues including, but not limited to:

(i) the parties agreement as of September 28, 2011 in chambers limiting discovery to issues of valuation of Plaintiff's interest in an attempt to mediate the case;

(ii) the agreement of the parties to hold in abeyance discovery other than that related to valuation of the company as agreed to at the previous status conference (See Memorandum in Opp. to Plaintiff's Motions for Rule to Show Cause, Motion to Compel, and Motion for Sanctions, filed June 22, 2012); and

(iii) misrepresenting the Defendants' cooperation in attempting to provide records requested pursuant to the Plaintiff's right to inspect corporate records, which records are voluminous, difficult to locate, collate and organize, as well as burdensome in time, effort and expense to meet Plaintiff's unduly burdensome requests and arbitrary deadlines. Defendants diligently addressed these requests; but Plaintiff set arbitrary deadlines and filed frivolous Motions to Compel, for Sanctions and for Rule to Show Cause in an attempt to abuse the litigation process and Defendants.

(7) Filing affidavits in which the Plaintiff made a variety of false statements, including:

(i) that he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the [DCAA] as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, p.264-265);

(ii) falsely claiming that he: "was personally aware that the Defendants record [these] personal expenses as supposed business expenses", only to admit in his deposition that he was not personally aware of how personal expenses were coded or whether they were ever passed on the government. See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2 and Hanekamp Depo. day 2, p. 264-269;

(iv) misrepresenting the magnitude and significance of the percentage of "General and Administrative" ("G&A") expenses Defendant Miller incurred for G&A travel and meals as being "53% of the entire company's costs" when in fact it was less than one (1%) percent of the entire company's travel and meal costs (Plaintiff juxtaposed the figure that Atlas had 80 to 100 employees alongside this statement to mislead the Court as the record makes clear); (See Hanekamp Aff., p. 2; See Also Affidavit of Bill Walter, ¶ 17-18 and Supplemental Affidavit of Cynthia Coldren filed July 20, 2012, ¶ 10) ;

(v) falsely claiming that he could: "personally attest that Miller does not maintain regular work hours, that he spends most of his time away from our offices indulging in his personal pleasures such as boating and vacationing and there is no business purpose for the bulk of Miller's meals and travel". (Hanekamp Aff., p. 3); and

(vi) claiming that: "Defendant Miller also bills two vehicles to the company, a Porsche Panamera and a BMW 7-series, one which his wife drives, for a total annual cost of \$28, 812.00" even though these statements were false and Plaintiff knew they were false. See Supp. Hanekamp Aff., p. 3; Supp. Coldren Aff. filed July 20, 2012, ¶ 16.

To reach the consideration which Defendants should pay to acquire Plaintiff's interest in Atlas and TASL, I have relied on B. Perry Woodside, III, Ph.D's Supplemental Affidavit, the Second Supplemental Affidavit of Cynthia Coldren, Atlas' Chief Financial Director, Brian M. Miller's Fourth Supplemental Affidavit and the Affidavit of John E. Rosen, Esq. Cynthia Coldren's affidavit details the

money Plaintiff converted to his own personal use. Brian Miller's fourth supplemental affidavit reflects his allocation of legal fees and costs between Defendants Atlas and TASL, including the amounts deemed to be frivolous or in bad faith as to each Defendant. John E. Rosen's affidavit provides the amount of money Defendants paid in fees and costs to defend Plaintiff's frivolous claims and his bad faith, vexatious and arbitrary actions in this litigation.

An analysis of this information prepared by Cynthia Coldren results in set offs to Plaintiff's "fair value" in Atlas shares are as follows: \$26, 476.25 for bad faith litigation in violation of S.C. Code Ann. § 33-18-410(b); \$58,898.98 in expert's fees for Dixon Hughes Goodman; \$145,018.50 in frivolous claims in violation of S.C. Code Ann. §15-36-10; and \$73,236.82 for conversion of Atlas' funds. The resulting value for Plaintiff's buyout from Atlas is -\$13,380.55. Set offs to the "fair value" of Plaintiff's shares in TASL are: \$6, 278.75 for bad faith in violation of S.C. Code Ann. § 33-18-410(b); \$26, 329.25 in frivolous claims in violation of S.C. Code Ann. §15-36-10. The resulting value for Plaintiff's buyout from TASL is \$80,183.21.

I find that Defendants are therefore allowed to purchase all of Plaintiff's shares in both Defendants Atlas and TASL for a total purchase price of **SIXTY SIX THOUSAND EIGHT HUNDRED AND TWO AND 66/100 DOLLARS (\$66,802.66).**

III. CONCLUSION

Based on the above findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Summary Judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, and (5) constructive fraud is hereby GRANTED; and

FURTHER ORDERED, that the Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and violation of S.C. Code Ann. §15-36-10 (Sanctions) filed on March 24, 2014, is hereby GRANTED;

FURTHER ORDERED, that Defendants are hereby allowed to purchase to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" of Atlas (\$284,250.00) and TASL (\$112,791.21) *with such purchase price to be offset by:*

a. the amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars (\$73,236.82)[net amount after credit of \$29,220.79];

b. the amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, in this proceeding due to Plaintiff's actions being arbitrary, vexatious and in bad faith (See S.C. Code Ann. §33-18-410(b) in the amount of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars (\$52,898.98); and

c. Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars (\$204,102.75) in attorney's fees due to Plaintiff's violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended.

FURTHER ORDERED, that Defendants Miller and Diehl shall purchase all of Plaintiff's shares in Atlas for \$284,250.00 and all of Plaintiff's shares in TASL for \$112,791.21 within sixty (60) days from the date this Order is served upon Plaintiff;

FURTHER ORDERED, that the proceeds from the sale of Plaintiff's shares in Atlas be paid to Atlas to reimburse Atlas for (i) the \$73,236.82 converted by Plaintiff from Atlas for his own use, (ii) \$52,898.98 in litigation costs, and (iii) \$171,494.75 in attorney's fees paid by Atlas resulting from 19

Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended;

FURTHER ORDERED, that a portion of the proceeds from the sale of Plaintiff's shares in TASL (i) be paid to TASL to reimburse TASL for \$32,608.00 in attorney's fees paid by TASL resulting from Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the SC Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended, and (ii) be paid to Atlas to pay the remaining \$13,380.55 the Plaintiff owes Atlas pursuant to the terms of this Order;

FURTHER ORDERED, that to facilitate the sale of Plaintiff's shares and payment of funds to Atlas, TASL and Plaintiff, that the Law Firm of Rosen, Rosen & Hagood, LLC act as Disbursement Agent to receive the proceeds from the sale of Plaintiff's stock in Atlas and TASL and disburse the proceeds in accordance with the terms of this Order; and

FURTHER ORDERED, that following the Disbursement Agent's receipt of \$284,250.00 and \$112,791.21 from Defendants Miller and Diehl, and the disbursement of those funds as provided herein, the Defendant Corporations, Atlas and TASL, shall cancel the shares formerly held by the Plaintiff on the respective books of those Corporations.

AND IT IS SO ORDERED!

The Honorable Roger M. Young, Jr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
This 15th day of May, 2014

¹ S.C. Code Ann. § 33-18-420 provides in pertinent part: (a) If the court finds that the ordinary relief described in Section 33-18-410(a) is or would be inadequate or inappropriate, it may order the corporation dissolved under Section 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b). For section (b) see *infra*.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr.,

Appellant,

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 I have served the Petition for Rehearing by depositing a copy of it on **March 19, 2015**, addressed to the attorneys of record for Respondents: Emma Ruth Brittain, Esq. and J. Jackson Thomas, Esq., Thomas & Brittain, P.A., Post Office Box 1290, Myrtle Beach, South Carolina 29578; and John M. Leiter, Esq., Law Offices of John M. Leiter, P.A., 1203 48th Avenue North, Suite 109, Myrtle Beach, South Carolina 29577.

HAYNSWORTH SINKLER BOYD, P.A.

By: Elizabeth H. Black

Robert Y. Knowlton

Elizabeth H. Black

1201 Main Street, 22nd floor (29201)

Post Office Box 11889

Columbia, South Carolina 29211-1889

Tel: 803.779.3080

SC Bar No. 3589

Attorneys for Appellant

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MAR 19 2015

SC Court of Appeals

Haynsworth
Sinkler Boyd, P.A.

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ELIZABETH H. BLACK
DIRECT DIAL NUMBER 803.540.7753
EMAIL elblack@hsblawfirm.com

March 19, 2015

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Joseph E. Mason, Jr. v. Catherine L. Mason, et al.*
Appellate Case No. 2012-212146
Lower Court Case No. 2008-CP-26-06169
HSB File No.: 35061.0001

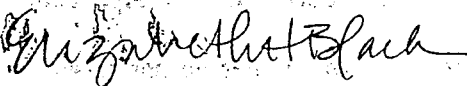
Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing in the above-referenced matter, along with a Certificate of Service. Also enclosed is my firm's check in the amount of \$25.00 to cover the filing fee. Please file the original and six copies and return a clocked copy to me via my courier.

By copy of this letter, I am serving a copy of the Petition for Rehearing on the attorneys for the Defendants.

Please do not hesitate to contact me with any questions or concerns you may have.

Sincerely yours,



Elizabeth H. Black

EHB/lhg

Enclosures

cc: Emma Ruth Brittain, Esq.
J. Jackson Thomas, Esq.
John M. Leiter, Esq.

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MAR 19 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

Ralph P. Stroman, Special Referee

Case No.: 2008-CP-26-6169

Joseph E. Mason, Jr., ...Appellant

v.

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

**RETURN OF RESPONDENTS CATHERINE L. MASON, JOSEPH E. MASON,
SR., KATHY ST. BLANCHARD AND MASON HOLDING COMPANY, INC. TO
APPELLANT'S PETITION FOR REHEARING**

ARGUMENT

Appellant has petitioned for rehearing citing multiple instances in which he claims this Court has overlooked or misapprehended his arguments. These Respondents contend this Court has neither overlooked nor misconstrued any of Appellant's arguments, but has simply disagreed with Appellant as to what issues he has raised on appeal and has arrived at a different conclusion on the issues raised by Appellant based upon this Court's view of the law and the evidence.

Appellant first questions the Court's finding that the Appellant failed to address

the special referee's finding his suit should have been filed as a derivative action. Appellants Final Brief on appeal lists ten issues on appeal (the "Issues") for consideration by this Court. (Final Brief of Appellant, pp. iv and v). Not one of the Issues contains any reference to "shareholder derivative action" either directly or indirectly. Moreover, only Appellant's Issue numbered one (1) questions in any manner the special referee's determination that these Respondents should be required to purchase his shares. That Issue as stated, however, questions only whether the evidence established these Respondents should be required to purchase his shares, and fails to make any mention or inference of whether that claim should be pursued individually or derivatively. The statement of issues must be concise and direct. Broad general statements may be disregarded by the appellate court. Rule 208(b)(1)(B), SCACR; *see Windsor Prop. Inc. v. Dolphin Constr. Co.*, 331 S.C. 466, 498 S.C.2d 858 (1998); *Langehans v. Smith*, 347 S.C. 348, 554 S.E.2d 681 (Ct. App. 2001). Moreover, regardless of whether Appellant's suit or portions thereof could be maintained individually or derivatively, the Court of Appeals affirmed the special referee's factual finding that the Appellant was not an oppressed shareholder, thereby making the issue moot.

Appellant's reliance on the case *Hanekamp v. Atlas Techs, Inc.*, C.A. No. 2011-CP10-1243, Business Court Op. 2014-05-15-02 (Charleston County, May 15, 2014), (a copy attached to their petition) is misplaced. In *Hanekamp*, summary judgment was granted to the defendants on a counterclaim seeking a court ordered buy-out of the plaintiff's shares in the two corporate defendants because of the plaintiff's multiple violations of statutory and common law duties owing to the defendants. This is the reverse of the facts in the instant action before this Court. In *Hanekamp*, the plaintiff did

not even appear at the summary judgment hearing to oppose the defendants' requested relief, nor was he represented by counsel because his counsel had previously been relieved by court order. *Hanekamp* is neither controlling nor even persuasive authority for anything related to the instant action.

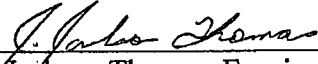
Appellant's assertion of error as to the Court's conclusion that Appellant is barred under the two-issue rule from pursuing his claim that he owns an additional twenty percent (20%) of the shares of the company is equally without merit. In the Special Referee's Conclusion of Law numbered 11, he clearly based his ruling that Appellant was not entitled to the additional twenty percent (20%) interest that he sought on multiple grounds: (1) the claim was completely absent from the Plaintiff's Amended Complaint; (2) the provisions of the documents which would have arguably triggered Appellant's entitlement to the additional twenty percent (20%) were not complied with; and (3) the agreements themselves were illegal on their face. Neither Appellant's argument for entitlement to the additional stock, contained on pages 35 through 38 of his Final Brief, nor any of the Issues Appellant posited on appeal, address the absence of such a claim from his Amended Complaint; similarly, neither the Appellant's Brief nor issues raised on appeal address the noncompliance with the Retirement Documents provisions, or why these documents found to be, clearly, on their face, illegal and unenforceable, should be the subject of a court's enforcement decree. His sole argument is that the result is "inequitable." Contrary to his assertion contained in his petition for rehearing, however, Appellant had every opportunity to amend his pleading to include such a claim at any time. He also had the opportunity to make this an issue in his appeal, but did not.

In summary, all issues raised and presented by Appellant were extensively briefed

by the parties and were correctly determined in the Court's extensive Order based on the extensive record exhibits and testimony

Based on the foregoing, and the arguments previously submitted in their Final Brief, these Respondents respectfully request the Court to deny Appellant's Petition for Rehearing.

Respectfully submitted,


J. Jackson Thomas, Esquire
S.C. Bar ID: 5527
Emma Ruth Brittain, Esquire
S.C. Bar ID: 5298
THOMAS & BRITTAIN, P.A.
Post Office Box 1290
Myrtle Beach, South Carolina 29578
(843) 692-2628
ATTORNEYS FOR RESPONDENTS
CATHERINE L. MASON, JOSEPH E.
MASON, SR., KATHY ST. BLANCHARD
AND MASON HOLDING COMPANY,
INC.

March 27, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM HORRY COUNTY
Court of Common Pleas

APR 01 2015

SC Court of Appeals

Ralph P. Stroman, Special Referee

Case No.: 2008-CP-26-6169

Joseph E. Mason, Jr., ...Appellant

v.

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

PROOF OF SERVICE

I certify that I have served the Return of Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc. to Appellant's Petition for Rehearing, by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2015, addressed to its attorney of record, Robert Y. Knowlton, Esquire, as follows:

Robert Y. Knowlton, Esquire
Elizabeth H. Black, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, South Carolina 29211

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

John M. Leiter, Esquire
Law Offices of John M. Leiter
1203 48th Ave. N., Suite 109
Myrtle Beach, South Carolina 29572

Kimberly W. Nobles

Kimberly W. Nobles
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March 27, 2015

Thomas & Brittain, P.A.

Attorneys at Law

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Myrtle Beach, South Carolina 29577

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Fax (843) 692-0928

J. JACKSON THOMAS
JThomas@MYRlaw.com

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APR 01 2015

SC Court of Appeals
Mailing Address:
Post Office Box 1290
Myrtle Beach, SC 29578

March 27, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Joseph E. Mason, Jr. v. Catherine L. Mason, Joseph E. Mason, Sr.,
Kathy St. Blanchard, Mason Holding Company, Inc., and Irwin Levine
Appellate Case No.: 2012-212146

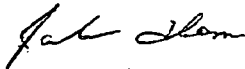
Dear Ms. Kitchings:

In connection with the above-referenced matter, enclosed please find the original and six (6) copies of the Return of Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard and Mason Holding Company, Inc. to Appellant's Petition for Rehearing and the Proof of Service. Please return a clocked copy of the Return us in the enclosed self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

THOMAS & BRITTAIN, P.A.

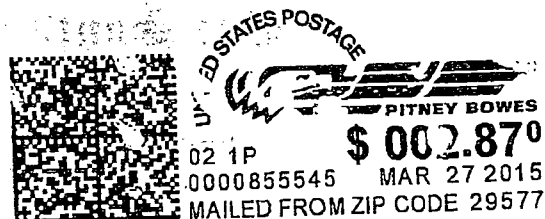

J. Jackson Thomas

JJT/kwn

Enclosures

cc: Robert Y. Knowlton, Esquire
Elizabeth H. Black, Esquire
John M. Leiter, Esquire
Mr. and Mrs. Joseph E. Mason, Sr.
Ms. Kathy St. Blanchard

THOMAS & BRITTAIN, P.A.



EMMA RUTH BRITTAIN
THOMAS & BRITTAIN, P.A.
1314 PROFESSIONAL DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577

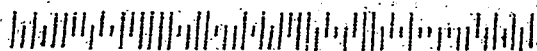
TO:

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

APR 01 2015

SC Court of Appeals



The South Carolina Court of Appeals

Joseph E. Mason, Jr., Appellant,

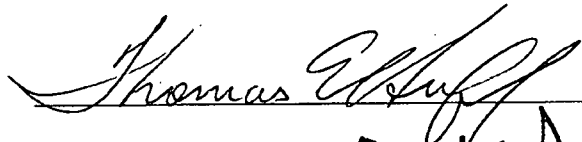
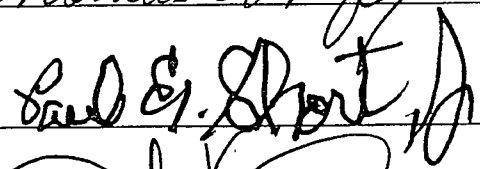
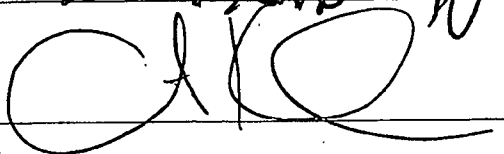
v.

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

Appellate Case No. 2012-212146

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Yates Knowlton, Sr., Esquire
Emma Ruth Brittain, Esquire
J. Jackson Thomas, Esquire

FILED

April 29, 2015

Elizabeth Halligan Black, Esquire
John M. Leiter, Esquire