

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

S.C. SUPREME COURT

Case No.: 2008-CP-26-6169
Supreme Court Case No.: 2015-001157

Opinion No. 5300 (S.C. Ct. App. Filed March 4, 2015)

Joseph E. Mason, Jr.,Petitioner

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 PETITION FOR CERTIORARI**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the two issue rule as one ground to uphold the special referee's finding the Son's claims should have been derivatively filed? (Petitioner's Questions 1, 2, and 3).
2. Did the Court of Appeals err in concluding that Son was not entitled to a forced buyout of his shares of the Company or other relief under the Corporate Code? (Petitioner's Questions 4 and 5).
3. Did the Court of Appeals err in affirming the special referee's conclusion that Son was not entitled to relief on his tort claims? (i.e., breach of officer/directors duties, civil conspiracy, and constructive discharge in violation of public policy)? (Petitioner's Questions 6 and 9).
4. Did the Court of Appeals err in not considering the valuation of Son's stock in Company? (Petitioner's Question 7).
5. Did the Court of Appeals err in giving due regard to the findings of fact of the special referee? (Petitioner's Question 8).
6. Did the Court of Appeal err in affirming the special referee's holding that Son was not entitled to relief on his claim against Respondent Levine for allegedly aiding and abetting the Mason Respondents in a breach of fiduciary duty? (Petitioner's Question 10).
7. Did the Court of Appeals err in concluding Son was not entitled to a claim (which he did not plead) for an additional twenty percent interest in the Company because of, *inter alia*, the two issue rule? (Petitioner's Question 11).
8. Did the Court of Appeals err in sustaining the special referee's judgment in favor of Company and against Son for conversion of funds paid by Son to the law firm which

initially represented Son and for funds taken by Son as part of his casing scheme?
(Petitioner's Questions 12 and 13).

9. Did the Court of Appeals err in upholding the special referee's holding that Company's claim against Son for damages related to his filing of false tax returns could be brought later because the amount of damages in back taxes and fees was not determined as of the trial date? (Petitioner's Question 14).

COUNTER-STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint by Petitioner 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 of 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 employment with Company and cause him harm; (4) for relief pursuant to S.C. Code Ann. §33-14-300 *et seq.* requiring Mother, Father and Sister to purchase Son’s interest in 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” and asserting counterclaims against Son for damages resulting to Company and its shareholders from Son’s actions while employed by Company as President and for conversion of Company funds. Son filed an 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, Company and Family Respondents filed an Answer and Counterclaims to Son's Amended Complaint. Son filed no Reply to the Counterclaims. 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, and April 13, 2011. The case was tried without a jury over five (5) days during November 14-18, 2011. At the conclusion of Son's case, Son agreed to drop his claim of constructive termination in violation of Company's employee handbook alleged as his fifth cause of action.

On January 20, 2012, the Special Referee filed separate Final Orders disposing of (1) Son's claims against Company and Family Respondents ("Mason Order"), and (2) Son's claim against Accountant ("Levine Order"). 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 Company could later pursue its claim against Son for damages resulting from his filing of false and inaccurate Company State and federal tax returns while Company President, once the amount of damages and additional tax liabilities to the Internal Revenue Service and South Carolina Department of Revenue were determined.¹ The Levine Order granted judgment in favor of Levine. This appeal followed.

¹ The final amount of damages arising from the filing of the false tax returns was unknown as of the trial date.

COUNTER-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. 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.²

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. 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. 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

² Son consented to the acquisition of BCJ Tires, Inc. stock by Accountant. (R. p. 373, line 14 - p. 374, line 18).

Mason Tire & Auto Service, Inc. (the "Surfside Store").

Upon graduating from the University of Alabama with a Business Administration degree, Son worked for Ryder Truck rentals in the Tampa 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.³ 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 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 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.

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

³ The record is unclear as to precisely when Son was elected President, but the testimony and records indicate that by 2001 Son was operating as Company President.

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 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 Kelaher, ("Attorney Kelaher"), 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.

On November 8, 2002, following meetings with Father, Son, and Accountant, Attorney Kelaher forwarded documents to Company shareholders which he had prepared in accordance with Father, Son and Accountant's instructions. (R. p. 808). Attorney Kelaher termed the documents "unusual", expressing concern with some aspects of the

documents. While the specific documents enclosed with Attorney Kelaher'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").⁴ (R. pp. 810-826). The Retirement Documents, 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.

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. All 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

⁴ Father was 79 years of age at the time of trial.

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 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 and cover up 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. 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 Company's financial affairs. (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 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 that rendered him a quadriplegic during a motorcycle “event” in support of the Toys for Tots program. 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 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, continued to operate at a loss at the time of trial. 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). It was established at trial that Company was continuing 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 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 Son's behalf, wrote Accountant outlining alleged financial and tax accounting irregularities which Accountant was

accused of having “devised and fashioned.” While the alleged activities were substantially accurate, the 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 undisputed that Son was aware of, actively engaged in and furthered the very practices of which Attorney Byrd’s 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 Byrd’s letter, Accountant advised Sister, by email, that certain tax accounting and practices complained of in the letter (including Company payment of personal expenses) should be terminated. (R. p. 852). Accountant also requested each shareholder to agree to repay Company for Company paid personal expenses. (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).

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 2003 through 2006, including revisions Duncan requested. A shareholders’ meeting was scheduled for December 7, 2007, for the purpose, *inter alia*, of mailing the amended returns. (R. p. 896). Prior thereto, Son visited Duncan and requested his assistance in making inventory adjustments similar to the adjustments made by Son 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 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 companies⁵. Son created fake invoices that indicated that the fictitious companies had sold (and that the Company

⁵ A “casing” is a used commercial truck tire suitable for “recapping” and resale. (R. p. 248, line 8 – p. 249, line 9).

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 removal of cash from the Company register in an amount equivalent to the fictitious casing sum. Son admitted engaging in this practice, but contended Accountant said it was acceptable so long as he split the cash equally with Sister (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 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 Company General Manager and Vice President. Other than financial restrictions imposed on Son, 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 his job and 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).

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 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 Company's behalf, that he has made voluntary disclosure to State and federal tax authorities regarding Company's past tax practices and that 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).

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 Father, in her presence, of wanting to "stick your nose in everything." (R. p. 662, line 7 – p. 664, line 25).

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 overpaid 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).

ARGUMENT

I. Did the Court of Appeals err in applying the two issue rule as one ground to uphold the special referee's finding the Son's claims should have been derivatively filed? (Petitioner's Questions 1, 2 and 3).

Son's Questions Presented numbered 1, 2, and 3 question the Court of Appeals determination that the Son's appeal failed to address the special referee's finding that the Son's suit was improper because it should have been filed as a derivative action. The Court of Appeals noted that the special referee did not specify to which cause or causes of action his decision applied but that he did specifically hold that "[t]he inaccuracies in the tax return and any damages that follow from these falsities would affect the corporation in its entity, not . . . Son specifically. Therefore, Son's suit was improper in that it was not filed as a derivative action." Son's Final Brief on Appeal listed ten separate issues on appeal (Son's Brief, pp. iv,v). Not a single issue even addresses the "derivative action" finding. His brief (Son's Brief p. 39) makes only a cursory general reference to some of his damages having been sustained in his individual capacity, but makes no distinction between those damages and damages resulting to Company. The Court of Appeals accordingly properly determined that the special referee's ruling that the suit should have been filed as a derivative action was the law of the case under the two issue rule. See Jones v. Scott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Even assuming, *arguendo*, the Son had properly raised the issue of which actions might be properly asserted individually, the Court of Appeals examined the factual basis for each of Son's causes of action and properly agreed with the special referee's conclusions that the Son was not an oppressed shareholder, nor was he entitled to additional stock in Company; that the Mason Respondents had breached no fiduciary

duty to Son, had not engaged in a civil conspiracy to damage him, and had not constructively discharged him; and that Son had demonstrated no basis for an award of attorneys fee or expenses.

II. Did the Court of Appeals err in concluding that Son was not entitled to a forced buyout of his shares of the Company or other relief under the Corporate Code? (Petitioner's Questions 4 and 5).

Son simply ignores the fact that first the special referee, then the Court of Appeals, based on its own view of the evidence, found that Son was not an oppressed shareholder. The record clearly reflects that Son is not an oppressed shareholder, he is a dissatisfied shareholder. Moreover, he is the architect of his own dissatisfaction. The evidence presented was clear and convincing that Son was instrumental in creating the financial challenges now facing the Company and that he quit his job.

Son is in no way precluded from selling his shares in Company other than the statutory limitations on sale applicable to all close corporation interests. Son seeks to have the Court, however, provide extraordinary relief in the form of a court ordered purchase of his shares, even absent a showing of any oppression. The Court of Appeals' consideration of the equities, including the equitable defense of "unclean hands," is clearly appropriate in regard to this cause of action seeking equitable relief.

Son's reliance on the case of *Hanekamp v. Atlas Techs, Inc.*, C.A. No. 2011-CP10-1243, Business Court Op. 2014-05-15-02 (Charleston County, May 15, 2014), 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 neither appeared at the summary judgment hearing to oppose the defendants' requested relief, nor was he represented by counsel (his counsel had previously been relieved by court order). *Hanekamp* is neither controlling nor even persuasive authority for any issues related to the instant action.

III. Did the Court of Appeals err in affirming the special referee's conclusion that Son was not entitled to relief on his tort claims? (i.e., breach of officer/directors duties, civil conspiracy, and constructive discharge in violation of public policy)? (Petitioner's Questions 6 and 9).

Son asserted three tort claims against the Mason Respondents (i.e., breach of fiduciary duty, civil conspiracy, and constructive discharge in violation of public policy). "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). The Court found considerable evidence in the record to support the special referee's finding thereabout. Moreover, the Court of Appeals specifically recognized that under South Carolina law, the breach of fiduciary duty claim should have been pursued through a derivative, and not an individual action. *Rivers v. Wachovia Corp.*, 665 F.3d 610, 617 (4th Cir. 2011).

IV. Did the Court of Appeals err in not considering the valuation of Son's stock in Company? (Petitioner's Question 7).

Son asks this Court to review and determine an issue which both the special referee and the Court of Appeals did not address because neither found the question germane because Son failed to establish his claim for any form of shareholder relief, much less the extraordinary relief requested. In the absence of such entitlement, the issue is simply beside the point.

V. **Did the Court of Appeals err in giving due regard to the findings of fact of the special referee? (Petitioner's Question 8).**

This assignment of error by Son provides no legal or factual basis as to why the special referee's factual findings should not be accorded such weight as the well established principles of appellate review require. No misapplication of these principles is pointed out either in Son's exceptions or his argument.

The Court of Appeals opinion makes it clear that, as to the equitable claims, the Court made its on findings of fact based on its view of the evidence. In so doing, the Court of Appeals specifically found that based on the evidence in the record:

[S]on 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.

VI. **Did the Court of Appeal err in affirming the special referee's holding that Son was not entitled to relief on his claim against Respondent Levine for allegedly aiding and abetting the Mason Respondents in a breach of fiduciary duty? (Petitioner's Question 10).**

This issue does not directly affect the Mason Respondents, however it is noted that a claim of "aiding and abetting" a breach of fiduciary duty of the Respondents would seem to have as a necessary predicate a finding of the breach of duty alleged. No such breach of duty was found. Also, while this claim is mentioned in Son's Question Presented No. 10, no argument is made by Son in Petition which addresses the issue and thus it should be deemed abandoned. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102,

106, 439 S.E.2d 283 (Ct. App. 1993).

VII. Did the Court of Appeals err in concluding Son was not entitled to a claim (which he did not plead) for an additional twenty percent interest in the Company because of, *inter alia*, the two issue rule? (Petitioner's Question 11).

The Court of Appeals determined Son was not entitled to additional stock on multiple grounds. He neither pled such a claim nor did he address the failure to plead in his appeal to the Court of Appeals. His claim, had it been pleaded, would have been a contract claim, which is an action at law. The Court of Appeals found evidence to support the special referee's finding that the Son stopped complying with the terms of the retirement documents when he quit his job and Father was unable to retire. The Court also based its decision regarding the Son's claim to additional stock on its finding the contract was illegal and therefore unenforceable. In addition, the Court of Appeals affirmed the special referee under the two issue rule because the issue of the Retirement Agreements validity, and enforceability were not raised or addressed on appeal.

VIII. Did the Court of Appeals err in sustaining the special referee's judgment in favor of Company and against Son for conversion of funds paid by Son to the law firm which originally represented Son and for funds taken by Son as part of his casing scheme? (Petitioner's Questions 12 and 13).

The Company's counterclaim for conversion against Son was based on his use of Company funds to pay his attorney and his taking money based on admittedly fraudulent casing invoices. These are legal claims. The Court of Appeals found ample evidence in the record to establish these claims, including Son's own testimony as to the casing scheme, i.e., the Son recorded fake inventory then paid himself for it. As to the case of the legal fees, the attorney consulted by Son (who initially represented Son in this litigation) actually returned to the Company the money Son had given him. (R. pp. 1164, 1165). The record is undisputed that Son shortly thereafter "reimbursed himself" from

Company funds for the money he had paid his attorney. (R. pp. 1166, 1167).

IX. Did the Court of Appeals err in upholding the special referee's holding that Company's claim against Son for damages related to his filing of false tax returns could be brought later because the amount of damages, back taxes and fees was not determined as of the trial date? (Petitioner's Question 14).

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 filed no 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, fraudulent 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 a 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 of Appeals properly held that Son should be held accountable in a later action for any damages to Company proximately resulting from his actions when such damages are known. In such an action, Son can assert any defenses as to the amount of damages as may be available and burden remains on Company to establish the amount of damages attributable to Son's actions.

Company's claim for damages arising out of Son's fraudulent filings of Company tax returns was clearly made in this litigation in its Amended Answer of Counterclaim (R. p. 56). Son's assertion in his Petition that the Company ". . . did not seek this remedy before or during trial" is without merit. Petition, p. 24.

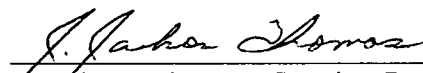
Son's reliance on *Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694

(S.C. 1996) is misplaced. This case addresses only the statute of limitations issue of when a known claim (or claim which was discoverable with reasonable diligence) should initially be filed. In the instant case, the claim was clearly made within the three year period. Because the amount of damages is capable of being determined in the future, but not yet known because the tax authorities have not finally resolved the amounts owed, the Court of Appeals upheld the special referee's ruling that the Company's claim could be pursued once the amounts were determined.

CONCLUSION

The Mason Respondents respectfully submit that Son's Petition for Certiorari should be denied because it raises no novel question of law, no constitutional issue, no federal question, no action of the Court of Appeals in conflict with a prior decision of the Supreme Court and that there was no dissent in the Court of Appeals. The Court of Appeals wrote a detailed twenty-seven (27) page Order based on its review of the One Thousand Three Hundred Thirteen (1313) page record. Son, in the final analysis, simply disagrees with the factual findings as made by the special referee and the Court of Appeals. Accordingly, it is respectfully submitted that his Petition should be denied.

Respectfully submitted,



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INC.

June 26, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM Horry COUNTY
Court of Common Pleas

JUN 29 2015

Ralph P. Stroman, Special Referee

S.C. SUPREME COURT

Case No.: 2008-CP-26-6169
Supreme Court Case No.: 2015-001157

Opinion No. 5300 (S.C. Ct. App. Filed March 4, 2015)

Joseph E. Mason, Jr.,Petitioner

v.

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

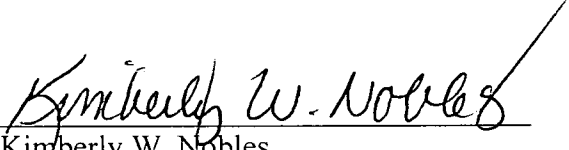
PROOF OF SERVICE

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., by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2015, addressed to the attorneys of record, as follows:

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June 26, 2015