

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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MAR 21 2016

APPEAL FROM GREENVILLE COUNTY  
Circuit Court

SC Court of Appeals

D. Garrison Hill, Circuit Court Judge

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Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

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David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC, Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, Zoi Films, LLC, and Carolina Custom Converting, LLC, Defendants,

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

David Wilson, Steve Norvell, Neologic Distribution, Inc. and Fresh Water Systems, Inc.,

Of Whom David Wilson, Neologic Distribution, Inc. and Fresh Water Systems, Inc. are the Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Appellants.

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**APPELLANTS GANDIS AND SHIRLEY'S  
REPLY TO RESPONDENT WILSON'S RESPONSE TO PETITION FOR  
WRIT OF SUPERSEDEAS**

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Appellants John Gandis and Andrea Comeau-Shirley (“Shirley”) (*collectively* “Appellants” or “Gandis and Shirley”) file this Reply to Respondent David Wilson’s Response to their Petition for Writ of Supersedeas filed with this Court on March 9, 2016.

**I. ANALYSIS**

**A. Wilson’s Substantive Argument Ignores Central Issues on Appeal**

Wilson’s singular substantive argument in opposition of Appellants’ Petition for Writ of Supersedeas rests upon the premise that Wilson will be paid regardless of the outcome the appeal. He contends that “[t]here is no outcome in the appeals process of this case that would prevent Wilson from being paid for his interest in CCC” and “the only issues raised by Appellants on appeal only affect the value of Wilson’s interest...and the identity of the parties who will pay Wilson for his ownership interest.” (Resp. at 5). In short, Wilson’s opposition to the writ rests upon his contention that the only issues on appeal are who should pay him and how much because he will be paid for his interest in CCC regardless of the outcome. This argument ignores the most central issues on appeal, in which a favorable resolution would result in Wilson not being paid for his interest in CCC as ordered by the trial court.

On appeal Appellants challenge the trial court’s order mandating Gandis and Shirley as individuals pay Wilson \$347,863.23 for his interest in CCC (the “Trial Order”). Wilson is correct that they challenge their individual liability for the buyout and the lower court’s valuation of his interest. (Ap. Br. at 43-46). Wilson ignores that Gandis and Shirley seek reversal of the Trial Order in its entirety on multiple grounds. Favorable resolution on any of these grounds may result in Wilson not being entitled to the relief ordered.

First, Appellants seek reversal of the Trial Order's oppression finding; the holding that forms the basis for the relief ordered under S.C. Code. § 33-44-801.<sup>1</sup> Reversal of the oppression finding nullifies the relief fashioned by the trial court and in turn Wilson's entitlement to it. In a footnote, Wilson attempts to rebut the inevitable result of this Court reversing the oppression finding claiming that "even if the finding of oppression were reversed, Wilson is entitled to the purchase of his interest under South Carolina Code § 33-44-801(4)." (Resp. p. 5 fn.2). This is not correct. As noted above and in Appellant's Petition, the Trial Order's oppression finding is the basis for its ordering the buyout of Wilson's shares. (Pet. Writ p. 7-9). Without the finding of oppression the foundation upon which the equitable relief was created no longer exists.

Gandis and Shirley argue that Wilson's many inequitable acts constitute unclean hands that prevent him from receiving equity. (Ap. Br. at 47-48). Should this Court agree that Wilson's secret side dealing, theft of company property and trade secrets, destruction of evidence, litigation tactics and other acts are "unclean hands" then he is not entitled to the buyout ordered in the Trial Order. Furthermore, one of Gandis and Shirley's primary arguments on brief is that the trial court applied an incorrect legal standard and erred when the court held that Wilson did not breach his fiduciary duties to Gandis and Shirley. (Ap. Br. at 18-26). If this

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<sup>1</sup> Under section 801(4)(e) "[a] limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events...(4) on application by a member or dissociated member, upon entry of a judicial decree that: (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." S.C. Code Ann. § 33-44-801(4)(e). This Section gives the court power to dissolve a LLC under certain circumstances, and permits it to fashion equitable remedies other than dissolution, including ordering a buyout of the disgruntled member's interest when "one or more members have engaged in fraudulent or unconscionable conduct...." See S.C. Code Ann. § 33-44-801 Reporter Comments. The Trial Order found Wilson had been oppressed and utilized its equitable powers under Section 801 to fashion an equitable remedy other than dissolution - the buyout of Wilson's interest in CCC. (Trial Order at 8-12, 18). Reversal of the oppression finding strips the Trial Order of the basis upon which it ordered the purchase of Wilson's interest in CCC.

Court finds the Trial Order applied the incorrect standard for evaluating Appellants' breach of fiduciary duty claim, the equitable relief of a buyout ordered would be improper. <sup>2</sup>

Therefore, there are at least three independent grounds currently on appeal any one of which if resolved in Gandis and Shirley's favor, prevent Wilson from receiving the equitable relief ordered by the lower court. His lone substantive argument in opposition to the writ is not well taken.

**B. Issuance of the Writ is Necessary for Appellants' Protection and Will Not Harm Wilson**

A supersedeas is an extraordinary writ, which appellate courts use only when necessary to preserve the fruits of a meritorious appeal, to avoid irreparable harm, or to prevent a miscarriage of justice. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (“[T]he purpose ... of a supersedeas ... is to ... preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *quoting* 4A C.J.S. Appeal & Error § 662 at 494-95 (1957). Additionally, the court takes into consideration whether a supersedeas “is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” SCACR 241(c)(2). “An order staying proceedings pending appeal...should be made only when it appears that the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result of the appeal.” *Porter v. Lesesne*, 85 S.C. 399, 400, 67 S.E.2d 453 (1910).

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<sup>2</sup> At trial expert witness Dr. Charles Alford testified that he calculated CCC lost \$394,797 in profits due to Wilson's side dealing. (Tr. p. 834:11-22). Therefore, if Gandis and Shirley are successful on their argument that Wilson breached his fiduciary duties to them by doing side deals, the established lost profits to CCC nullifies what Wilson claims he is owed for his interest in the company (\$374,863.23). Such an outcome in fact results in a negative balance or, stated differently, leaves Wilson owing the company money.

The benefit of success on appeal for Gandis and Shirley is setting aside the extraordinary remedies created by the lower court. That would include not having to pay another member hundreds of thousands of dollars who violated his fiduciary duties by secretly side dealing, absconded with company trade secrets, and received over \$100,000 in advanced payments in preference to other members. As noted in Appellant's Petition, if they are forced to pay Wilson before this Court resolves the issues on appeal a substantial injustice and unjust burden goes unchecked. Protection is needed for the possibility that Gandis and Shirley never should have been required to purchase Wilson's interest or pay him a substantially inflated amount. Appellants have no protection such as a bond or surety posted by Wilson to guard against the risk of the Trial Order being reversed or modified. Absent the writ, success on appeal will result in Gandis and Shirley attempting to recover large quantities of money from an individual with well-known financial difficulties who never should have received it. (*See e.g.* Tr. pp. 420-21 (Wilson testified that he was worried about paying his mortgage without monthly advances and had a \$200,000 tax liability.); p. 440 (Wilson testified when he left CCC he did not have money to pay his mortgage or health insurance.); Tr. p. 365 (Wilson previously filed bankruptcy). Recognizing this very real potential risk, Gandis and Shirley have also appealed the lower court's Bond Order. In that Order the lower court held that the Trial Order directing Gandis and Shirley to buyout Wilson's interest in CCC is a "money judgment" not subject to automatic stay under S.C. Code Ann. § 18-9-130(A)(1).<sup>3</sup> Gandis and Shirley argued before the lower court and contend on appeal that the Trial Order directs the sale of property (Wilson's interest in CCC) and

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<sup>3</sup> That section states that "[a] notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment...."

is not a “judgment directing the payment of money.” As such Wilson is foreclosed from enforcing the sale of his interest in CCC without posting a bond:

A plaintiff may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed.

S.C. Code Ann. § 18-9-130(A)(2). The statute requires Wilson to post a bond or surety if this scenario is present. Alternatively, Wilson claims that no matter the disposition of the appeal, he will be paid for his interest in CCC. (Resp. p. 5). By his own argument and admission, Wilson’s ownership interest in CCC acts as security for the judgment. Therefore, he should not suffer any harm if the writ is issued.

**C. The Remainder of Wilson’s Response Contains No Substantive Grounds for Opposing the Writ**

A large part of Wilson’s Responses consists of advocacy points and statements completely unrelated to the issue of whether to issue the writ of supersedeas. Wilson attempts to influence the ultimate appeal in his Response by citing to colorful language in an effort to portray Gandis and Shirley in a negative light and taint this Court’s view of them. (Resp. at 2-3). This citation and other inflammatory statements illustrate these are “red herrings” and the lack of substantive grounds Wilson has to oppose the writ. Gandis and Shirley have responses to each of Wilson’s points, but will address them during the appeal, and not waste this Court’s time with responses to attacks at this critical juncture for a writ of supersedeas. Appellants frankly view this language contained in Wilson’s Response as an attempt to impact the ultimate disposition of the appeal. Importantly, due to the equitable action and issues on appeal the standard of review in this case is expansive and this Court will be able to view the evidence in the record and find facts according to its own view of the preponderance of the evidence. *See Ballard v. Roberson*, 399 S.C. 588,

593, 733 S.E.2d 107, 109 (2012)(Oppression action is one in equity and the appellate court may find facts according to its own view of the preponderance of the evidence.). Thus, this Court will have the opportunity to view and make its own determination as to the facts of this case when considering the issues on appeal. Wilson's use of inflammatory statements, colorful language, and other attempts to persuade has no bearing on whether the Court should issue the writ of supersedeas.

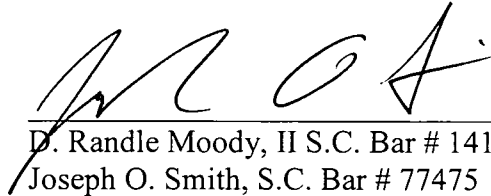
## II. CONCLUSION

A writ of supersedeas performs an important function in appeals to guard against actions that would rob Appellants of the benefit of a successful appeal or render issues moot on appeal. *See* SCACR 241, *Porter*, 85 S.C. at 400. This case presents unique issues regarding legal standards, whether oppression existed, and extraordinary equitable remedies created by a court that orders individual members of a limited liability company to buyout another member. As that member contends he has the interest regardless of the appeal and will be paid despite the outcome, the issuance of a writ of supersedeas is proper in this case. If a writ is not issued, Gandis and Shirley will lose the benefit of a successful appeal.

**(signature page to follow)**

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.

A handwritten signature in black ink, appearing to read 'D. R. Moody, II', written over a horizontal line.

D. Randle Moody, II S.C. Bar # 14135

Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

*Attorneys for Appellants John Gandis and  
Andrea Comeau-Shirley*

March 16, 2016

Greenville, South Carolina

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Of Whom David Wilson, Neologic Distribution, Inc. and Fresh Water Systems, Inc. are the Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Appellants.

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**PROOF OF SERVICE**

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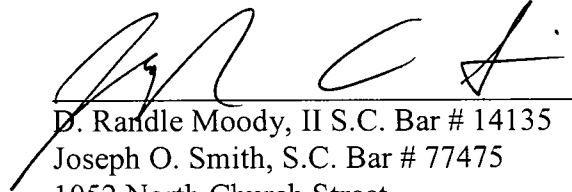
I certify that I have served Appellants Gandis and Comeau-Shirley's **Reply to Respondent Wilson's Response to Petition for Writ of Supersedeas** by depositing a copy of the same in the United States Mail, postage pre-paid, on March 16, 2016, addressed to the attorneys of record and also electronically served the document on the below-named individuals by emailing a copy of the document to the email addresses listed below:

W. Andrew Arnold, Esq.  
Jeremy Summerlin, Esq.  
712 E. Washington Street  
Greenville, South Carolina, 29601  
[aaronld@aalwfirm.com](mailto:aaronld@aalwfirm.com)  
[jsummerlin@aalawfirm.com](mailto:jsummerlin@aalawfirm.com)  
*Attorney for Respondent David Wilson*

Bruce B. Campbell, Esq.  
307 Pettigru Street  
Greenville, South Carolina 29601  
[bcampbell@hortonlawfirm.net](mailto:bcampbell@hortonlawfirm.net)  
*Attorney for Respondents Steve Norvell,  
Neologic Distribution Inc. and Fresh Water Systems, Inc.*

Burl F. Williams  
NEXSEN PRUET, LLC  
Post Office Drawer 10648  
Greenville, South Carolina 29603-0648  
[bwilliams@nexsenpruet.com](mailto:bwilliams@nexsenpruet.com)  
*Attorney for Co-Appellant, Carolina Custom Converting, LLC*

ROE CASSIDY COATES & PRICE, P.A.



D. Randle Moody, II S.C. Bar # 14135  
Joseph O. Smith, S.C. Bar # 77475  
1052 North Church Street

Greenville, South Carolina 29601  
(864) 349-2600  
(864)-349-0303 fax  
*Attorneys for Appellants, John Gandis and  
Andrea Comeau-Shirley*

Greenville, South Carolina



Roe Cassidy  
Coates & Price PA

JOSEPH O. "JOSH" SMITH  
(864) 404-3140  
JSMITH@ROECASSIDY.COM

March 16, 2016

VIA U.S. MAIL

The Hon. Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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SC Court of Appeals

**Re: David Wilson v. John Gandis**  
**Appellate Case No. 2015-000476**  
**Lower Case No. 2012-CP-23-02887**  
RCCP 2209.0002

Dear Ms. Kitchings:

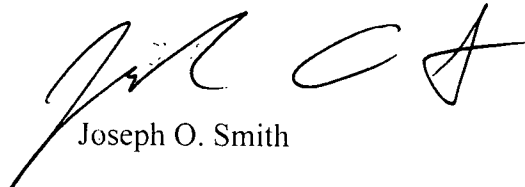
Please find enclosed for filing the original and one (1) copy Appellants' Reply to Respondent's Return to Appellants' Petition for Writ of Supersedeas in the above-referenced matter. Please return the filed copy to me in the envelope provided herein.

If you have any questions or concerns, please do not hesitate to call. Thank you for your assistance.

With kind regards, I am,

Sincerely,

ROE CASSIDY COATES & PRICE



Joseph O. Smith

Enclosures: (as stated above)

cc: W. Andrew Arnold with Enclosures  
Bruce B. Campbell with Enclosures  
Burl F. Williams with Enclosures

1052 North Church Street  
Greenville SC 29601

PO Box 10529  
Greenville SC 29603

p 864 349 2600  
f 864 349 0303