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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-CP-23-002790

Andrew P. (Andy) Ballard, Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. Appellants/Petitioners.

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rule 221, SCACR, Appellants Warpath Development, Inc., Tim Roberson, Rick Thoennes and Rick Thoennes, III hereby petition the Court to rehear and reverse its July 15, 2015, Opinion on the basis that the Court erred in the following respects:

1. The court's opinion fails to address and/or misperceived the first argument presented by Appellants on appeal. Specifically, Appellants asserted that the lower court's October 3, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout enforced by a personal judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

2. The court's opinion fails to address and/or misperceived the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.
3. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent. Dr. Woodside's valuation was the only reliable opinion of value presented in the record and his valuation was dependent upon the happening of all events necessary to complete the development, which would trigger the release of all shares from escrow. Dr. Alford's opinion accepted Dr. Woodside's methodology. The methodology of all other evidence of value is unknown. It is inequitable for the court to base overall company value on the happening of all events of financing and development that would trigger the release of shares from escrow, but then ignore those events for purposes of finding 50% share ownership for the respondent.
4. The court's opinion improperly assigns a value of \$6,250,000 to Warpath. While the court correctly notes the impropriety of the lower court's assigned value of \$7,178,594 in adjusting the value of Warpath downward, the court nevertheless relies upon unreliable statements of value in reaching its decision. The only reliable opinion of value presented is that of the court's appraiser, Dr. Woodside. Dr. Woodside

was presented with and considered all of the facts and information of value, including all statements of value and offers of purchase and financing in concluding a total company value of \$4,360,000.

Appellants respectfully submit that the Court overlooked or misapprehended the following points.¹

I. Argument for Rehearing

1. The court's opinion fails to address or misperceived the first argument presented by Appellants on appeal. Specifically, Appellants asserted that the lower court's October 3, 2013 Order was legally deficient and fatally flawed on entry because it ordered a buyout enforceable by personal judgment which exceeded the remedies permitted by S.C. Code § 33-14-310(d).

Outside of the issues of value and percentage ownership, Appellants presented two arguments to set aside and reverse the court's entry of judgment. The first argument which was presented in Sections 2(A), (B), and (C) of Appellants' Final Brief presented a question of law addressing the propriety of the lower court's October 2, 2013 Order. Specifically, Appellants argue that the lower court's order was legally deficient and fatally flawed on its face and on entry because it went beyond what was statutorily permitted, was a remedy more drastic than dissolution, and dissolution is the default remedy. The second argument presented in Section 3 concerned the issue of the "appropriateness" of the 90-day buyout and the court's equitable obligation to consider the ability of the parties to complete the terms before the entry of judgment.

¹ Appellants incorporate their earlier briefs and the record on appeal by reference.

In the court's July 15, 2015 opinion, the court fails to address Appellants' arguments concerning the legal propriety of the court's October 2, 2013 order. The court instead lumps Appellants' argument together concluding that the "gist of these arguments is that the buyout 'failed' because it was impossible for the individual Appellants to comply with the ninety-day provision." The court's finding is inaccurate and misapprehends Appellants' arguments. Further, the court misapprehends Appellants assertions in stating that the Appellants did not appeal the propriety of the court's October 2, 2013 ordered buyout and imposition of personal judgment. Section 2 of the Final Brief, the first argument presented in the appeal by the Appellants, is entirely devoted to the legal question of whether the lower court's imposition of a buyout enforceable by a personal judgment was permitted by South Carolina law.

Specifically, Appellants asserted on page 4 of its final brief that the court's October 2, 2013 "order is legally deficient and fatally flawed at entry because the lower court unlawfully imposed a personal judgment in violation of South Carolina law to address the failure of the Appellants to complete the buyout." Appellants further argue on page 5 of their Final Brief,

Specific to this matter, the court may choose to remedy oppression by issuing an order "providing for the purchase at their fair value of shares" § 33-14-310(d)(4) (emphasis added). According to the Oxford English Dictionary, "provide" means to "make provision for the future", "to make adequate preparation", "to prepare", "to make available", etc. See OXFORD ENGLISH DICTIONARY, available at <http://www.oed.com/view/Entry/153448?rskey=iJgXU6&result=2&isAdvanced=false#eid>. The legislature could have, but, did not use the words "order the purchase", "compel the purchase", or "command the purchase". As in this case, to "provid[e] for the purchase" the court may set the value, terms and conditions of sale, but neither §§33-14-300 or 310 permit the court to enter an order also entering a personal judgment.

Appellants make further arguments concerning the drastic nature of the lower court's remedy and the proper reversion to dissolution in the event of the failure of the buyout on pages 6-9 of the Appellants' Final Brief. Regardless of whether the terms "voluntary" or "mandatory" are

employed, Appellant's arguments on appeal make it very clear that a buyout enforced by personal judgment is improper and dissolution is the only option available in the event of a failed buyout. The court failed to address the issues presented regarding the ability of the lower court to impose a buyout forcibly enforced by a personal judgment exposing Appellant's assets beyond their investment in Warpath.

Regardless of the labels one seeks to apply to the question, the Appellants plainly present arguments addressing the legality of the entirety of lower court's order with respect to the order of buyout. The question of the legal propriety of the October 2, 2013 order of buyout is certainly before the court and must be addressed. Appellants request a rehearing to address this question before the court.

2. The court's opinion fails to address or misperceived the second argument presented by Appellants on appeal. Specifically, the Appellants asserted that the lower court was obligated prior to entry to consider the "appropriateness" of its ordered buyout which included the ability of the Appellants to complete the buyout and the structure of the buyout.

This appeal addresses legal and equitable questions concerning the propriety of the lower court's October 2, 2013 order at entry and the evidence in the record before the court at that time. The court in its opinion makes reference to oral argument where questions concerning the ability of the Appellants to complete the court ordered buyout were asked. In response, Appellants' counsel referenced testimony offered at trial that the parties were unable to complete a buyout during an arbitrary time period set out by the court or suggested by respondent and submitted themselves to the court for further financial examination on the question of the appropriateness of the buyout remedy. The failure of the court to properly consider the "appropriateness" of its

remedy at or before entry was placed at issue before the court on appeal. The argument is presented in Section 3 of Appellants' Final Brief on pages 9-13 of the brief.

The court's July 15, 2015 opinion only vaguely references this argument in stating that "[w]ithout any evidence that the individual Appellants cannot comply within the time limit, we find the time limit is appropriate". First, the court's finding fails to account for the evidence in the record on pages 223-224 and 231 of the Record on Appeal where both Mr. Roberson and Mr. Thoennes Sr. both plainly state that neither had the ability to immediately fulfill a buyout and were willing to submit to an examination of their financial condition in order to properly structure a buyout or determine whether the buyout was at all appropriate. Therefore, despite the court's finding, there is evidence before the court that the individual Appellants cannot comply with the buyout.² Second, the court does not address the question presented, which is when presented with testimony that the individual parties cannot complete a buyout, must the lower court determine ability and therefore the "appropriateness" of its remedy as required by statute prior to issuing its order. This question was presented to the court in this appeal, but never addressed by the court in its July 15, 2015 opinion. Appellants request a rehearing to address this question before the court.

3. The court's opinion improperly affirms that Respondent's shares are entitled to be valued as 50% of the overall company value as opposed to the 20% they represent.

With respect to valuation, the question before the court is the value of the 20,000 shares held by respondent. It is undisputed that at present, Warpath is a nonoperational, raw lease of land. As has been accepted by all parties, there are only two ways to value Warpath: (1) Warpath can be valued as an operational entity in which its financing, development and

² Because Mr. Thoennes III is protected by a bankruptcy discharge and not obligated to participate in a buyout, his testimony was unnecessary.

operations are assumed and value is reached by reducing to present value the potential investment and return, or (2) a valuation of Warpath's assets "as is" in its present condition. To date, Warpath has not any point been valued in its "as is" condition. There is no evidence in the record of a value of the leasehold interest of Warpath. Dr. Woodside as well factually was unable to make such a valuation of leasehold interest or other assets of Warpath. Therefore, the only known methodology for valuing Warpath has been a discounted cash flow method assuming in the future that Warpath would be financed, developed and operational over an 8-year period. It then would have a terminal value that would be the value of Warpath. However, that terminal value 8 years in the future is not accurate of its present value which was required to be reduced. That summarizes the evidence of value in the record presented by Dr. Woodside and accepted by Dr. Alford. All other methodologies are unknown.

On its face, the buyout remedy presumes that the company will remain in the hands of the shareholders that complete the buyout. The company is not being sold in total. Only the value of respondent's 20,000 out of a total of 100,000 issued shares are being valued. Regardless of whether shares are in escrow or not, all of the shareholders not named Ballard were to remain with the entity to carry on. In affirming that Respondent's 20,000 shares should be valued as 50% of the value of the company, the court has committed error. First, the court has committed legal error in failing to account for the shares in escrow in valuing Warpath. There is no citation and no basis in law for the court to ignore the shares in escrow. The citation to S.C. Code Ann. § 33-6-210 only addresses the requirement and conditions of escrow. Whether shares remain in escrow or not is left to the good business judgment of the board of directors. § 210 does not justify the court ignoring the escrowed shares in valuing respondent's shares. In fact, the law supports an opposite conclusion. At law, the shares in escrow are not ignored as the court has

ignored them in its opinion. Holders of escrowed shares are still shareholders with all of the fundamental rights of a shareholder being retained. For instance, S.C. Code Ann. § 33-6-210(e) provides that the shares in escrow have the same distributional rights as all other shares, *i.e.* they share equally. There is no prohibition on a shareholder of escrowed shares being elected to the board of directors. The South Carolina Reporter's Comments to § 33-6-210 specifically provided that a shareholder of escrowed shares has the right to "exercise all voting rights to which the shares would be entitled in they were not held in escrow." Legally, the interests of the escrowed shares cannot be ignored or forfeited as the court has done in affirming the lower court. For these reasons, Appellants request a rehearing to address this question before the court.

Second, as argued in brief and in oral argument, because the value assigned to Warpath is premised directly upon the happening of the events that would trigger the release of the shares from escrow, it is fundamentally unfair and inequitable for the court to ignore those assumptions in forfeiting or ignoring the shares in escrow in assigning a percentage value. The valuation and the percentage value of the shares cannot be addressed separately. Given the manner in which Warpath was valued, they must be jointly considered. As set forth in their Final Brief on page 13

-14,

On the one hand, in reaching the value of 100% of the outstanding 100,000 shares of Warpath as of December 31, 2012, the lower court assumed for purposes of reaching that value that all contractual obligations of Appellants' Roberson, Thoennes and Thoennes III to secure funding and build the marina had been met and the marina had operated for 8 years into the future. On the other hand, in reaching a value for Plaintiff's individual 20,000 shares, which according to the law and all testimony offered was a bargained for 20% of the total, without any reasonable, factual or equitable basis, the lower court assumed that none of the events justifying the value of the company, *i.e.* funding, construction and 8 years of operation, occurred, forfeited the shares of Roberson, Thoennes and Thoennes III, and valued Plaintiff's interest at 50% of the total company value.

To repeat the same inequitable result of the lower court is fundamentally unfair, inequitable and in error.

Finally, the court appears to find justification for its conclusion in a finding that “on remand, the parties presented no evidence the individual Appellants had taken any steps toward performing the services they promised....” This finding is inaccurate. Beginning on page 216 and carrying on through page 221 of the Record on Appeal, Mr. Roberson summarizes all of his efforts during the previous few years to finance and build the project. Continuing on, beginning on page 226 and carrying on through page 231 of the Record on Appeal, Mr. Thoennes Sr. summarizes efforts during the previous few years to finance and build the project. These efforts are further illustrated by the communications, bank submittals, offers and conditional loan offers the court reviewed in assessing value. All of the testimony and documents presented demonstrate the continuous efforts of these individuals to bring this project to fruition. The court cannot simply ignore this evidence in reaching its findings and making blanket statements that there is “no evidence the individual Appellants had taken any steps toward performing the services they promised....” For these reasons, Appellants request a rehearing to address this question before the court.

4. The court’s opinion improperly assigns a value of \$6,250,000 to Warpath. While the court correctly notes the impropriety of the lower court’s assigned value of \$7,178,594 in adjusting the value of Warpath downward, the court nevertheless relies upon unreliable statements of value in reaching its decision on value.

While the court properly recognized the error in the lower court’s reliance on the value assigned in the October 3, 2013 Order, the court nevertheless has relied on wholly unreliable and flawed numbers in reaching its independent determination of a value of \$6,250,000 for 100% of

the shares of Warpath. In reaching its conclusion, the court relies upon (1) Dr. Woodsides' opinion that Warpath was worth \$4,360,000, (2) a representation by Rick Thoennes Sr. to a bank that Warpath was worth \$6,000,000,³ (3) a conditional offer by a marina group to purchase a super majority stake in Warpath for \$4.5 million, (4) Dr. Alford's opinion which is based entirely on a complicated financing arrangement at a rate of around 11% that never made it beyond an initial qualified offer.

Factually, the only qualified and reliable opinion of value in front of the court is that of Dr. Woodside. To consider the other "values" submitted invited error, confusion and fundamental unfairness into the process. Specifically, Dr. Woodside, the court's neutral appraiser, reached a value as to 100% of the shares by employing a 22% discount rate using the established "build up" method and employs objective, empirical data to reach the amount. Further, the rate was checked and confirmed against the actual market by polling various marina entities and investors. Dr. Alford has stated in testimony and multiple times that he agrees with and would have come to the same 22% rate as Dr. Woodside. Dr. Alford, however, assigns an 11% rate based upon a 4 page form Conditional Loan Commitment issued by lender Dakota Holdings (R. at 499-502) in December 2012 that neither progressed beyond that letter and is subject to substantial additional due diligence before final commitment.⁴ The Conditional Loan Commitment is far from a reliable document to base an entire valuation.

The valuation of Respondent's 20,000 shares is of a high risk investment. There are no guaranteed rates of return as a loan commands. The discount rate considers what an investor

³ This reference is to a document in the Record at page 477. It is contained in a section entitled Property Information. The purpose of this document identified in the Record on page 476 is the seeking of financing. The description of the real estate includes "102 floating docks; 200 boat storage in dry stacks; 34 camp & RV sites; 10 cabins; 9 cottages; 120 room Lodge and Conference Center; 1 free standing restaurant and 1 located in Lodge; 1 marina store." This description and value concerns the future of Warpath not the present.

would require as a reasonable rate of return on his capital contribution for taking the risk of losing it all in this high risk investment. Without dispute, as testified and presented in Dr. Woodside's report, which is part of the record herein (R. at 601-722), the empirical data indicates that the average investor is willing to invest in a large capitalized public company, *i.e.* a company listed on the New York Stock Exchange, with the expectation that the return will be on average 9.2%. Further, an investor is willing to invest in a small capitalized public company at an expected average rate of return of 15.2 %. It does not take an expert to explain that common sense suggests that a person investing in a four-person, high risk investment is going to expect a far greater return than an investment in a public company. Certainly, an equity investor would expect a return far greater than the 11% as set forth by Dr. Alford. The reality is that an investment may return more or less than expectation. However, it is unreasonable to expect that a person would invest in the high risk investment if the expected return is less than investing in public companies with all of the legal protections accorded.

Without having the benefit of the testimony of Dakota Holdings upon which Dr. Alford's opinion is premised, we cannot know their true intent or how its interest rates were calculated. However, we do know that Dakota Holdings and its offer do not fit the profile of what is being evaluated in this hearing. Dakota Holdings was not offering to invest in Warpath. They made no offer to purchase and run Warpath as a going concern. The face of the document provides that it is Conditional Loan Commitment and they are lending money to Warpath at a specified rate of return and taking the stock of Warpath as collateral. Dakota Holdings was not risking their capital in an investment. Dakota Holdings was lending the money, and through the control accorded by the collateralized stock would have control over how their money is appropriated, the build out, the management of Warpath, and would see the return of their investment in loan

payments with interest ahead of all others. Dakota Holdings has structured a deal in which they have a tight control over their risk and do not take near the chance of the mere capital investor that the investment may not perform as expected. Dakota Holdings does not have an expected rate of return. Dakota Holdings has a guaranteed rate of return which is far different from the equity investment being evaluated in this matter.

Appellants request that the court reconsider its assignment of value to 100% of the shares of Warpath. The lower court recognized that the only reasonable and reliable opinion of value was that of Dr. Woodside. As recognized by this court, the lower court's error was in accepting the higher and factually strained value that was unilaterally obtained by the respondent. As such, Appellants urge the court on petition for rehearing to accept Dr. Woodside's assignment of \$4,360,000 value to 100% of Warpath's shares. For these reasons, Appellants request a rehearing to address this question before the court.

II. Basis for Rehearing *En Banc*

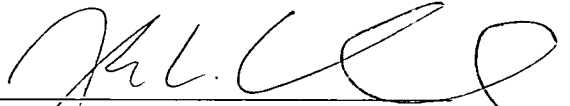
An *en banc* rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR. "[While Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* 'ordinarily will not be ordered' except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]" Williamson v. Middleton, 83 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

Appellants submit that Section 2 (A) – (C) of Appellants' appeal as presented in its Final Brief warrant a rehearing *en banc* as such involves significant questions of statutory

interpretation and judicial authority. For these reasons, Appellants request a rehearing *en banc* to address these questions before the court.

Conclusion

For the reasons set forth above, the court should grant the Petition for Rehearing and Rehearing *En Banc*, reconsider this matter and reverse the decision of the trial court.



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July 28, 2015
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Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Case No. 2008-CP-23-05739

Andrew P. (Andy) Ballard, Respondent,

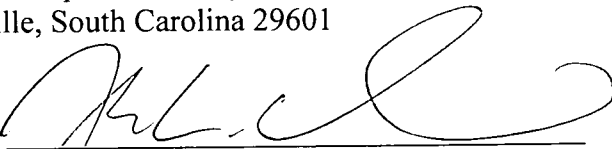
v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* was served upon all counsel of record on this the 28th day of July, 2015, by depositing a copy in the United States Mail, postage prepaid addressed as follows:

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