THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-002036

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

v.

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

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully submits this return in opposition to the petition by appellants for a writ of certiorari to the Court of Appeals.

This action has been pending for eight years now, and this is appellants' second appeal, having lost in the Circuit Court initially on the question of liability in 2010, again before this Court in their first appeal in 2012, again in the Circuit Court on the determination of damages in 2013, and most recently on appeal from that decision before the Court of Appeals in 2015. Thus, the petition is an attempt by appellants to get a fifth bite at the apple. Appellants are pursuing this appeal merely to buy more time in order to

postpone foreclosure against their assets, which in fact are substantial and more than enough to comply with the buyout terms ordered by the Circuit Court. Appellants have availed themselves of every procedural opportunity to prolong this litigation, and should not be allowed to continue to do so.

More fundamentally, there is no good reason for this Court to grant a writ of certiorari in this case to review the unpublished *per curiam* decision of the Court of Appeals. This appeal presents no novel question of law; there was no dissent in the Court of Appeals; there is no conflict between the Court of Appeals' decision and a decision of this Court; there are no substantial constitutional issues; and there is no federal question. In short, this appeal presents none of the "special and important reasons" for granting certiorari as set forth in Rule 242(b), SCACR. It involves the straightforward construction of clear statutory language, the application of settled principles of the law of the case doctrine to undisputed facts, and the weighing of conflicting evidence concerning the value of the corporate defendant and respondent's shares in the corporation.

Appellants have not provided any good reason that they should have another bite at the apple. The Court should deny the petition and bring this long-protracted litigation to an end.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does law of the case preclude appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, because of appellants' failure to raise this issue in their previous appeal from the

Circuit Court's 2010 Order and the Supreme Court's affirmance of this remedy in the previous appeal?

2. Does S.C. Code section 33-14-310 allow individual liability of majority shareholders for the buyout of a minority shareholder by explicitly giving the trial court the discretion to require the purchase of an oppressed minority shareholder's stock "by other shareholders"?

3. Did Judge Miller abuse his discretion in refusing to order dissolution and liquidation of the company in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits, which are the company's only significant assets?

4. Did Judge Miller abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and represented to the court on remand that they had the financial means to carry out the buyout?

5. Is the Court of Appeals' valuation of the company at $6.25 million supported by the evidence, which included appraisals ranging from $4.4 million to $20 million as well as representations by appellants to third parties that the company was worth from $6 million to $37 million?

6. Did Judge Miller and the Court of Appeals err as a matter of law by refusing to give value to shares of stock issued to appellants by the company for which appellants have never paid?

COUNTER-STATEMENT OF THE CASE

This suit was filed in 2008 by a minority shareholder against the majority shareholders and the corporation. It has been pending for eight years and has already been through one appeal to the South Carolina Supreme Court from an interlocutory, though appealable, order. It is now on appeal from the Circuit Court's final judgment, which was affirmed by the Court of Appeals in an unpublished *per curiam* opinion.

Through this action, the respondent has sought relief for oppression by the appellants and to require the escrow of shares issued by the company to the appellants for future services to the company that the appellants never provided. The present appeal challenges the valuation of the company and of respondent's ownership interest by the Circuit Court for purposes of a judicially ordered buyout of the respondent's shares by the appellants, a remedy that was decided upon in 2010 by the Circuit Court and affirmed in the 2012 decision of the Supreme Court.

The respondent, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc. ("Warpath"), and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, restaurant, marina store, and the like) on Lake Keowee in the Upstate of South Carolina, and through years of work by Mr. Ballard the company obtained a potentially perpetual lease from Duke Power Company for the land at the site of the marina. (R. p. 389, ¶ 1[1]) Warpath obtained all necessary permits to construct and develop the marina and related properties by the summer of 2010. (R. p. 188, lines 1-10)

[1] Record page numbers cited herein are to the original page numbers of the Record on Appeal, which are reproduced in the Appendix filed with the petition for certiorari.

Under a Stock Purchase Agreement dated May 29, 2007 (the "Agreement"), appellant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard for $1,000,000, and he and the other two individual appellants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. (R. pp. 369-70) Mr. Ballard retained ownership of 20,000 shares.

By October of 2007, merely five months after signing the Agreement with Mr. Ballard, the appellants began discussions among themselves of how to force Ballard out of the company, and then proceeded to try to do so.

Ballard filed suit on July 30, 2008. Following two years of discovery, Circuit Court Judge Edward Miller tried the case nonjury, and on May 4, 2010, entered an Order finding that the appellants had acted in a manner that was illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2)(ii). (R. pp. 1-14) Judge Miller ordered the appellants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d)(4) and set up a procedure for determining the value at a subsequent hearing. The 2010 Order specifically provides that the appellants' liability for buying out Mr. Ballard's shares is "joint and several" and states that "[t]his remedy is the appropriate one given the conduct of the defendants as found above." (R. p. 13, ¶ 15) Judge Miller also found that appellants had not provided the agreed upon consideration to pay for the 60,000 shares issued to them by the company, and ordered under S.C. Code § 33-6-210 that those shares be held in escrow. (R. pp. 8-9, ¶¶ 3-7)

Before the valuation hearing could be held, the appellants took an immediate appeal of the 2010 Order. In the appeal, the appellants contested the finding of

oppression and the escrow of shares, but they did not assert any error in the buyout remedy, did not take issue with Judge Miller's requirement that they be jointly and severally liable for the buyout, and did not contend that Judge Miller should have ordered dissolution of the company in lieu of the buyout. (*See* R. pp. 599-600)

In August of 2012, the South Carolina Supreme Court affirmed the 2010 Order. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The Supreme Court specifically affirmed the Circuit Court's remedy that all of the appellants, not just the company, be required to purchase Ballard's stock at fair value, and that appellants' 60,000 shares of Warpath stock be held in escrow. *Id.* at 598-99, 733 S.E.2d at 112-13. Contrary to the position that appellants seek to advance in the current appeal, the Supreme Court construed the Circuit Court's remedy as one that "ordered Appellants to purchase Ballard's stock at fair market value." *Id.* at 592, 733 S.E.2d at 109 (emphasis added). The Court then expressly held that, in lieu of dissolution under Code section 33-14-310(d)(4), "a court may instead order the corporation or other shareholders to purchase the shares of any shareholder at fair market value." *Id.* at 594, 733 S.E.2d at 110 (emphasis added). Finally, in affirming the Circuit Court, the Supreme Court stated: "We therefore affirm the circuit court's finding of oppression and its requirement that Appellants purchase Ballard's stock at fair market value." *Id.* at 597-98, 733 S.E.2d at 112 (emphasis added).

Appellants moved for reconsideration but did not challenge, or ask the Supreme Court to modify, the parts of its opinion holding that all of the appellants were ordered to buy out Ballard's shares at fair value, that a court has the discretion to order other shareholders to buy out the minority after a finding of oppression, and that the buyout

was a requirement of the Circuit Court and was affirmed. This Court denied the motion for reconsideration.

Nearly a year later, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. Mr. Ballard testified that in his opinion the company was worth approximately $20 million. (R. p. 193, lines 2-8) Respondent's appraisal expert, Furman University economist Dr. Charles Alford, appraised the total company value between $9.3 million and $12 million. (R. pp. 586-87 ("Indicated value of equity $9,268,126 [discounted 8 years, or] $12,034,969 [discounted 6 years]")) The court-appointed appraiser, Dr. Perry Woodside, set the value at either $4.4 million or $7.2 million depending on the time period over which the present value was calculated. (R. p. 242, line 13; R. p. 243, lines 10-21; *see also* R. pp. 723-24)

Notably, one of the individual appellants, Rick Thoennes Sr., admitted that he had represented to one third party that Warpath was worth $6,000,000 "in its present condition" and that it had an appraised value of $36.7 million. (R. p. 233, lines 5-13, 23-25; *see also* R. pp. 476-77) Respondent also presented evidence that appellants had told other third parties that the company was worth $28 million to $36 million. (R. pp. 194-95, 462-502)

Finally, the appellants "threw themselves on the mercy of the court" and asked Judge Miller to give them "several years" to buy out Mr. Ballard's interest. (R. p. 176, lines 19-21) This position was in direct contradiction of the representation they had made several months earlier, while the parties were attempting to schedule the valuation hearing, when appellants' counsel stated to Judge Miller and to Ballard's counsel that the

appellants had the financial means to go through with the buyout of Mr. Ballard's shares. (R. p. 177, lines 5-12; R. p. 309, lines 5-25) Discovery in the collection proceedings has verified that the appellants jointly possess assets worth more than enough to carry through with the buyout.

On October 3, 2013, Judge Miller issued an Order finding that a fair value of the company was $7,178,594. This finding was not based on any particular testimony, methodology, or expert analysis, but instead was derived from weighing all of the evidence and the parties' pre-hearing and post-hearing submissions. (R. p. 15) Judge Miller went on to hold that, because the appellants still had not provided the contractually agreed upon consideration for which they received the shares of stock held in escrow, those shares should not be counted in the valuation process. Not counting those shares, Ballard retained 20,000 of his original shares, and Roberson owned 20,000 purchased directly from Ballard in 2007. Accordingly, Judge Miller concluded that Ballard's ownership interest should be treated as 50% of the whole and ordered the appellants to purchase Ballard's shares at $3,589,297 (i.e., 50% of $7,178,594). He rejected appellants' request for a multi-year payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and the practical consideration that an extended period of structured payments would likely result in further litigation, and gave appellants 90 days to tender payment for Ballard's shares. (R. pp. 21-22) Appellants filed their second appeal from that judgment.

In January of 2014, after the 90 days for appellants to buy out Ballard's shares had passed with no attempt by appellants to satisfy the Order, respondent's counsel began efforts to execute on the judgment. Appellants moved for a stay of execution without

bond, which Judge Miller denied on March 27, 2014. (R. pp. 25-28) On April 23, 2014, after being presented with evidence suggesting that appellants were transferring large amounts of money and other assets in defraud of creditors, Judge Miller appointed a receiver to ascertain and secure the appellants' assets pending the appeal. (R. pp. 29-39, 298-364) In this Order and another entered the same day, Judge Miller specifically found that the appellants owned or controlled assets "at risk of being wasted, secreted, or diverted while the defendants' appeal is pending." (R. p. 31, ¶ 9; *accord* R. p. 42) Appellants did not appeal those orders or that finding, although the orders were immediately appealable. S.C. Code § 14-3-330(4).

On July 15, 2015, the Court of Appeals issued an unpublished *per curiam* opinion, in which the court engaged in its own weighing of the evidence, determined that $6,250,000 represented a fair value for the company, and affirmed the Circuit Court's determination that Ballard's ownership should be treated as 50% of the whole. Appellants moved for rehearing on July 30, 2015, and on August 26, the Court of Appeals granted the motion, issued a substitute opinion, and denied appellants' request for a hearing. The substitute opinion changed nothing of substance from the original opinion, but merely added some minor clarifying language.

On September 10, 2015, appellants filed a second motion for reconsideration that is virtually identical to their first motion for reconsideration. Rather than petition this Court for a writ of certiorari to review the August 26 decision of the Court of Appeals, appellants asked this Court to let them wait for the Court of Appeals to act on their second motion for reconsideration. On November 19, 2015, this Court held that the "second petition for rehearing [was] improper" but gave appellants 20 days to petition for

certiorari, which they did on December 9. Also on November 19, the Court of Appeals issued its order denying the second motion for reconsideration.

ARGUMENT

I. The law of the case doctrine bars appellants' challenge to the buyout remedy ordered in lieu of dissolution, including appellants' joint and several liability for the buyout, as this issue was decided in the Circuit Court's 2010 Order; it was not raised by appellants in their previous appeal from that Order; and the remedy was affirmed by the Supreme Court in the previous appeal.

Appellants' primary argument is that Judge Miller erred in entering a "personal judgment" against them for the buyout of Mr. Ballard's shares, and that the Judge should have dissolved the company instead. Because appellants did not raise this issue in their appeal from the Circuit Court's 2010 Order, when they could have done so, and the buyout remedy was affirmed by the Supreme Court in its 2012 decision, appellants are precluded from raising the issue now.

In his 2010 Order, Judge Miller expressly held 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 ...." (R. p. 13, ¶ 15 (emphasis added)) Joint and several liability, of course, means that each party is personally responsible for payment of the total amount due. "Thus, each liable party is individually responsible for the entire obligation." BLACK'S LAW DICTIONARY, *joint and several liability*, at 997 (9th ed. 2009).

Appellants took an immediate appeal from the 2010 Order, but at no time in that appeal did they raise any issue concerning the buyout remedy, Judge Miller's direction of appellants' joint and several liability for the buyout, or the decision to require a buyout of Ballard's shares in lieu of dissolution of the company. (*See* R. pp. 599-600) The Supreme Court construed the Circuit Court's remedy as one that "ordered Appellants to

purchase Ballard's stock at fair market value." *Id.* at 592, 733 S.E.2d at 109 (emphasis added). The Court then expressly held that, in lieu of dissolution under Code section 33-14-310(d)(4), "a court may instead order the corporation or other shareholders to purchase the shares of any shareholder at fair market value." *Id.* at 594, 733 S.E.2d at 110 (emphasis added). Finally, in affirming the Circuit Court, the Supreme Court stated: "We therefore affirm the circuit court's finding of oppression and its requirement that Appellants purchase Ballard's stock at fair market value." *Id.* at 597-98, 733 S.E.2d at 112 (emphasis added). The only issue left for remand was the determination of the amount constituting fair value.

Having failed to appeal the Circuit Court's buyout remedy in their previous appeal, appellants may not do so now. As the Supreme Court recently explained:

> "Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order. [A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal."

Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 119-20, 754 S.E.2d 486, 490 (2014) (emphasis added; citations omitted) (summarizing *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). This rule applies in the specific procedural context presented here, where one party failed to raise an issue decided by the lower court in a previous appeal but then attempts to raise the issue in a second appeal from a later order of the lower court.

> "[T]he law-of-the-case doctrine encompasses not only those issues decided on the first appeal, but also those issues decided by the trial court prior to the first appeal which were not presented for review at the first appeal. Thus, whether the prior appeal was decided correctly or not, under the law-of-the-case doctrine, the questions that were raised or could have been raised in that case ordinarily will not be reexamined on a subsequent appeal."

5 C.J.S. *Appeal and Error* § 991 (footnotes omitted); *see also Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."); *Worth v. Norton*, 56 S.C. 479, 35 S.E. 135 (1900) (question that could have been raised on a first appeal to the Supreme Court could not be raised on a second).

Because the buyout remedy and appellants' joint and several liability for it are law of the case, appellants cannot challenge this aspect of the 2013 Order in the present appeal. The Court of Appeals was correct in finding this issue foreclosed.

II. Appellants' individual liability for the buyout is clearly authorized by S.C. Code section 33-14-310, which expressly allows the court "in its discretion" to grant relief, "including, without limitation," the purchase of an oppressed minority shareholder's stock "by other shareholders."

In addition to being precluded by law of the case, appellants' contention that individual liability for the buyout of Mr. Ballard's shares is not authorized by the corporate dissolution statute, S.C. Code § 33-14-310, is flatly contradicted by the clear language and intent of the statute.

First, the statute gives the court broad discretion to "make such order or grant such relief, other than dissolution, as in its discretion, is appropriate, including, without limitation, an order [providing for certain types of relief set forth in the statute]." *Id.* § 33-14-310(d) (emphasis added). Thus, by its express terms, the statute's enumeration of certain potential forms of relief is "without limitation" to what the court may do in its discretion.

Further, in its description of potential remedies, the statute specifically includes "providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders." *Id.* § 33-14-310(d)(4) (emphasis added).

Appellants' argument that a buyout cannot be ordered or enforced against other shareholders personally, but only against the assets of the company, flies in the face of this clear statutory language, in addition to being foreclosed by the Supreme Court's holding in its 2012 opinion that a court has the power to order a buyout by other shareholders. If an order directing a buyout of a minority shareholder's stock by other shareholders could be satisfied only against the company or its assets, as appellants contend, then the statutory inclusion of the phrase "or by other shareholders" would be rendered meaningless. Under appellants' position, a court could direct other shareholders to buy out a minority owner, but then the minority owner would be powerless to enforce it. The court itself, appellants contend, may only "provide" for a buyout against other shareholders but cannot make its remedy effective against them. To state the argument is to refute it. It makes no sense to think that the General Assembly would specifically set forth a remedy in the statute but not intend for the courts to be able to enforce it.

Further, it is well established that an equitable decree requiring the payment of money may be enforced by execution, just like a money judgment for damages.

> "Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions."

S.C. Code § 15-39-30 (emphasis added). Similarly, judgment liens on real estate may be entered on the basis of "final judgments and decrees," *id.* § 15-35-810 (emphasis added), and the Uniform Enforcement of Foreign Judgments Act defines a "foreign judgment" for purposes of the act as "a judgment, decree or order of a court of the United States," *id.* § 15-35-910(1) (emphasis added). In addition to this specific statutory authority, numerous cases from the South Carolina Supreme Court and Court of Appeals (and from other

states) recognize the authority of the courts to enforce equitable decrees requiring the payment of money by execution against the assets of the obligee. *See, e.g., Finley v. Finley*, 299 S.C. 99, 100, 382 S.E.2d 890, 890 (1989); *Collins Music Co. v. IGT*, 365 S.C. 544, 550-51, 619 S.E.2d 1, 4 (Ct. App. 2005).

Code section 33-14-310 clearly authorizes the courts to require other shareholders to buy out an oppressed minority shareholder, and under Code section 15-39-30, as well as the well established statutory and case law discussed above, the remedy is enforceable by execution against their assets. There is no error in Judge Miller's judgment or the Court of Appeals' affirmance of it.

III. Judge Miller did not abuse his discretion in refusing to order dissolution in the absence of any evidence that Duke Power and Pickens County would have agreed to a judicial auction of the lease and permits (which are the only significant assets of the company), since dissolution without such agreement would wipe out the entire value of the company.

At the August 2013 valuation hearing, appellants asked the Court, for the first time, to dissolve Warpath and order a liquidation sale of its assets. Appellants now argue that dissolution would have been "less drastic" than the buyout remedy, and that Judge Miller committed reversible error by failing to order dissolution and liquidation.

As discussed above, this argument is barred by the law of the case and appellants' failure to challenge Judge Miller's decision to order a buyout in lieu of dissolution in their appeal from the 2010 Order. In addition, on the merits, their argument ignores the fact that dissolution would completely eviscerate the economic worth of the company's assets. Those assets consist entirely of the Duke Power lease and the Pickens County permits to construct the project. These assets cannot be auctioned off to the highest bidder in a liquidation sale; they are not freely assignable. Indeed, a dissolution sale without Duke Power's consent would cause the company to default under its lease (*see*

(R. pp. 395-96, sec. 29), and as a result the company's assets would become worthless. This is not equity that appellants seek, but mutual self-destruction.

Clearly, it was well within Judge Miller's discretion not to enter an order that would have wiped out the entire value of Warpath's assets. At the very least, it was incumbent on appellants to present evidence that Duke Power and Pickens County would have consented to the assignment of the lease and permits pursuant to a liquidation sale and judicial auction. Having failed to present a shred of evidence to this effect, appellants cannot now maintain that Judge Miller erred by not choosing this remedy.

IV. Judge Miller did not abuse his discretion in giving appellants 90 days to buy out respondent, when they had 3½ years to prepare for this eventuality, continued their oppression of respondent during that time, and protracted the proceedings on remand by representing that they had the financial means to go through with the buyout.

How much time the trial court should allow for a buyout in a shareholder oppression case is exactly the kind of detail that should be left to the discretion of the trial judge. Certainly, it would have been within Judge Miller's discretion to give more than 90 days to appellants had he deemed that appropriate, as the district court did in the case touted by appellants, *Kaplan v. First Hartford Corp.*, 671 F. Supp. 2d 187 (D. Me. 2009), but there is no support in that case or any other authority for the proposition that he was obligated to do so as a matter of law. Given the particular facts and history of the case at bar, it was well within Judge Miller's discretion to allow appellants 90 days for compliance with his Order (substantially more time than respondent suggested), rather than allowing them the additional "several years" that they requested. *See In re Petralia*, 267 A.D.2d 1013, 701 N.Y.S.2d 193 (N.Y. App. Div. 1999) (no abuse of discretion in trial court refusing to allow three years to complete purchase of petitioner's shares).

As Judge Miller noted in his Order, appellants had already had over six years to satisfy their contractual and fiduciary obligations to Ballard, and they had known since entry of the 2010 Order that they were facing the possibility of having to buy Ballard's remaining shares. Moreover, in the valuation hearing, appellant Roberson testified that the $1,000,000 price he paid for Ballard's 20,000 shares in 2007 was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the appellants had to have known that the buy-out price for Ballard's remaining 20,000 shares would be at least something higher than $1,000,000 (since the company now has the permits it did not have in 2007). In short, the appellants had more than enough time to prepare for the buyout. Instead of scheming to find ways to squeeze out the founder of the company, if they had merely done what they had agreed to do in the first place, or alternatively marshaled their assets so as to be ready to pay a reasonable buyout price, they would not now be in the predicament they claim to face.

Indeed, after the Circuit Court issued its 2010 Order, respondent's counsel suggested to appellants' counsel that the parties proceed with the valuation hearing so that all issues could be dealt with in one appeal. Appellants refused, and stated that they would not engage in the valuation until they had exhausted their appeal. (R. p. 21) Having done so and lost, they should not be heard to complain about not being allowed to further delay compliance with the court's judgment.

Furthermore, Ballard presented undisputed evidence at the August 2013 valuation hearing that the oppressive conduct of the appellants had continued since the 2010 trial through the present. (R. pp. 188-93) Judge Miller later made specific findings to this effect: "[T]he conduct of the defendants previously held to constitute shareholder

oppression had continued unchanged and unabated up to the time of the [valuation] hearing." (R. p. 31, ¶ 4; *accord* R. p. 41) In these circumstances, it would have been a miscarriage of justice to allow appellants to continue to string out this long-pending dispute for the "several years" more they wanted.

Their plea of poverty should be ignored because of their failure to raise this issue in a timely fashion. Not only did the appellants fail to apprise respondent or the Circuit Court that they would be unable to pay even what they agree is a fair price for Ballard's shares, but during the nine months from remand to the valuation hearing they repeatedly assured counsel and the Court that they would be able to pay Mr. Ballard when the time came. (*See* R. p. 177, lines 5-12; R. p. 309, lines 5-25) As a result of these assurances, both the respondent and the Court wasted months of time and numerous hours of preparation and court time pursuing the determination of a valuation number.

Appellants' position is particularly untenable since they presented no evidence to the Circuit Court that if they had more time they would be better able to comply with the Court's judgment. Indeed, given the nature and history of appellants' conduct toward Mr. Ballard and the complete breakdown of the parties' relations, as noted in the 2010 Order and the Supreme Court's opinion, Judge Miller correctly concluded that allowing additional time to buy out Mr. Ballard under a structured payout would likely end up in further litigation. In this regard, it is telling that, in addition to the instant action, the appellants have been sued over the past several years by numerous business partners and clients for fraud, breach of contract, and breach of fiduciary duty. *See, e.g.*, *Odom et al. v. Thoennes et al.*, 2009-CP-23-9828 (S.C. Cir. Ct. Greenville Cty.); *Stoneledge at Lake Keowee Owners Association, Inc., et al. v. IMK Development Co., LLC, et al.*, 2009-CP-

37-0652 (S.C. Cir. Ct. Oconee Cty.). Indeed, one of them has been convicted of federal felony conspiracy to commit bank fraud. *United States v. Thoennes*, No. 6:11-cr-02053-HFF-1 (D.S.C. Sept. 1, 2011). These facts, all of which are matters of public record, strongly suggest that appellants' primary objective is merely to drag out this litigation as long as possible in the hope that Mr. Ballard will be worn down and give up. The appellants did not present to Judge Miller, and have not presented to this Court, any reason to believe that they deserve more time.

This litigation has been ongoing for over eight years and it is time for it to come to an end. In these circumstances, Judge Miller acted well within his discretion in allowing the appellants 90 days to carry out the buyout.

V. Judge Miller's valuation of the company, and the Court of Appeals' slightly lower valuation of the company, are both reasonable valuations derived from weighing all of the evidence, including appraisals ranging from $4.4 million to $20 million as well as representations by appellants to third parties that the company was worth from $6 million to $37 million.

Judge Miller's Order specifically states:

> "The courts uniformly recognize that the valuation of shares in a forced buyout of stock in a closely held company is a flexible, context-specific process that should be guided by the overarching goal of reaching a result that is fair to the parties. ... 'Appraisal is not an exact science, and the precise weight to be given to any factor is necessarily a matter of judgment for the court in the light of circumstances in each case.' Based on all of the evidence presented to the Court, and considering the equities of the case, the Court concludes that, for purposes of S.C. Code section 33-14-310(d), $7,178,594 is a fair and reasonable estimate of the total economic value of the company and that it is supported by the preponderance of the evidence."

(R. p 19 (emphasis added; citations omitted) (quoting *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 124, 522 S.E.2d 357, 365 (Ct. App. 1999)).

Likewise, the Court of Appeals reviewed and weighed all of the various estimates of the company's value in reaching its valuation of $6.25 million. Thus, four good judges have now determined that the value of Warpath in 2013 was roughly $6 - $7 million, both of which are amply supported by the record evidence. There is no reason for this Court to perform yet another valuation.

In 2007, per the parties' Stock Purchase Agreement, appellant Roberson purchased 20,000 shares representing 20% of the company's ownership directly from Ballard for $1,000,000 cash. In the valuation hearing, appellant Roberson agreed that this was a fair price. (R. p. 214, lines 14-19; R. p. 215, lines 2-4) Thus, the overall value placed upon the company by all of the parties in 2007 was at least $5,000,000. (R. p. 186, line 9, to p. 187, line 25) Notably, at that time not all permits necessary for the venture to proceed had been obtained. At the time of the valuation hearing, all necessary permits were in hand, the final needed permit having been obtained in June of 2010. (R. p. 188, lines 1-10) Thus, the value of the company at the time of the 2013 hearing was clearly in excess of $5,000,000.

The Lease Agreement with Duke Power has substantial value in and of itself. The lease term goes to 2046, but is automatically renewed as long as the lessee is in compliance with the lease. (*See* R. p. 389, sec. 1) In effect, therefore, it is a perpetual lease. (R. p. 16 n.2) All necessary permitting and governmental approvals have now been secured. In light of the unique nature of the property, the fact that there is only one other marina and no hotel on Lake Keowee, and the potentially perpetual lease term, Mr. Ballard opined that a conservative value of the lease interest in the acreage itself is approximately $20 million. (R. p. 184, lines 19-22; R. p. 193, lines 2-8)

Indeed, in attempting to obtain financing for the project, the appellants themselves represented to third parties that the "appraised value" of the company's property was $36,669,050 (R. p. 476), and that the value of the company upon completion of construction would be in the range of $28 million to $37 million. (R. pp. 462-502; R. pp. 194-95, 233) Appellants also represented to a third party in 2011 that the "current value" of the company's property "in its present condition" was $6 million. (R. p. 477; R. p. 233, lines 23-25 (emphasis added)) Similarly, a third-party marina developer made an offer of $4.5 million for 70% of the company's equity in the company's current condition in 2012. (R. pp. 504, 510) This price for 70% ownership is equivalent to $6.4 million for 100%. (R. 207, lines 5-28)

Dr. Woodside determined that after eight years for construction and "ramp up," the company's net value as a whole would be $20,384,428. (R. pp. 638-39) Using a discount rate of 22.0%, Dr. Woodside's initial report discounted this figure to a present value of approximately $4.4 million, based on the assumption that financing was in hand and construction would begin sometime in 2013. (R. p. 639) In a subsequent analysis, however, Dr. Woodside opined that the present value of the company would be $7,178,594 if construction had begun in July of 2010, when the final needed permits had been obtained. (R. p. 724)

Dr. Alford did not criticize Dr. Woodside's overall approach, but opined that the discount rate used by Dr. Woodside to compute present value was too large in light of an actual offer that had been made for the company in late 2012 by a third-party private venture capital firm called Dakota Holdings. (*See* R. pp. 273-85, 729-32) Using the lower discount rate derived from the Dakota Holdings offer, Dr. Alford computed a

present value of the company of $9.3 million to $12 million. (R. pp. 586-87 ("Indicated value of equity $9,268,126 [discounted 8 years, or] $12,034,969 [discounted 6 years]"))

Thus, Judge Miller and the Court of Appeals were presented evidence supporting the following present values of the company as a whole:

- $4.4 million (Dr. Woodside's lowest figure),
- $5 million (the least value placed on the company by the parties' 2007 contract),
- $6 million (appellants' representation to a third party of the "current" value of the company "in its present condition" in 2011),
- $6.4 million (calculated from the Vinings 2012 offer for 70% equity),
- $7.2 million (Dr. Woodside's higher valuation),
- $9.3 million (Dr. Alford's lower valuation),
- $12 million (Dr. Alford's higher valuation), and
- $20 million (Andy Ballard's valuation).

Both courts weighed all of the evidence and came to valuations that they decided were reasonable in light of the record and the inherent imprecision of valuing a closely held start-up company of the nature of Warpath. Appellants have not sustained their burden to show that this Court needs to do yet another valuation.

VI. The Circuit Court did not err by refusing to give value to shares of stock owned by the appellants for which they have never paid.

The appellants acquired their ownership interests in Warpath under the 2007 Stock Purchase Agreement. Per the Agreement, defendant Roberson purchased 20,000 shares constituting 20% of the company's stock directly from Mr. Ballard for $1 million, and he and the other two individual defendants (Thoennes and Thoennes III) also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. (R. pp. 369-70)

In its 2010 Order, the Court concluded that the appellants had not performed the services they had contractually agreed to perform in return for the stock issued to them by

the company, and ordered them to place those 60,000 shares in escrow. That holding and remedy were affirmed by the Supreme Court. *Ballard v. Roberson*, 399 S.C. at 598-99, 733 S.E.2d at 112-13. Those shares remain in escrow, and it was undisputed at the 2013 valuation hearing that the appellants have still not performed the services for which they received 60,000 shares of stock from the company. Judge Miller found specifically to this effect (R. p. 17), and appellants cannot point to any evidence contradicting that finding of fact. All they have done is point to evidence that they have "tried" – but it is undisputed that they have not actually performed the services for which the stock was issued to them.

Based on that finding, Judge Miller allocated 50% of the company value to Ballard's shares, since Ballard owned 20,000 of the 40,000 shares that were not in escrow. This was not only legally correct, but was mandated by section 33-6-210(e) of the South Carolina Code. That statute dictates that "the corporation must place in escrow shares issued for a contract for future services." S.C. Code § 33-6-210(e) (emphasis added). The shares must remain in escrow until "the services are performed ... or the benefits are received." *Id.* Further, "[a]ny share dividends in respect of the shares escrowed also must be placed in escrow." *Id.* (emphasis added). If the contract for future services is not completed, the escrowed shares "may be canceled in whole or in part, and the corporation may reclaim the distributions." *Id.* (emphasis added). South Carolina's statute differs from the Model Business Corporation Act and the statutes of most other states, which provide that a "corporation may place in escrow shares issued for a contract for future services." *See, e.g.*, Model Bus. Corp. Act § 6.21(e) (emphasis added); Conn. Gen. Stat. § 33-672(e).

South Carolina's substitution of "must" for "may," and the resulting statutory mandate that shares issued in consideration for future services and any dividends issued thereon be held in escrow, shows that the General Assembly intended to prohibit the value of a shareholder's investment from being unfairly diluted through the issuance of stock to other shareholders in exchange for future services.

Accordingly, the value of Ballard's stock ownership should not be diluted by giving the appellants the benefit of counting the escrowed shares in determining Ballard's ownership percentage of the total value of the company, as this would reward the defendants for their failure to deliver the consideration they agreed to provide for those shares. *See Kreischer v. Kerrison Dry Goods Co.*, 172 F.3d 863, at *12 (4th Cir. 1999) (upholding the district court's refusal to apply a minority discount "because such an award would reward the majority stockholders for their wrongful conduct"). This is not a "forfeiture" or "penalty" as the appellants assert, but a fair and equitable conclusion that appellants should not benefit in the valuation process by counting escrowed shares for which they have never paid.

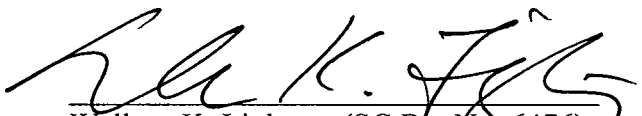
In short, South Carolina Code section 33-6-210 clearly contemplates that a shareholder whose shares were issued for future consideration should not receive any economic benefit from those shares until the consideration has been provided. As it is undisputed that the appellants have not performed the services in exchange for which their stock was issued, the 60,000 shares in escrow should not have been considered in the allocation of an ownership percentage to Ballard. It was entirely correct, therefore, for Judge Miller to allocate 50% of the total company value to Ballard's shares. To do otherwise would be to allow appellants to benefit from stock for which they have not

paid, in violation of S.C. Code section 33-6-210. The Court of Appeals was correct in affirming.

CONCLUSION

Appellants have failed to advance any good reason for this Court to grant certiorari. The Petition should therefore be denied.

Respectfully submitted,



Wallace K. Lightsey (SC Bar No. 6476)
William M. Wilson (SC Bar No. 15808)
Amos A. Workman (SC Bar No. 6231)
WYCHE, P. A.
44 E. Camperdown Way
Greenville, SC 29601
Telephone: 864-242-2800
Facsimile: 864-235-8900
E-Mail: wlightsey@wyche.com
bwilson@wyche.com
aworkman@wyche.com

Date: January 11, 2016

Attorneys for Respondent

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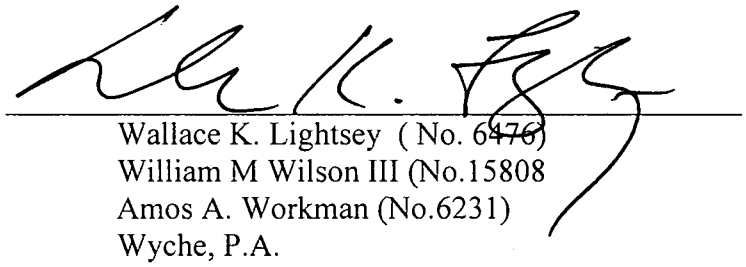
Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR A WRIT OF CERTIORARI on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

Joshua L. Howard, Esquire
Womble Carlyle Sandridge & Rice LLP
550 South Main Street, Suite 400
Greenville, SC 29601



Wallace K. Lightsey (No. 6476)
William M Wilson III (No.15808
Amos A. Workman (No.6231)
Wyche, P.A.
44 E. Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728

Date: January 11, 2016

Attorneys for Plaintiff