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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge
Case No. 2013-CP-23-002790

Appellate Case No. 2015-002036

Opinion No. 2015-UP-364
(S.C. Ct. App. Withdrawn, Substituted and Refiled August 26, 2015)

Andrew P. (Andy) Ballard, ... Respondent,

v.

Of Whom Tim Roberson, Rick Thoennes, Rick Thoennes, III,
and Warpath Development, Inc., is ..... Petitioners.

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioners Warpath Development, Inc., Tim Roberson, Rick Thoennes and Rick Thoennes, III hereby petition the Court for Writ of Certiorari to the Court of Appeals August 26, 2015, Opinion.

CERTIFICATION OF COUNSEL

In accordance with Rule 242(d)(1), counsel hereby certifies that a petition for rehearing was made and finally ruled upon by order entered November 19, 2015.

QUESTIONS PRESENTED

A. Certiorari should be granted to reverse the trial court's October 2, 2013 Order as legally deficient and fatally flawed on entry because an order of personal judgment in this matter exceeds the remedies permitted by S.C. Code § 33-14-310(d).

1. **The trial court's order of personal judgment against Petitioners in an amount equal to the assessed value of Respondent's 20,000 shares is an error at law and should be vacated.**

    a. **First, a personal judgment is not within the enumerated remedies for oppression set forth within the South Carolina Business Corporations Act.**
    b. **Second, a personal judgment is a more drastic remedy than dissolution.**
    c. **Finally, dissolution is the default remedy and should be applied.**

2. **The court of appeals' August 26, 2015 opinion errs in applying a law of the case analysis in addressing Petitioners' appeal of the trial court's entry of a personal judgment and should be vacated.**

B. Certiorari should be granted to reverse the trial court's October 2, 2013 order for failure to value Respondent's 20,000 shares as 20% of Warpath Development, Inc.

C. Certiorari should be granted to vacate the court of appeals $6,250,000 value assigned in error and assign the value of $4,360,000 assessed by the trial court's neutral appraiser.

D. Certiorari should be granted to reverse the trial court's October 2, 2013 because the terms of the remedy imposed are not "appropriate" in accordance with South Carolina law.

STATEMENT OF THE CASE

This matter comes before the court on Petitioners Tim Roberson ("Roberson"), Rick Thoennes Sr. ("Thoennes Sr."), Rick Thoennes III ("Thoennes III"), and Warpath Development, Inc.'s ("Warpath") (collectively the "Petitioners") appeal of the lower court's October 2, 2013 order arising out of August 6, 2013 hearing on the valuation of the 20,000 shares of Warpath held by Respondent Andrew Ballard ("Ballard"). This matter has been previously on appeal with respect to the issue of liability for shareholder oppression. In a 3-2 decision the Supreme Court of South Carolina affirmed the lower court's finding and remanded the matter for further consideration of remedy. See Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012).

In furtherance of a buy-out of Ballard's 20,000 shares, the trial court appointed Dr. Perry Woodside ("Dr. Woodside") to serve as the court's business appraiser. Dr. Woodside completed his work in April 2013 and submitted his opinion to the court that Ballard's *pro rata* 20% share of Warpath Development, Inc. represented by 20,000 shares was worth $873,000. (R. pp. 601-722) In coming to this conclusion, Dr. Woodside testified that he "developed a discounted cash flow for the primary needs in determining the value of the [Warpath] stock." (R. 238, lines 4-5.) "The model that I developed reflects the agreements that [were] reached among the parties where capital was to be provided by Mr. Roberson sufficient to obtain financing. None of that has happened to this point so what I did was to look at what lending requirements generally were in April of 2012." (R. p. 238, lines 11-16.) Dr. Woodside further assumed construction of all phases of the marina project beginning by the end of 2013, a period of stabilization upon construction, long-term financing and an eventual sale of the project 8 years later. (See id. R. p. 238, line 21–p. 240, line 23; p. 256, lines 7-11.) The resulting value at the time of sale after all debts were paid was then reduced to present value leaving an overall stock value as of December

31, 2012 as $4,360,000. Taking 20% of the overall company value, Respondent's shares were then properly valued at $873,000. (R. pp. 601-722.)

After the hearing on August 6, 2013, the trial court went against the appraisal of Dr. Woodside and entered an order dated October 2, 2013 assigning a value of $3,589,297 to Respondent's 20,000 shares of stock, which is over four times the value assigned by Dr. Woodside. (October 2, 2013 Order; R. p. 22) The trial court did so by improperly assuming Respondent's interest accounted for 50%, as opposed to the 20% actually held, and improperly imposing a fictional start to construction in 2010 without any factual or legal support.[1] (R. p. 21) The court further ordered that the buyout be arbitrarily accomplished within 90-days without any inquiry into the ability of Petitioners' ability to accomplish that task and entered personal judgment for the purchase price. [Id.]

The Petitioners are appealing to this Court to be the fair, equitable and reasonable arbiter of these issues. The court's award is an improper for the reasons cited herein. Respondent is only entitled to a remedy for oppression, which may be one that permits him to remove his investment either through dissolution or buyout, or another statutorily enumerated remedy short of money exchanging hands. The law recognizes a distinct difference between fashioning a remedy for the Respondent and a *de facto* award of damages.

Equity requires consideration of all involved, including the corporation itself. It is the court's task to weigh all interests, including the survival of Warpath, the preservation of the Petitioners' interests and the Respondent's interest in receiving the fair value for his shares. The Respondent requested and the court has ordered a buyout. However, assuming a buy-out

[1] The trial court's imposition of the fictional start to construction in 2010 was vacated by the court of appeals in its August 26, 2015 opinion.

remains a reasonable and appropriate remedy; equity does not demand that the buyout be immediate. Equity demands that the value and the terms be fair and reasonable.

This matter came before the court of appeals for oral argument on May 7, 2015. In a decision entered July 15, 2015, the court of appeals altered the lower's court order to adjust the overall company value downward, but affirmed the remainder. A petition for rehearing was timely filed on July 30, 2015. On August 26, 2015 the court of appeals granted Petitioners' petition for rehearing, withdrew its July 15, 2015 opinion and entered a substitute opinion on August 26, 2015. In so doing, the court of appeals entered a new opinion, did not rule on the majority of Petitioners' petition for rehearing and modified its opinion such that Petitioners were obligated to seek rehearing of the court of appeal's August 26, 2015 opinion. That motion was timely made on September 10, 2015. On November 19, 2015, the court of appeals entered an order denying Petitioners' petition for rehearing. This court subsequently entered an order requiring that a writ of certiorari, if any, be served on or before December 9, 2015.

ARGUMENT

A. Certiorari should be granted to reverse the trial court's October 2, 2013 Order as legally deficient and fatally flawed on entry because an order of personal judgment in this matter exceeds the remedies permitted by S.C. Code § 33-14-310(d).

In this matter, the trial court's October 2, 2013 Order was legally deficient and fatally flawed on its face and on entry by ordering entry of a personal judgment against Petitioners in an amount equal to the buyout. By so ordering, the court went beyond what was statutorily permitted, ordered a remedy more drastic than dissolution, and the only legal alternative to a buyout is dissolution as the default remedy.

On appeal, the court of appeals was asked to review and reverse the trial court. In error, the court of appeals failed to address the substance of Petitioners' arguments on appeal. Instead,

in the court of appeal's August 26, 2015 opinion, the court summarily addresses Petitioners' arguments concerning the legal propriety of the court's October 3, 2013 order. The court lumped Petitioners' argument together concluding that the "gist of these arguments is that the buyout 'failed' because it was impossible for the individual Petitioners to comply with the ninety-day provision." This is an inaccurate simplification of Petitioners' claims. The trial court's order is an error at law that court of appeals improperly disposed of summarily. Certiorari should be granted in order to review Petitioners' arguments in substance and reverse the trial court.

1. The trial court's order of personal judgment against Petitioners in an amount equal to the assessed value of Respondent's 20,000 shares is an error at law and should be vacated.

On October 3, 2013, the trial court improperly entered an order stating as follows: "it is hereby ordered and decreed that defendants pay the Respondent $3,589,297 within 90 days of the date of this Order, and judgment in this amount is hereby entered for the Respondent against the defendants jointly and severally." (October 2, 2013 Order; R. p. 22) This order is legally deficient and fatally flawed at entry because the trial court unlawfully imposed a personal judgment in violation of South Carolina law in conjunction with the the buyout. Equity must follow the law. See Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375 (1938). By law, in order to remedy oppression, the court is granted the ability to either dissolve the corporation or, if an alternative remedy is "appropriate", order relief short of dissolution as set out in § 33-14-310(d). See S.C. Code § 33-14-310(e). The law does not permit a personal judgment exposing assets beyond those of the corporation or those invested in the corporation to secure a failure to complete a buyout. The October 2, 2013 order of personal judgment is legally improper and should be vacated.

The entry of a personal judgment is legally improper for these reasons:

a. First, a personal judgment is not within the enumerated remedies for oppression set forth within the South Carolina Business Corporations Act.

A claim for oppression under South Carolina law is grounded in statute, see S.C. Code Ann. §33-14-300(2)(ii), and there is no statutory provision permitting the imposition of a personal judgment to remedy oppression. The only means by which the Respondent may bring an action for "oppression" is through § 33-14-300 entitled "Grounds for judicial dissolution". By statute, dissolution is the default remedy of shareholder oppression. A party bringing a claim for "oppression" must ask the court to find grounds for dissolution. Dissolution is, however, considered a "drastic remedy" under South Carolina law. See In re Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. 2002); see also S.C. Code Ann. 33-18-430 (entitled "Extraordinary relief: dissolution"). As such, the legislature provided alternatives to dissolution in §33-14-310(d) with the caveat that the alternatives must be "appropriate". However, all of the remedies of §33-14-310(d) are short of the "drastic remedy" of dissolution.

Specific to this matter, a 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.[2]

b. Second, a personal judgment is a more drastic remedy than dissolution.

As set forth above, according to South Carolina law, dissolution is the "drastic remedy" for oppression. The South Carolina Business Corporations Act governs the creation, the existence and the end of a corporation formed pursuant to its terms. See S.C. Code Ann. §33-1-101 *et seq.* Petitioners submit that dissolution is the drastic remedy under the Act because it is a final end to the corporation. Business ceases, the assets are gathered and sold, creditors are paid and what remains is distributed to the shareholders. Once dissolved, a corporation ceases to exist. By design, when appropriate, dissolution is disfavored to allow the corporation and its remaining shareholders to continue business into the future.

However, by the very nature of the limits of liability at the core of the corporate form, the drastic remedy of dissolution at worst only exposes a shareholder's investment within the corporation to loss. Dissolution, in and of itself, does not expose a shareholder to a personal judgment to remedy oppression. If dissolution is the "drastic remedy", under no circumstance is the Respondent entitled to a remedy more "drastic" than dissolution. Petitioners would submit that the court ordered compulsion to invest over $3 million in an undeveloped, non-operating marina on 90-days' notice without any inquiry into the ability to do so accompanied by a joint and several (including the corporation itself[3]) personal judgment for the same amount that exposes assets beyond the loss of an investment in Warpath is decidedly more drastic than

[2] The time for personal judgment has passed. As the record reflects, prior to trial in 2010, Respondent had stated legal causes of action for breach of fiduciary duty and breach of contract, which, if successfully proven, would have entitled Respondent to recover damages secured by a personal judgment. The Respondent, however, chose to pursue equitable remedies for oppression pursuant to S.C. Code Ann. §33-14-300. As a result of this choice, South Carolina law does not now permit the Respondent's claim to reduce to damages and personal judgment. Damages cannot be recovered in an equitable action such as involuntary dissolution. See McLeod v. Stevens, 617 F.2d 1038 (4th Cir. 1980).

[3] As the corporation is presently encumbered with the judgment, the majority shareholders cannot even sell the stock to a party who may be inclined to further the development.

dissolution.

c. Finally, dissolution is the default remedy and should be applied.

While §33-14-310(d)(4) permits the court to "provide" for the purchase of the shares, it does not explicitly direct what happens when shares cannot be purchased. While §§33-14-300 and 310 are silent on the particulars of how to address a matter where the corporation or majority does not have the resources to further invest in the company or simply chooses not to further invest, the solution is that the court seeks another enumerated remedy or reverts to default remedies and dissolves the corporation. The minority shareholder gains their relief from further participation and their *pro rata* resulting share of the corporations assets, if any.[4] Unlike other matters where dissolution was rejected, Warpath has no income, is not developed and does not operate. Contra Hendley v. Lee, 676 F.Supp. 1317, 1324 (holding dissolution improper where the company was profitable and growing). In this case, dissolution would allow the Respondent to release his trapped investment, which, according to this court's opinion in Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (2012), is the "concern and focus in shareholder oppression cases." Ballard, 733 S.E.2d at 110.

2. The court of appeals' August 26, 2015 opinion errs in applying a law of the case analysis in addressing Petitioners' appeal of the trial court's entry of a personal judgment and should be vacated.

In its August 26, 2015, Opinion, without any consideration of substantive statutory authority, common law or equity, the court of appeals held that a personal judgment is proper in this case based on its conclusion that the May 3, 2010, trial court order set forth a "mandatory"

[4] While certainly not controlling in this matter, analogous support for Petitioners' assertion is contained within S.C. Code Ann. §33-18-420 of the Statutory Close Corporation Supplement. Section 33-18-420(b)(5) specifically provides that "if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under Section 33-18-430...." §33-18-430 further provides that "[t]he court may dissolve the corporation if it finds: (1) there are grounds for judicial dissolution under Section 33-14-300; or (2) all other relief ordered by the court under Section 33-18-410 or 33-18-420 has failed to resolve the matters in dispute."

buyout that was not appealed. While not specifically stated or supported, the court of appeals apparently bases its conclusion solely on a law of the case analysis. For the following reasons, the court's analysis is in error and should be set aside to permit full consideration of the legal issue presented above.

First, there has been no order issued at any point in time, in any court in this matter that employs the term "mandatory" when describing the buyout. The order upon which the court of appeals bases its reasoning is the trial court's May 3, 2010 Order. In pertinent part, the trial court's order provides as follows: "[T]he Court concludes that the proper equitable remedy is to provide for the purchase of Ballard's shares at their fair value by the defendants, jointly and severally, as set out in S.C. Code § 33-14-310(d)(4)." (R. p. 13.)

The law of the case doctrine only applies to lower court orders that are subject to being appealed and decided. See Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486 (2014) (holding that any issues that could have been presented in a voluntarily abandoned appeal become the law of the case.); Bone v. U.S. Food Svc, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal."). In this matter, the trial court's 2010 Order specifically refers to the order as equitable, tracks the language of S.C. Code Ann. § 33-14-310(d)(4), makes no mention of personal judgment, and makes no mention of or employs the terms "voluntary" or "mandatory". Arising from the trial court's 2010 Order there were a number of questions remaining to be determined such as adequacy, amount, would the remedy remain acceptable to the Respondent, the timing of the buyout, the structure of the buyout, economic viability, would the remedy remain equitable for all parties, and what happens if the buyout could not be completed. However, what is

unequivocally missing from the trial court's 2010 order is the notice necessary to put the Petitioners on alert in 2010 that the court would later amend and add to its order the imposition of a personal judgment creating a forced investment and exposing their assets beyond their equity in Warpath to levy and execution.

Further, the 2010 order specifically contemplates additional proceedings, additional findings and additional orders. Outside of the findings on the question of oppression, the trial court's 2010 order cannot be said to be final with respect to the remedy. In fact, the trial court's 2010 order was not final as the trial court's October 2013 order added the imposition of a personal judgment to the remedy. For all of the reasons stated herein and in prior briefing, the propriety of a court imposed personal judgment and forced investment is not the law of the case coming out of the trial court's 2010 Order.

Next, regardless of whether the terms "voluntary" or "mandatory" are employed as expressed in the court of appeal's August 26, 2015 opinion, Petitioners' 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. Even if the court adopts the court of appeals assertion that the buyout is "mandatory" (a descriptive term that has never been employed at any level prior to the court of appeal's order), the buyout must still comply with the law which, as set forth by Petitioners above, does not permit the imposition of a personal judgment. Using terms employed by the court of appeals, a "mandatory" buyout may still be enforced by dissolution, which is the statutory default.

The court of appeals applied an improper procedural analysis to an issue that should have been addressed substantively. As such, the Court of Appeals August 26, 2015 Opinion is in error, should be set aside, and, on review of this Court, the trial court's imposition of a personal

judgment should be reversed.

B. Certiorari should be granted to reverse the trial court's October 2, 2013 order for failure to value Respondent's 20,000 shares as 20% of Warpath Development, Inc.

In its October 3, 2013 Order, the trial court set a value on Respondent's 20,000 shares equal to 50% of the company. However, factually, the Respondent's 20,000 shares only represent 20% of the 100,000 shares issued by Warpath. The remaining 80,000 are divided between Petitioner Roberson who holds 40,000, Petitioner Thoennes who holds 20,000 and Petitioner Thoennes III who holds 20,000. Pending the completion of financing and development, which is ongoing, 20,000 of Roberson's, 20,000 of Thoennes and 20,000 of Thoennes III were placed into escrow. For purposes of setting the adjusted percentage, the trial court ignored/forfeited the escrowed shares. The court of appeals affirmed the trial court's error. This question is important to the shareholders of South Carolina, is an issue of first impression and needs to be addressed by this Court. For the reasons set forth below, which will be further supported in brief, the trial court's order was affirmed in error by the court of appeals and should be reversed.

First, Respondents' 20,000 shares only legally represent 20% of the corporation. Petitioners submit that it is an error at law for the court to fail 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 trial court.

Second, the only known reliable valuations of Warpath assume that Warpath is financed, constructed and operational for years into the future[5]. Dr. Woodside testified as follows: "And the basic assumption I made was I appraised this assuming the development had not taken place but was to be undertaken...". (R. p. 237:8-10.) Therefore, the values supporting the buyout number are premised directly upon the happening of the events that would trigger the release of the shares from escrow, *i.e.* finance and construction. As such, 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 dollar 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.

[5] 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 leaseholder. To date, there has been no testimony valuing Warpath in its "as is" condition. There is no evidence in the record of a value of the leasehold interest of Warpath. According to Dr. Woodside, "[t]he company has a lease with Duke and lease with the permit has value but the value is determined about what it could be used for. In an of itself does not have any value." (R. p. 237-38.) Dr. Woodside expressed in his report that the asset and market approaches were rejected. (R. p. 629.) Therefore, the only known methodology for valuing Warpath has been an income/discounted cash flow method which assumes for its purposes that in the future 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 at an accepted discount rate. (R. pp. 238-42; 631-41.) That summarizes the evidence of value in the record presented by Dr. Woodside and incorporated by Dr. Alford in his analysis, (R. pp. 274-75). The only difference between Dr. Woodside's analysis and Dr. Alford's is the discount rate employed. All other methodologies are unknown.

Any other result is improper and inequitable. The unfairness arises from the fact that on one hand the court reached a value of all 100,000 shares of Warpath as of December 31, 2012, by assuming for purposes of reaching that value that all contractual obligations of Petitioners' 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. Then, on the other hand, in assigning a value for Respondent's individual 20,000 shares[6], assumed that none of the events justifying the overall value of the company, *i.e.* funding, construction and 8 years of operation, occurred, thereby forfeiting the shares of Roberson, Thoennes and Thoennes III, in valuing Respondent's interest at 50% of the total company value. The court cannot equitably have it both ways.

Finally, the court of appeals finds justification for its conclusion in a finding that "on remand, the parties presented no evidence the individual Petitioners had taken any steps toward performing the services they promised...." This finding is without merit. In testimony included in the Record on Appeal, Mr. Roberson summarizes all of his efforts during the previous few years to finance and build the project. (R. pp. 216-221.) Further, in testimony included in the Record on Appeal, Mr. Thoennes Sr. summarizes further efforts of the Petitioners during the previous few years to finance and build the project. (R. pp. 226-31.) These efforts are further illustrated by the communications, bank submittals, offers and conditional loan offers the court reviewed in assessing value. (R. pp 462-536.) 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 make blanket statements that there is "no evidence the individual Petitioners had taken any steps toward performing the

[6] According to the law, the Stock Purchase Agreement and all testimony offered was a bargained for 20% of the total.

services they promised...." For these reasons, the court of appeals and the trial court erred in holding that Respondent's 20,000 shares should be valued at 50% of the company.

C. Certiorari should be granted to vacate the court of appeals $6,250,000 value assigned in error and assign the value of $4,360,000 assessed by the trial court's neutral appraiser.

In its August 26, 2015 Opinion, while the court of appeals properly recognized the error in the trial court's value assigned in the October 3, 2013 Order, it, nevertheless, erred in relying 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 of appeals specifically relies upon (1) Dr. Perry Woodsides' opinion that Warpath was worth $4,360,000, (2) a representation by Rick Thoennes Sr. to First Ticonderoga Bank that Warpath was worth $6,000,000,[7] (3) a conditional offer by Vinings Marine Group to contribute $4.5 million to Warpath in exchange for 70% ownership, which was adjusted to $6.43 million of 100% of the company by the court of appeals, and (4) Dr. Alford's opinion of $5,034,969 if construction began in 2013[8] which is based entirely on a complicated financing arrangement at a rate of around 11% that never made it beyond an initial qualified offer.

By law, Respondent's shares must be valued at their "fair value". In South Carolina, "fair value" means "intrinsic value," which is computed by establishing the fair market value at a fixed moment in time as an established and going business. See Metromont Materials Corp. v. Pennell, 270 S.C. 9, 19, 239 S.E.2d 753, 758 (1977). Historically, South Carolina has focused on

[7] 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."

[8] In light of the court of appeals opinion, it appears that Dr. Alford's opinion of $9,286,126 if construction began in 2010 should not be accorded any weight for the same reasons that Dr. Woodside's opinion was discarded. As held by the court of appeals, "[b]ecause Warpath did not begin financing and construction of the marina in July 2010, an appraisal based on the assumption that it did cannot be correct.").

three factors to consider in establishing "fair value": (1) net asset value, (2) market value, and (3) the earnings or investment value of the stock. See Santee Oil Co. v. Cox, 265 S.C. 270, 272-73, 217 S.E.2d 789, 791 (1975). The Santee method is substantially similar to the well-known "Delaware Block Method".

First, Petitioners would object to the value set by the court of appeals on the basis that the only qualified and reliable opinion that properly considered the factors required by Santee is that of Dr. Woodside. As reflected in the record, Dr. Woodside opined that Warpath had a value of $4,360,000. Petitioners have and continue to submit that all other opinions should be disregarded at law.

Outside of Dr. Woodside's appraisal, the court of appeal consideration of values (2), (3), and (4) invite error, confusion and fundamental unfairness into the process. A more close analysis of these "values" shows them to be an unreliable indicator of the value of Warpath. Specifically, as set forth above, value (2) is the representation of Rick Thoennes to a potential lender in an attempt to obtain funding in late 2011. There is no evidence of any specific analysis behind the value expressed. Even if considered, for these reasons, it should not be accorded significant weight.

Value (3) is conditional offer by Vinings Marine Group to contribute $4.5 million to Warpath in exchange for 70% ownership, which was adjusted to $6.43 million of 100% of the company by the court of appeals. (R. pp. 504-36.) The court of appeals viewed this as a stock purchase agreement. It is not. It is an agreement to "contribute" funds "to the Company as its initial capital contribution". In reality, none of the shareholders were going to receive any of the $4.5 million. The funds were going to be placed into the company's treasury as capital to be

used for development. For that contribution, the current shareholders were going to have to give up 70% of the company and receive no value in return.

Value (4) is Dr. Alford's opinion of value. Dr. Alford's opinion differs from Dr. Woodside's opinion in the methodology employed. Dr. Woodside employed a marina industry specific analysis. 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. (R. pp. 636-38.) Further, Dr. Woodside testified that the rate was checked and confirmed against the actual market by polling various marina entities and investors. (R. pp 241-42.) Dr. Alford stated in testimony that had he employed Dr. Woodside's methodology; he would have come to the same 22% rate. (R. pp. 290-91.) Dr. Alford, on the other hand, analyzed one financing offer, (R. at 291), and assigned an 11% rate based upon the four 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. Petitioners submit that the Conditional Loan Commitment is far from a reliable document to support the valuation. Further, 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 Dakota Holdings calculated its own interest rates. However, Petitioners would submit that the record establishes that Dakota Holdings was not offering to invest in or purchase Warpath. 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. (R. pp. 499-502.) Dakota Holdings was lending the money subject to certain conditions and expected its funds to be returned at a guaranteed rate. 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 has a guaranteed rate of return which is far different from the equity investment being evaluated in this matter. Dr. Woodside's opinion as the neutral court appointed appraiser is simply more reliable in all respects.

Second, assuming values (2), (3) and (4) above were properly considered, there is no evidence of how the court of appeals weighed the four opinions of value in reaching its value. See Santee Oil Co. 217 S.E.2d 789. Based on the $6,250,000 value, it appears that the two expert's opinions were substantially discounted or even disregarded. For instance, an average of $6,000,000 (the number cited as Rick Thoennes, Sr.'s valuation that was considered) and the $6,430,000 (the adjusted value assigned to a marina investor's offer) is approximately $6,125,000, which is below but close to the value assigned by the court of appeals. An average of the two expert's opinions would support a value of $4,697,485. By comparison, if all four values considered by the court of appeals were equally weighted then the value should be $5,456,242. Assigning a greater weight to the expert opinions would bring down the average further. Based on this analysis, the court of appeal's assignment of value appears arbitrary and inequitable. For this reason, this court should reassess value in line with the standards required by the Santee decision. Petitioners assert that such reassessment should result in only considering the $4,360,000 value established by the court's neutral appraiser.

For these reasons, Petitioners submit that the court of appeals erred in its assignment of value. Petitioners submit that Dr. Woodside's opinion, as the court-appointed appraiser, is the only proper opinion of value. For these reasons, this Court should grant certiorari to review the assessment of value in this matter.

D. Certiorari should be granted to reverse the trial court's October 2, 2013 because the terms of the remedy imposed are not "appropriate" in accordance with South Carolina law.

S.C. Code Ann §33-14-310 requires that courts determine that the structure for the remedy for oppression be "appropriate". In fashioning this order, the trial court failed in this charge on entry of its order and in its requirement as a court of equity to consider the equities due to all parties. In its Order, the lower court found that "having more time will [not] make any difference" and "a structured payment arrangement, including provisions for interest, security and remedies on default, will simply end up in further litigation." (R. pp. 21-22.) This statement in and of itself evidences the trial court's failure of its statutory obligation. By this statement, the trial court has entered a finding that more time will make no difference and the buyout will nevertheless end up in default and further litigation. As such, the trial court cannot fairly state that "90 days is a fair and reasonable period of time for the defendants to meet the terms of the buyout hereby ordered." (R. p. 21.) The internal inconsistency in the order evidences the trial court's failure to meet its statutorily required obligation to determine that the terms of its remedy were "appropriate". For example, questions that come to mind are where are the interests of Warpath Development, Inc. being considered by the court. Presumably, the trial court ordered the buyout in order to remedy the oppression, but issued an order short of dissolution in order to allow Warpath to continue to exist and operate. Given that the court reasoned that under no circumstances could the shareholders meet the buyout and more litigation would result, that leaves Warpath in perpetual limbo. Petitioner's submit that in supplying a remedy under S.C. Code Ann. §33-14-310 the court is charged by the General Assembly to consider these eventualities when fashioning its remedy. In this case, the court has clearly neglected that charge.

The court has treated this as an order for damages to be collected upon, which is improper. The court's obligations are greater. Petitioners submit that a court properly discharging its obligations under South Carolina law would engage in a full inquiry as to the entirety of the circumstances[9], fashioning an appropriate and well-reasoned remedy and maintaining jurisdiction to see that the remedy is timely completed and has the force and effect desired.

By example, Petitioners reference Hendley v. Lee, 676 F.Supp. 1317 (D.S.C. 1987). In Hendley, after a thorough court inquiry into the matter brought pursuant to former S.C. Code Ann. §33-21-155 (now S.C. Code Ann. §33-14-310), the court ordered the purchase of shares by the Respondent to occur on December 15, 1987. However, the court did not enter judgment for the shareholder, as it was improper, or rigidly adhere to a closing date. See id. ("Therefore, the sale shall occur December 15, 1987. If the Hendleys experience difficulty in obtaining financing by this date, they may apply to the court for a reasonable extension."). Recognizing the lack of certainty in such a solution, the court remained flexible, as justice obligated, and retained jurisdiction to see that its remedy was accomplished or whether it must be reevaluated. See id. at 1331-32. By doing so, the court met its obligations to fashion an "appropriate" remedy and to be the fair arbiter of the dispute.

Further, jurisdictions outside of South Carolina support similar court intervention and continued jurisdiction to properly marshal the court's order. For example, in the matter of Kaplan v. First Hartford Corporation, 671 F.Supp.2d 187 (D. Maine 2009), following a determination of oppression and valuation, the court proceeded as follows: "In this corporate

[9] This issue goes deeper than just value. Petitioners would submit that the court must examine the present state of the corporation, the ability of the corporation or the shareholders to meet its order, the resulting effect of the order on the ability of the corporation to survive, the departing shareholder's interests in a timely separation, the effect on third parties such as Duke Energy as the leaseholder, etc.

oppression case, I appointed Attorney George J. Marcus as Special Master to determine whether the corporation is financially able to purchase the oppressed shareholder's shares and under what circumstances; and, if the corporation cannot do so, whether the controlling shareholder can." Id. at 189. The Special Master determined that a 5-year structured buy-out was reasonable. Id. at 191. Similar to this matter, the Respondent in Kaplan objected to the buy-out stating that the Special Master "should have determined what is reasonably speedy from [Respondent's] point of view: "an oppressed shareholder who has had to resort to extraordinarily costly litigation over a period of [four] years." Id. Considering such assertion, the court responded as follows:

> While recognizing that Kaplan had prevailed at trial and was entitled to a remedy, I charged the Special Master with creating a remedy that recognized other interests as well. Specifically, my Order precluded any schedule so speedy as to affect adversely "the corporation's ability to . . . continue as a viable company in its business pursuits for the benefit of other shareholders." It was therefore wholly appropriate for the Special Master to consult both the Bankruptcy Code and commercial practice for guidance on standards of commercial reasonableness. He noted, for example, that it is customary for shareholders in close corporations to be bought out over time and that it is a reasonable commercial expectation that a shareholder buyout will typically be funded over "five to ten years with no security or junior security and with modest interest if any." He also considered how current economic conditions affect First Hartford's core business and First Hartford's financial condition as he assessed the schedule by which First Hartford could buy Kaplan's shares at the 2005 price, a price far above that supported by today's market. The Special Master noted that First Hartford's "operating performance . . . has been marginal and unsteady," that it has a "very thin margin of available working capital" and that it must rely on "opportunistic" liquidations and refinancings to meet its "existing obligations." I agree with his conclusion that, given its business model, First Hartford needs flexibility in meeting its existing business obligations and its obligations to Kaplan. Given current economic conditions, the Special Master found that five years would provide reasonable confidence in First Hartford's ability to perform. He quite reasonably did not speed up the buyout by assigning net sales proceeds to Kaplan because of the consequences for First Hartford's operations and because the five-year schedule is already on the speedier end of the spectrum of shareholder buyouts. I agree with the Special Master that the five-year buyout is reasonably speedy for a shareholder buyout, and I conclude that the Special Master has crafted a reasonably speedy, commercially reasonable buyout schedule.

(Id. at 192.) As the court in Kaplan recognized, and the courts of South Carolina similarly

recognize, a finding of oppression "entitled" Respondent to a remedy, but that is all. In this matter, Petitioners seek no more than a fair consideration of all interests, a reasonable inquiry into the ability to fund a buyout, and a reasonable amount of time to act. Petitioners assert that principles of equity and South Carolina law demand such engagement by the court.

In this matter, the testimony presented at trial called into question the Petitioners' inability to fund a buyout in a short time period. Both Mr. Roberson and Mr. Thoennes Sr.[10] plainly state that they did not have 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. (R. at 223-24, 231.) This testimony has been ignored. However, such testimony puts the courts on notice to engage in further inquiry and, in this matter, calls into question the equity of the buyout and creates questions as to whether such a remedy is "appropriate" under §33-14-310(e). An order providing 90 days to accumulate over $3.0 million without any inquiry into the ability of Petitioners to do so that was also accompanied by a personal judgment for an equal amount is not "appropriate" or equitable. It is punitive. A finding of oppression under §33-14-300 does not allow for such punitive action.

A buyout only makes sense as an "appropriate" remedy if it is structured in a manner that is reasonably achievable. To date, the courts have refused to take such reasonable steps. As such, the court of appeal's opinion is in error and the trial court's October 2, 2013 order must be vacated and remanded for further proceedings consistent with the statutory obligation to "provide" for the purchase of the shares if such remedy remains "appropriate." For these reasons, the Court should grant certiorari to consider this question.

Conclusion

[10] Thoennes III had, by then, declared Chapter 7 bankruptcy.

For the reasons set forth above, the court should grant Petitioner's Petition for Writ of Certiorari in order to hear and alter or reverse the decisions of the court of appeals and the trial court.

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December 9, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
From Greenville County Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Circuit Court Case No. 2008-CP-23-05739
Appeal File No.: 2015-002036

Andrew P. (Andy) Ballard, ... Respondent,

v.

Of Whom Tim Roberson, Rick Thoennes, Rick Thoennes, III,
and Warpath Development, Inc., is ..... Petitioners.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the ***PETITION FOR WRIT OF CERTIORARI and APPENDIX*** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, address as follows:

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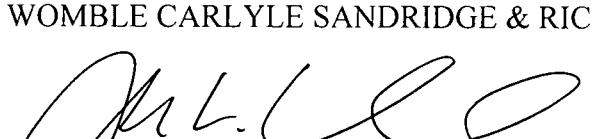
Counsel's Signature Block on Next Page

Respectfully Submitted,

WOMBLE CARLYLE SANDRIDGE & RICE LLP



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December 9, 2015