

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge
Case No. 2013-CP-23-002790
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 Withdrawn, Substituted and Refiled August 26, 2015)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.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioners Warpath Development, Inc., Tim Roberson, Rick Thoennes and Rick Thoennes, III hereby set forth the following replay in support of their petition for Writ of Certiorari to the Court of Appeals August 26, 2015, Opinion:

1. From the initial filing of this matter to present, the matter has carried on over a number of years; however that is no basis to avoid justice as suggested by Respondent.

Petitioners assert the trial court's October 3, 2013 is in error for the reasons set forth in this appeal. The issues presented on appeal and in which review is sought by this Petition are largely ones of first impression, involve serious errors of law (in particular, the application of the law of the case doctrine to foreclose substantive consideration of Petitioner's appeal of the application of personal judgment), and presents issues that are of utmost importance to the businesses of South Carolina. For these reasons and the reasons set forth in the Petition, a grant of certiorari and a complete, substantive review of the trial court's order by the Supreme Court is warranted.

2. With respect to Respondent's Argument I, the error remains unchanged and unrefuted. Petitioners' assignment of error to the trial court's imposition of a personal judgment in its October 3, 2013 Order was not a part of the trial court's 2010 order and not subject to being appealed from the 2010 order. The application of law of the case to dispose of that novel, but important question strains the doctrine and is grossly inequitable. Petitioners are entitled to have that issue considered substantively and not conveniently brushed aside.

3. With respect to Respondent's Argument II, without revisiting the Petition, Respondents are incorrect to suggest that SC Code Ann. § 33-14-310 permits the imposition of a personal judgment to enforce a court ordered buyout. The statute provides in full:

(d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:

(1) canceling or altering any provision contained in the articles of incorporation, or any amendment to the articles, or in the bylaws of the corporation;

(2) canceling, altering, or enjoining any act or resolution of the

corporation;

(3) directing or prohibiting any act of the corporation or of shareholders, directors, officers, or other persons party to the action; or

(4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

S.C. Code Ann. § 33-14-310(d).

The statute provides that if the court in its discretion deems dissolution inappropriate, it may, as an alternative to dissolution, issue an order of one or more, without limitation, of the four categories of enumerated remedies set forth in subsection (d)(1)-(4). In no form or fashion is a personal judgment included as an enumerated remedy and there is no “catch all” provision such as “or, any other form of relief as the court may deem appropriate” adopted. The statutory remedies short of dissolution are not open ended suggestions. They are a closed list.

This scheme makes sense for many reasons. First, the statute seeks to establish an immediate resolution to an issue among shareholders. The most immediate remedy to a conflict among shareholders is to order dissolution. However, as has been set forth in the case law, dissolution can be drastic. Therefore, the court is given some limited discretion to affix a remedy short of dissolution. However, dissolution is always available if the court’s chosen remedy of buyout should fail. While Petitioners submit it is persuasive, but acknowledge it is not controlling in this matter, this scheme of defaulting to dissolution is specifically adopted in the South Carolina Statutory Close Corporations Supplement, S.C. Code Ann. § 33-18-420(b)(5).

Second, the relief afforded to a complaining shareholder is not contemplated to be a windfall to him or a penalty to those that may remain. As this court expressed in Ballard v.

Roberson, et al., 399 S.C. 588, 733 S.E.2d 107 (2012), “[t]he concern and focus in shareholder oppression cases is that the minority “faces a trapped investment and an indefinite exclusion [from] participation in business returns.” Id. at 110. Said another way, a finding of oppression permits a trapped investment to be released. The default remedy of dissolution is means to release a trapped investment. However, equities to all parties must also be considered. Dissolution is equitable to all parties. All share equally in dissolution. The statute does not contemplate a windfall to Respondent. The statute does not contemplate a forced investment by the Petitioners. The statute does not contemplate that the Petitioners will be penalized by having their financial assets beyond those invested in Warpath be exposed to levy and execution to fund a purchase of shares.

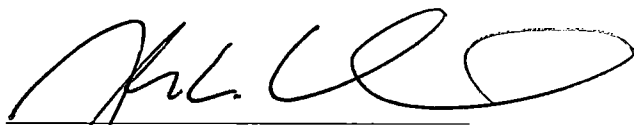
Finally, the statute does not seek to permit a remedy to linger indefinitely. Other courts and case law cited by Petitioners in the Petition and earlier briefs reached this understanding. A judgment in South Carolina is good for 10 years. During those 10 years the corporation, the shareholders, the investment, the lease, third-party interest holders, the aggrieved shareholder and the project remain in limbo. This is far from the remedies contemplated the by the statute and should be rectified by this court.

4. For the reasons set forth in the Petition, the appendix and prior briefs on appeal, incorporated herein by reference, Petitioners dispute the assertions of Sections III, IV, V and VI of Respondent’s Return. Petitioners assert that dissolution is the only legal solution to remedy a unfulfilled buyout. Petitioners assert that in fixing a 90-day buyout in the face of the undisputed evidence before it, the trial court made no effort to fashion a reasonable achievable and appropriate buyout as required by statute. The court’s valuation of Warpath unreasonably favors opinions of value that go against the expert testimony and employ

unknown and unreliable methods of valuation. The court's valuation further fails to properly weigh all opinions of value as required by South Carolina law. Finally, the courts have erred to date in failing to give value to the shares in escrow. The outstanding shares of the company as a whole are not what are ordered to be valued. It is only the 20,000 shares of Mr. Ballard that are subject to value. Those shares in escrow do and will exist after Mr. Ballard is no longer a shareholder. Mr. Ballard benefits from the overall company being valued in a manner that assumes facts that would give rise to the release of those shares from escrow. It is fundamentally unfair and inequitable for Mr. Ballard to benefit financially and receive the windfall of simultaneously receiving the benefit of the value of those shares in reaching an overall company value, but ignoring those shares in valuing the 20,000 shares by Mr. Ballard.

Conclusion

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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January 21, 2016
Greenville, South Carolina

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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 **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, address as follows:

Wallace K. Lightsey
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
864-242-8200
Attorneys for Respondent

Counsel's Signature Block on Next Page

Respectfully Submitted,

WOMBLE CARLYLE SANDRIDGE & RICE LLP

A handwritten signature in black ink, appearing to read 'J.L. Howard', written over a horizontal line.

Joshua L. Howard (SC Bar No.: 70260)
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January 21, 2016

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

**RE: Andrew P. (Andy Ballard v. Tim Roberson, Rick Thoennes,
Rick Thoennes, III, and Warpath Development, Inc.
Case No.: 2013-CP-23-002790
Appellate Case No.: 2015-002036**

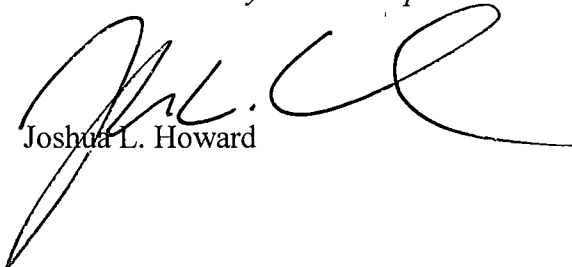
Dear Ms. Kitchings:

With regard to the above-referenced action, please find the original and seven (7) copies of a **Reply in Support of Petition for Writ of Certiorari** in the above-referenced matter. A copy of same has been on the Respondent. If you would please return a filed stamped copy to me in the self-addressed return envelope.

Should you have any questions or concerns, please do not hesitate to contact me.

With kind personal regards, I am

WOMBLE CARLYLE SANDRIDGE & RICE,
a Limited Liability Partnership


Joshua L. Howard

JLH/dps
Enclosures
cc (w/encl): Wallace K. Lightsey, Esquire



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