

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Case No: 2008-CP-40-3687
Court Of Appeals Number: 2014-002724

Debra B. Croft, a/k/a Debra C. Morris Appellants,

v.

Kirby Croft Florist & Greenhouse, Inc., Denyse Nodden and Ward Croft Respondents.

INITIAL BRIEF OF APPELLANT

Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellants

Kirby D. Shealy, III, Esquire
Adams & Reese, LLC
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190
Attorneys for Respondents

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STATEMENT OF ISSUES ON APPEAL

- I. *Whether the Trial Court erred in not granting Appellant her requested relief in relation to whether the Respondents acted fraudulently, oppressively, or unfairly prejudicial?*
- II. *Whether the Trial Court erred in not ordering a new trial regarding the damages in light of the required accounting.*

STATEMENT OF THE CASE

On May 23, 2008, Debra C. Morris (“Appellant” or “Mrs. Morris”), acting within her rights as a shareholder, brought this action originally seeking the production of financial documents and an accounting against Kirby Croft Florist & Greenhouse, Inc. (the “Company”). *See Complaint, p. 1.* Later Appellant amended the action seeking the dissolution of the Company, proper distributions in accordance with a shareholder agreement between Appellants, Denyse Nodden (“Mrs. Nodden”), and Ward Croft (“Mr. Croft”, and jointly with Mrs. Nodden as “Respondents”), the fair value of her shares at the time she was removed from management, and an accounting for the Company’s finances. *See Amended Complaint, p. 1.* Respondents filed and served their Answer and Counterclaim to the initial action on [date] and their amended answer on [date]. *See Answer and Counterclaim, p. 1 and Amended Answer and Counterclaim, p. 1.* Appellant then filed and served Respondent with its Reply to Respondents’ Counterclaims on [date]. *See Reply to Respondents’ Counterclaims, p. 1.* On April 8, 2013, the Court had a trial on the matter that lasted through April 11, 2013. *See Trial Transcript, p. 1.* On December 5, 2013, the Court entered a decision in favor of Respondents. *See Order of Circuit Court dated*

December 5, 2013, p. 1. The Appellants were served with notice of the Order of the Court on May 21, 2014 when Counsel for Respondents emailed a March 30, 2014 letter that was addressed incorrectly. *See May 21, 2014 email including as an attachment the Letter from Respondents' Counsel dated March 27, 2014, p. 1.* The Order found that dissolution was appropriate and that a formal accounting be performed as the affairs were not properly wound up. *See Order of the Court dated December 5, 2013, p. 6-7.* If the parties mutually agreed such an accounting was unnecessary, the action was to be dismissed with prejudice. *See Order of Court dated December 5, 2013, p. 7.* Further, the Order awarded the Corporate Defendant attorney's fees to be awarded in a later judgment in the matter. *See Order of Court dated December 5, 2013, p. 9.* On June 2, 2014, Appellants moved the Court for a new trial in light of the need for proper accounting or judgment in its favor. *See Motion to Reconsider, p. 1.* On November 24, 2014, the Court denied the motion of Appellants. *See Order Denying Appellants' motion to Reconsider, p. 1.* This appeal was filed on December 22, 2014.

STANDARD OF REVIEW

“A shareholders derivative action, as well as an action for stockholder oppression, is one in equity.” *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct.App.2009). Therefore, “[i]n 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).

However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001).

FACTS

The Company was formed in 1947 by William H. Croft and Juanita K. Croft (the “Parties’ Mother”). See *Findings of Fact in Court’s Order of December 5, 2013*, ¶ 1. *Trial Transcript p. 42-43*. In 1990 the Company was incorporated as a close corporation with Mrs. Morris, Mrs. Nodden, and Mr. Croft as sole shareholders. See *Findings of Fact in Court’s Order of December 5, 2013*, ¶ 1; *Trial Transcript 43 and 110*. The Company was instituted without a board of directors and, instead, the shareholders acted as the directors. The initial president and manager was Mrs. Morris, initial vice-president was Mrs. Nodden, and initial secretary was Mr. Croft. See *Trial Transcript p. 43-44*. The officers of the Company remained the same until August of 2007. From time to time, all of the parties were employees of the Company and took salaries as such, either as a salary or on an hourly basis. See *Findings of Fact in Court’s Order of December 5, 2013*, ¶ 4; *Trial Transcript p. 43-44, 138-139, 288-289, 295, and 411-412*. The Company continued to operate from 1990 until sometime in the fall of 2009, generating profits in some years and losses in others. See *Findings of Fact in Court’s Order of December 5, 2013*, ¶ 3 and 14.

During this time, Mrs. Morris agreed to provide personal funds for the business to continue paying for certain obligations and company improvements. See *Trial Transcript p. 124, 127, 133-134, and 316*. Mrs. Morris similarly provided the Company with the use of her personal

vehicles for which the Company reimbursed some expenses including gas and repairs. *See Trial Transcript p. 156-157, 198-201, and 206.* At no time were distributions made or financial statements prepared or issued to the shareholders. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 3. Trial Transcript p. 140 and 317-318.* Further, at no time prior to August of 2007 were distributions or financial statements requested by any of the shareholders. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 3. Trial Transcript p. 140.*

During 2007 Mrs. Morris began making the other shareholders aware of financial stress the Company was undergoing and the need to make changes in the way the business operated in order to best adapt to the current struggles. *See Trial Transcript p. 149-152 and 413.* In August of 2007, Mrs. Morris was terminated from her position as manager of the Company. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 7.* The sole reason testified to at trial for the termination of Mrs. Morris was for the threatened and eventual discontinuance of payments made directly to the Parties' Mother. *See Trial Transcript p. 290-291, 304, 339-340, and 416.* Mrs. Morris unsuccessfully argued that the Company should make payments to creditors of the Company before royalty payments to the Parties' Mother. *See Trial Transcript 129, 363-365, and 413.* Upon her termination, the payments resumed to the Parties' Mother. *See Trial Transcript p. 69, 71, 290-291, and 363-365.* Upon removing Mrs. Morris from her role as manager, Mrs. Nodden and Mr. Croft were not involved in the day to day operations of the business. *See Trial Transcript p. 306, 322, 341-343, 349, 350, 434, 444, 497, and 503.* During this time, Mrs. Nodden was employed and worked with a competing florist and greenhouse in Newberry, a garden center in Columbia, and owned her own competing florist in Columbia. *See*

Trial Transcript p. 306, 313, 333, and 347-348.

On August 29, 2007, the Company held a special meeting with all shareholders present at the office of the Company's attorney. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 7; Trial Transcript p. 49 and 135-137.* At that meeting, it was unanimously decided that the Company would provide the shareholders with monthly statements of all business activities. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 9; Trial Transcript p. 50-53.* Similarly, it was unanimously decided that at the end of each month, net profits would be distributed to the shareholders with each shareholder receiving one-third of the net profits for the preceding month of the business. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 9; Trial Transcript p. 50-53 and 141.* Further, the shareholders agreed that certain obligations of the Company would no longer be solely supported through guarantees of Mrs. Morris, but instead all shareholders would agree to guarantee those obligations. *See Trial Transcript p. 53.* Contrary to this agreement, financial statements were either not prepared or never produced to Plaintiff, distributions were never made, and the Respondents never assumed personal liability for the obligations previously discussed. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 9; Trial Transcript p. 50-54, 221, 317-318, and 344-346.*

Towards the end of 2007 and again in 2008, the Company had its computers stolen and lost some of the digital books and records of the Company, while retaining the hard copies of those books and records. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 9. Trial Transcript p. 31, 311-312, and 423.* An attempt to rebuild the digital financial books and records was attempted in late 2008 early 2009. *See Trial Transcript p. 314-315.* In response to the failure

to follow the shareholder's agreement, the Plaintiff requested that her shares be purchased by the Company or the Individual Respondents in January of 2008. *See Trial Transcript p. 55, 97, and 436.* After failed attempts to do so outside of the legal system, on May 23, 2008, Plaintiff brought this action originally seeking the production of the aforementioned financial documents. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 13. Trial Transcript p. 344-346.* After four additional months of failing to produce any financial documents, the Plaintiff moved the court for temporary relief and production of the requested documents. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 1. Trial Transcript p. 221.* Upon court order, a special meeting of the shareholders was had on October 13, 2008. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 13; Trial Transcript p. 56-57, and 437-438.* In that meeting, the shareholders admitted that no distributions had been made since the practice was adopted and no financial statements had been produced. *See Trial Transcript p. 56-57.* Had distributions been made in accordance with the Shareholder's Meeting of August 29, 2007 and in reliance upon the numbers provided by the Respondents, Mrs. Morris would have been distributed \$36,951.06. *See Trial Transcript p. 61-63.*

Upon the election of Mrs. Nodden and Mr. Ward the adoption of such failed practice of making distributions and release of financial statements was rescinded and instead the Company would only be required to produce the statutorily required yearly statements. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 13.* A limited and incomplete number of the requested financial statements were produced at the October 13, 2008 shareholders meeting, of which none of the information was reliable. *See Findings of Fact in Court's Order of December*

5, 2013, ¶ 10, 11. *Trial Transcript* p. 221, 360, 380-382, 396, 431-432, 442-443, and 468-469.

Of the scant documentation Respondents produced, all were sworn by the Respondents to be either incorrect or unreliable. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 1. Trial Transcript* 359-360, 380-382, 396, 431-432, 442-443, and 468-469. Similarly, the only documentation regarding the assets of the company were two hand written receipts regarding the settlement of debts. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 14. Trial Transcript* p. 76-78, and 85.

In late 2008 and early 2009, the Company hired a business consultant to do a forensic accounting for the Company in order to prepare the 2007 and 2008 tax returns. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 11; Trial Transcript* p. 12 and 64. Upon several months of reviewing the books and records and interviewing the shareholders and employees of the Company, a proper accounting for 2007 was completed so as to file the 2007 tax returns. *See Trial Transcript* p. 41 and 64. There was no documentation found in the Company's books and records, outside of the agreed upon minutes by shareholders, regarding the loans made by Mrs. Morris to the Company. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 7; Trial Transcript* p. 34 and 128-129. The 2007 tax return contained no IRS form 1099's for purposes of claiming that checks written to individuals by the Company were anything other than proper business expenses. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 11. Trial Transcript* 16, 19-20, 33, and 64. The Accountant was able to locate and identify the necessary documentation to properly identify whether the payments from the Company to Mrs. Morris were proper business expenses in over 98% of the alleged payments. *See Trial Transcript* p. 33. The

documents relied upon by the accountant were in the custody and control of the Company at all times after the forensic accounting. The Respondent failure to produce any of these documents in discovery or at trial resulted in Mrs. Morris being unable to present supporting evidence to the findings of the accountant. The 2007 tax return was signed by one of the Individual Respondents. No analysis was made by the consultants in regards to transactions or accounts of the Company in 2006. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 11.*

In the spring of 2009, several interested buyers of the Company were brought to the attention of the shareholders. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 15, Trial Transcript p. 27-28, 337-338, 425, and 450.* None of the offers by the potential buyers were accepted by the Respondents and no counteroffers were proposed. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 15; Trial Transcript p. 337-338.* While all of the shareholders agree that the sale of the business would have been preferable, the sale of the business fell through for lack of communication and an inability to reach an agreement among the Respondents. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 15; Trial Transcript p. 337-338, 367, and 425.* Specifically, the sale of the Company's client list was deemed not a feasible business decision and the presence of shareholder litigation drastically reduced on of the buyers' willingness to buy. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 15; Trial Transcript p. 337-338.* Other than these two specific events, no attempt to sell the Company was made by the Respondents. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 15. Trial Transcript p. 367.* Several recommendations were made by consultants, employees, and Mrs. Morris well within their professional competence regarding

ways in which to best improve the going concern of the Company to and mostly ignored by the Respondents. *See Trial Transcript p. 24-25, 27-28, and 66-67.*

In the fall of 2009, the Company, as best can be described, was closed. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 14; Trial Transcript p. 74, 369-370, 500, and 502-503.* The Company was never dissolved, its assets were never properly liquidated, there was never a distribution of any remaining property among its shareholders, and there was never an accounting for the Company's final books and records. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 14, Trial Transcript p. 14-15, 76, 228-230, 377, and 450-452.* The Respondents and the employees simply stopped showing up to the Company's property location. *See Findings of Fact in Court's Order of December 5, 2013, ¶ 14. Trial Transcript p. 503-507.* The Respondents arranged for two creditors to exchange personal property of the Company in exchange for forgiveness of debt and the payment of cash. *See Trial Transcript p. 76-78, 85, 325-329, 372, and 374.* The Cash received was never accounted for outside of paying a CPA to file taxes and the attorney to defend them personally in this action, none of which was accounted for by the accountant or attorney. *See Trial Transcript p. 80, 373, 404, and 408.* The physical taking of the inventory and assets of the Company was not witnessed by the Respondents. *See Trial Transcript p. 375.* There has never been a proper accounting of the assets and liabilities of the Company from the end of 2008 to its closing. *See Findings of Fact in Court's Order of December 5, 2013, ¶ Trial Transcript p. 228-230, 277-278, 370, 397-400, and 452.* The failure to account includes interests the Company had in real property, personal property, investments in co-ops with rights to real property, rent and accounts receivables. *See Trial Transcript p. 14-15,*

91-96, 228-230, 379, 397-400, 452-453, and 466.

Upon becoming aware of the closing of the Company and the inability to receive a fair price for her shares, Appellant amended her complaint to include seeking the dissolution of the Company, a proper distribution as was agreed to by the shareholders in the August 2007 meeting, the fair value of her shares at the time she was removed from management, and an accounting for the Company's finances. *See Amended Complaint*. The Respondents brought counterclaims alleging Plaintiff's misappropriation of Company assets during her tenure as manager from 2006 through 2007 and, later, for the judicial dissolution of the Company.

LEGAL ARGUMENT

- I. *The actions by Respondents, as evidenced at trial and as found by the Trial Court, entitled the Appellant to her requested relief and the Trial Court's Order should, therefore, be reversed.*

The Appellant was entitled to have the decision rendered in her favor. The Trial Court properly found that the Company should be judicially dissolved in accordance with S.C. Code Ann. § 33-14-300. The Trial Court erred, however, in denying the other forms of relief sought by Appellant. All of the evidence presented at trial supported Appellant's action under S.C. Code Ann. § 33-14-300(2)(ii), entitling Appellant to damages in the amount equal to those distributions the Respondents agreed to distribute in the August shareholders meeting, the fair value of her interest at the time Appellant was removed from her position, and the reasonable expenses incurred in the proceeding. Finally, the Trial Court improperly required Appellant affirmatively show acts of fraud, theft, or some other illegal activity in order to support her claim

of a minority squeeze out in direct contradiction with South Carolina jurisprudence.

Section § 33-14-300(2)(ii) permits a court to grant relief to a minority shareholder if it is established by a shareholder that “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).” See *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 597, 541 S.E.2d 257, 263 (2001). The evidence presented at trial and found by the Trial Court established the following actions taken by Respondents; (1) failure to provide required financial documentation or information, (2) failure to cooperate in good faith for the sale of the company, (3) failure to make a good faith offer for Appellants interest in the Company, (4) removal of Appellant from a position as manager and exclusion from participating in management of the company, (5) failure to provide adequate management of the company, (6) failure to properly wind up the affairs of the company, (7) continued payments to the Parties’ Mother before other creditors, (8) failure to assume liability on corporate debts previously carried by Appellant, (9) use of company assets to pay legal fees for defending this action, (10) failure to provide any accounting for the cash received by the Respondents as shareholders of the Company, and (11) no good faith justification for any of these corporate actions. Much of this evidence would separately support a finding of fraudulent, oppressive, or unfairly prejudicial actions against the Appellant. By finding all of these actions to have taken place, the Trial Court erred in not finding that Appellant was entitled to relief.

The Trial court should have awarded the relief requested in Appellant’s amended

complaint for the purchase of her shares at their fair market value. S.C.Code Ann. § 33–14–310 lists as an alternate remedy to dissolution in any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33–14–300 “the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.” The evidence clearly supported a finding for dissolution, as awarded by the Trial Court, and likewise supported a finding in favor of awarding the Appellant the fair value of her shares. The Trial Court erred in not granting such relief.

- A. The trial court erred in finding the Respondents acted fraudulently, but failing to hold that such fraud entitled Appellant to relief.

The Trial Court found the necessary facts to support a claim that Respondents acted fraudulently by failing to disclose any reliable financial documentation, but erroneously failed to grant Appellant her relief. The Respondents had a fiduciary duty to Appellant as she was a shareholder and family member. Such duty carried with it the duty to disclose the financial details of the Company to Appellant. Their failure to do so is considered fraud under South Carolina law. The nondisclosure of a fact becomes fraudulent when it was the duty of a party, having knowledge of the facts, to disclose such to the other party. *Warr v. Carolina Power & Light Co.*, 237 S.C. 121, 127, 115 S.E.2d 799, 802 (1960).

The duty to disclose may be reduced to three distinct classes: (1) Where it arises from a preexisting definite fiduciary relation between the parties; (2) Where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) Where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure, without regard to any

particular intention of the parties.

Gordon v. Fid. & Cas. Co. of N. Y., 238 S.C. 438, 450-51, 120 S.E.2d 509, 515 (1961). The Respondents assumed responsibility for directing and handling all of the financial affairs of the Company when they removed Appellant. Further, the Respondents agreed at a shareholder meeting regarding the disclosure of financial information on a monthly basis. This requirement was specifically demanded by Appellant to insure the Company was not being pilfered and squandered by the Respondents.

The Trial Court explicitly found that the Respondents, after assuming control and management of the company and promising to provide financial documents in the meeting of the shareholders, produced scant documentation of which none was reliable and only after a court order. Such a finding necessarily requires a finding that the Respondents acted fraudulently. Suppression of material information which one is duty bound to disclose is equivalent to a false misrepresentation. *Landvest Associates v. Owens*, 276 S.C. 22, 25, 274 S.E.2d 433, 434 (1981). It is of no import that the Trial Court sympathized with the Respondents and the facts regarding the loss of some of the digital copies of the books and records. The Respondents' testified that the hard copies of the records were never lost. Similarly, the impact of losing backups of prior months financial records should have had no impact on the Respondents' ability to generate financial documents for following months. The Respondents had over four years to produce a single piece of reliable financial documentation. None was ever provided. The Respondents cannot now rely upon the lack of documentation as evidence there was no taking of corporate assets and that actions taken by Appellant are now unsupported by proper documentation. It was

an error by the Trial Court to recognize such facts and not similarly find the fraud necessary to grant Appellants requested relief.

- B. The trial court, similarly, erred in not finding the actions of Respondents were not oppressive or unfairly prejudicial under South Carolina law.

The findings of the Trial Court under South Carolina law demanded an award in favor of Appellants regarding her claim of oppression. In establishing the proper considerations for finding oppression, the Supreme Court has observed that the terms oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case. *Kiriakides*, 343 S.C. at 597,541 S.E.2d at 263. The Supreme 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. *Id.* 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 v. Roberson*, 399 S.C. 588, 595, 733 S.E.2d 107, 110 (2012). “[I]llegal or fraudulent conduct is not required under section 33–14–300(2)(ii).” *Id.* The conduct of the Respondents presented adequate evidence of oppression and unfairly prejudicial actions. Thus, the Trial Court erred in failing to grant Appellant her requested relief.

In the seminal case in South Carolina regarding an action brought by a minority shareholder, the Supreme Court held that in lieu of defining what constitutes oppression, “a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior, [is] the proper inquiry under S.C. Code § 33-14-300.” *Kiriakides*, 343 S.C. at 597,541

S.E.2d at 263. Further, the statute “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.* at 597, 263. Although the Supreme Court declined to set out specific factors of oppression in *Kiriakides*, it observed several common factors 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.” *Id.* at 605 n. 28, 541 S.E.2d at 267 n. 28. It also went on in a footnote to hold that the factors considered by the Court of Appeals could, likewise, be considered. *Id.* These factors included:

- (1) A visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely; or
- (2) A breach of the fiduciary duty of good faith and fair dealing; or
- (3) Whether the reasonable expectations of the minority shareholders have been frustrated by the actions of the majority; or
- (4) A lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or
- (5) A deprivation by majority shareholders of participation in management by minority shareholders.

Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 603-04, 527 S.E.2d 371, 387-88 (Ct. App. 2000) *aff'd* as modified and remanded, 343 S.C. 587, 541 S.E.2d 257 (2001). The analysis, as described in *Kiriakides* and supported by the evidence and admitted by the Individual Respondents in this case, should have resulted in a finding of oppression.

Similarly, the Supreme Court’s decision in *Ballard* dictates that the Court hold Defendants liable for the actions taken. The Trial Court in holding oppression was not present,

found that under South Carolina law there must be direct evidence that property was taken from the company by the Respondents. In what was the only factor considered in whether Appellant was being oppressed and entitled to damages, the Court placed the burden to show illegal or fraudulent conduct by the Respondents on the Appellant. Such illegal or fraudulent conduct, however, is not required under section 33-14-300(2)(ii), and the evidence in the record reflects similar acts found to be oppressive by South Carolina courts. See *Ballard*, 399 S.C. 588, 733 S.E.2d 107. In *Ballard* the majority shareholders were outside investors that forced Ballard out of his position as manager of a project to develop a marina. *Id.* The outside investors then removed Ballard from any position of authority and attempted to circumvent prior contracts with Ballard in order to avoid certain liabilities. Unlike in *Kiriakides*, there was no finding of fraud or any acts that would not be considered fully within their rights as majority shareholders. Ballard, like Appellant here, faced the prospect of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload the investment.

Unlike *Ballard* and *Kiriakides*, the current facts do not involve actions by the majority shareholders that result in the business benefitting only those shareholders. Instead, the Respondents effectively allowed the Company to lose all value. The gross mismanagement of the Company ultimately resulted in, according to the testimony of the Respondents, the assets of the Company being depleted to nearly nothing and the accounts receivable being uncollectible. After she was terminated, Appellant sent a facsimile to the majority shareholders regarding financial issues with the Company. At a meeting of the shareholders later that month, Appellant requested monthly financial statements and distributions of profit be made. Respondents agreed to these

requests, believing such oversight would be in the shareholders' best interests. After months of not receiving the required financial documents, Appellant began pushing the issue through legal avenues. After five years of litigation, a court order, several motions to compel, multiple extensions of time, and a four day trial the Respondents have never produced financial documents that they are willing to testify are reliable. Similarly, the Respondents have failed to take appropriate actions in the closing of a business in order to account for the assets and liabilities of the Company. Any ability for Appellant to gain a return on her interest through the sale of the Company was mishandled or not appropriately managed. As a direct result, Appellant has been completely unable to see a return on her interest in the Company since her removal in August of 2007.

The Respondents failure to meet their basic fiduciary responsibilities to the Company and to Appellant should have resulted in a finding of oppression. Under South Carolina law, Respondents failure to disclose and communicate truthful and accurate information about the financial condition and performance of the Company to Appellant should have resulted in judgment in her favor. South Carolina law declares that "officers and directors of a corporation have a fiduciary duty to act in the best interest of the corporation and its shareholders." *Rivers v. Wachovia Corp.*, 665 F.3d 610, 617 (4th Cir. 2011) See S.C.Code Ann. § 33-8-300(a) ("A director shall discharge his duties as a director ... in a manner he reasonably believes to be in the best interests of the corporation and its shareholders."); Id. § 33-8-420(a) (same with respect to a corporate officer). Similarly, South Carolina law extends special protection to minority shareholders in a closely held corporation. See *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d

601 (1967) (holding that officers and directors of a corporation owe a fiduciary duty to a minority stockholder to make a full disclosure); see also *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C.App. 390, 537 S.E.2d 248 (2000)(holding that “majority shareholders in a close corporation owe a ‘special duty’ and obligation of good faith to minority shareholders”). This duty includes the disclosure and communication of accurate information regarding the corporation’s financial condition. See *Rivers*, 665 F.3d 610. The Respondents fail in every way to meet this fiduciary responsibility. Similarly, the Respondents actions in continuing to pay the Mother before all other creditors was a breach of their fiduciary duties. South Carolina has long held that when a corporation becomes insolvent, or in a failing condition, the officers and directors cannot by transfer of its property or payment of cash, prefer themselves or other creditors. See *Fed. Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973, 977 (4th Cir. 1982). These clear breaches of their fiduciary duties should have, similarly, resulted in Appellant being awarded her requested relief.

C. The Trial Court improperly applied South Carolina jurisprudence regarding the business judgment rule in determining there was no evidence of bad faith on the part of the Respondents.

In ruling there was no evidence of fraud or self-dealing, the Trial Court erroneously ruled the Appellant had not carried her burden of proof. The Trial Court, in requiring the Appellant affirmatively show evidence of fraud or self-dealing, found that the actions taken by Respondents were all protected by the business judgment rule. This analysis is not only not in accord with the very facts found by the Trial Court, but are also not in accord with South Carolina law. Under the

business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith. *Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App.) aff'd, 294 S.C. 86, 362 S.E.2d 874 (1987) The analysis, as stated by the Court of Appeals in *Kuznik v. Bees Ferry Associates*, is as follows:

When a [shareholder] alleges [a director] has violated his fiduciary duty, the allegedly violating [director] **must show** he acted: (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 the partner reasonably believes to be in the best interests of the [company]. However, the rule will not apply if the [directors] have engaged in self-dealing, fraud, or other unconscionable conduct.

342 S.C. 579, 603, 538 S.E.2d 15, 27 (Ct. App. 2000)(emphasis added). This analysis clearly puts the burden of proof on the director alleged to have violated his duties to show he first acted in good faith. Such a showing by Respondents was never made. The Trial Court's placing the burden on the Appellant without an affirmative showing by Respondents that they acted in good faith was reversible error.

The Respondents offered no good faith justification for failing to manage the company or abide by the requirements of the Company as captured in the shareholder minutes. The Respondents persistently testified that they were either too busy or not knowledgeable enough to manage the company. The only affirmative decision the Respondents testified they were capable of was the removal of Appellant from a position of management. The only support for this decision was the Appellant's reluctance to continue making payments to their Mother in preference to other creditors. They were unable to manage the creation of financial documents,

though one worked for an accounting firm. They were unable to continue to oversee the signing of checks from the Company, instead deciding to give an employee a signature stamp. They were unable to organize the sale of assets of the company, though they had both previously worked for the Company. They were unable to attempt to collect account receivables from customers, though an employee did collect some receivables with the sole purpose of paying himself for his work. They were unable to meet with potential buyers of the Company, though they claimed to be motivated to sell. They were unable to hire a broker to market the sale of the company, though when foreclosure proceedings on the property commenced they hired a broker to sell the property. They were unable to witness the physical taking of assets of the Company when done in exchange for certain accounts payable, though they rely on this taking as an accounting of what happened to much of the assets of the Company. The only justification for such inept management was that they were too busy working for their own companies or competing florists. None of the inaction of the Respondents can be described as done in good faith with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner reasonably believed to be in the best interests of the Company.

Similarly, the Trial Court erred in allowing the ultra vires acts of the Respondents to be protected by the business judgement rule. South Carolina courts have long held that “a corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are ultra vires.” *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987). The business judgment rule only applies to intra vires

acts, not ultra vires ones. *Id.*, see also *Kuznik*, 342 S.C. at 605, 538 S.E.2d at 28. The Company, by way of a unanimously approved shareholders meeting, required the directors (1) produce monthly financial reports, (2) make monthly distributions of profits, and (3) assume personal liability for certain prior obligations of the Company. None of these actions were taken by the Respondents. To find that such inaction was protected by the business judgment rule was reversible error by the Trial Court.

In the only reference to the whether the actions of Respondents were in good faith, the Trial Court ruled that the Respondents reasonably relied upon the person hired to generate accurate financial records. Under South Carolina law,

a director 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 director reasonably believes to be reliable and competent in the matters presented

S.C. Code Ann. § 33-8-300. The greatest flaw in such a finding is that the Respondents testified it would be unreasonable to rely on the competency of the employee charged with generating the financial books of the Company. After testifying that they had repeatedly attempted to have the reports produced by the employee, they were only able to swear to perhaps receiving some. They similarly testified that other companies the Respondents worked for, including three other florists, would not have relied upon the efforts of an employee with similar performance. The statute does not protect directors from relying on statements of employees that have shown themselves to not be reasonably considered unreliable or incompetent. The business judgment rule cannot be relied upon by the Respondents without first showing its actions were in good

faith. Similarly, the Respondents' inaction must be shown to have been done in good faith. South Carolina law has never and will never allow directors to claim that their inability to produce any financial documentation as required by law is protected by the business judgment rule. The Trial Court erred in allowing the Respondents to use the lack of financial documents as evidence for a lack of maleficence and similarly evidence of maleficence by the Appellant.

II. The Trial Court erred in not ordering a new trial regarding the damages in light of the new accounting performed.

In light of the Court's finding that the corporation's assets were not wound up accordingly and an accounting of what assets remain in existence is needed, a new trial should be had once a formal finding of facts regarding the assets of the company is ascertained. Without a finding of what property remains, there is no adequate way to determine the actual damages to shareholders. The evidence of harm to Appellant relied in large part to the faulty financial documents produced by Respondents. Similarly, the Respondents claims relied entirely upon the inability of Appellant to produce the documents in the control of Respondent. The Individual Respondents swore repeatedly that the financial documents produced were not reliable and that persons that ordinarily are capable of producing reliable documentation, the Respondents' own accountant and lawyer, could not provide proper supporting documents.


The Trial Court, in finding an accounting was appropriate, held that the Company failed to wind up its affairs upon dissolution. The Trial Court went on to hold that if the Parties mutually agree to dispense with an accounting, then the action will be dismissed with prejudice. In the event of an accounting, as Respondents failed to produce reliable documentation after

discovery requests, court orders, and a lengthy trial, the Respondents will either not produce any documentation. The benefit of an accounting would thus only occur if new evidence relevant to the matter is produced by Respondents to the accountant. The Appellant would then be entitled to a new trial. To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2004). Any information of substance provided to the Accountant by the Respondents would likely meet all of these requirements. The Trial Court finding that an accounting was proper necessarily requires a finding of insufficient evidence for damages. Thus, the Trial Court erred in not granting a new trial as to damages.

CONCLUSION

The trial court erred in not granting the Appellants the requested relief. Similarly, the Trial Court erred in not ordering a new trial as a result of the need for a proper accounting. The evidence as presented and the findings of the Trial Court all supported Appellants causes of action. Not only did the Respondents act in a way that was oppressive and unfairly prejudicial, but fraudulently withheld the necessary documentation for Appellant to prosecute her causes of action. Similarly, the Trial Court improperly shifted the burden of proof to the Appellant in showing Respondents did not act in good faith. South Carolina law dictates that the Trail Court

erred in not granting Appellant her requested relief and its order should therefore be reversed.

By: 
Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for Appellant

Columbia, South Carolina
May 26, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-In-Equity

Case No: 2008-CP-40-3687
Court Of Appeals Number: 2014-002724

Debra B. Croft a/k/a Debra C. Morris Appellants,


v.

Kirby Croft Florist & Greenhouse, Inc., Denyse Nodden and Ward Croft Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 27, 2015, addressed to their attorney of record as follows:

Kirby D. Shealy, III, Esquire
Adams & Reese, PA
Post Office Box 2285
Columbia, South Carolina 29202



Anissa Terpstra, Paralegal to
Richard R. Gleissner
Gleissner Law Firm, L.L.C.
1237 Gadsden Street, Suite 200A
Columbia, South Carolina 29201
(803) 787-0505
Attorneys for the Appellant

Dated: May 27, 2015