

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

RECEIVED

The Honorable Diane Schafer Goodstein, Circuit Court Judge
JUL 15 2016

SC Court of Appeals

Consolidated Cases for Trial

Case No. 2010-CP-28-00322
Case No. 2010-CP-28-00323
Appellate Case No. 2016-000626

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski Respondent,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski and Robert Puchalski, Defendants,

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina ENT, Allergy & Sleep Medicine, P.A., are the Appellants/Respondents.

**INITIAL BRIEF OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND
DR. ORVILLE DYCE IN RESPONDENTS/APPELLANTS' CROSS APPEAL**

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July 13, 2016
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS7

STANDARD OF REVIEW18

ARGUMENT19

I. AS AUTHORIZED BY SCENT’S ARTICLES OF INCORPORATION
AND TWO SOUTH CAROLINA STATUTES, THE CIRCUIT COURT
ERRED BY FAILING TO AWARD DR. DYCE ATTORNEYS’ FEES
AGAINST SCENT AND DR. PUCHALSKI, JOINTLY AND
SEVERALLY.19

II. THE CIRCUIT COURT ERRED BY NOT AWARDING DR. DYCE
DAMAGES AGAINST AMY PUCHALSKI AS RECIPIENT OF THE
FUNDS ON DR. DYCE’S CONVERSION AND CONSTRUCTIVE
TRUST CLAIMS.....24

CONCLUSION.....29

TABLE OF AUTHORITIES

Cases

<u>Austin v. Indep. Life & Acc. Ins. Co.</u> , 296 S.C. 156, 370 S.E.2d 918 (Ct. App. 1988)	25
<u>Butler Contracting, Inc. v. Court St., LLC</u> , 369 S.C. 121, 631 S.E.2d 252 (2006).....	19
<u>Chapman v. Allstate Ins. Co.</u> , 263 S.C. 565, 211 S.E.2d 876 (1975).....	18
<u>Corley v. Ott</u> , 326 S.C. 89, 485 S.E.2d 97 (1997).....	18
<u>Doe v. Clark</u> , 318 S.C. 274, 457 S.E.2d 336 (1995).....	19
<u>Dorchester County Dep't of Soc. Servs. v. Miller</u> , 324 S.C. 445, 477 S.E.2d 476 (Ct. App.1996)	19
<u>First Union Nat. Bank v. New York Life Ins. and Annuity Corp.</u> , 152 F. Supp. 2d 850 (D. Md. 2001)	26
<u>Georgia Bank & Trust Co. of Augusta v. Trenery, Jr.</u> , No. 3:08-2371-JFA, 2010 WL 3271732 (D.S.C. Aug. 18, 2010)	26
<u>Gitlitz v. Comm'r</u> , 531 U.S. 206, 214 n. 6, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001).....	20
<u>Gordon v. Pete's Auto Serv. of Denbigh, Inc.</u> , 838 F. Supp. 2d 436 (E.D. Va. 2012).....	26
<u>Green v. Waidner</u> , 284 S.C. 35, 324 S.E.2d 331 (Ct. App. 1984)	25, 27
<u>Homac Inc. v. Fort Wayne Mortgage Co.</u> , 577 F. Supp. 1065 (N.D. Ga. 1983)	26
<u>Kuznik v. Bees Ferry Associates</u> , 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000)	18
<u>Laughon v. O'Braitis</u> , 360 S.C. 520, 602 S.E.2d 108 (Ct. App.2004)	19
<u>Lollis v. Lollis</u> , 291 S.C. 525, 354 S.E.2d 559 (1987).....	19
<u>Maloof v. C.I.R.</u> , 456 F.3d 645, 647 (6 th Cir. 2006).....	20
<u>McNair v. Rainsford</u> , 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)	29
<u>Moore v. Benson</u> , 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010)	18
<u>Moore v. Weinberg</u> , 383 S.C. 583, 681 S.E.2d 875 (2009).....	25,26
<u>Mullis v. Trident Emergency Physicians</u> , 351 S.C. 503, 570 S.E.2d 549 (Ct. App. 2002)	26,27

<u>Owens v. Andrews Bank & Trust Co.,</u> 265 S.C. 490, 220 S.E.2d 116 (1975).....	27
<u>Perry v. Heirs at Law and Distributees of Gadsden,</u> 313 S.C. 296, 437 S.E.2d 174 (Ct. App. 1993)	18
<u>Richardson's Rests., Inc. v. Nat'l Bank of S.C.,</u> 304 S.C. 289, 403 S.E.2d 669 (Ct. App. 1991)	27
<u>SSI Med. Servs., Inc. v. Cox,</u> 301 S.C. 493, 392 S.E.2d 789 (S.C. 1990).....	25,26,27,28
<u>Tiger, Inc. v. Fisher Agro, Inc.,</u> 301 S.C. 229, 391 S.E.2d 538 (1989).....	19
<u>United States v. Brabham,</u> 122 F. Supp. 570 (E.D.S.C. 1954).....	26
 <u>Statutes</u>	
26 U.S.C. § 1366(a)(1).....	20
S.C. Code Ann. § 33-8-520	22,23
S.C. Code Ann. § 33-18-210.....	23
S.C. Code Ann. § 33-18-410.....	2,24
S.C. Code Ann. § 41-10-10.....	2

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BY FAILING TO AWARD DR. DYCE ATTORNEYS' FEES AGAINST SCENT AND DR. PULCHASKI, JOINTLY AND SEVERALLY?

- II. DID THE TRIAL COURT ERR BY NOT AWARDING DR. DYCE DAMAGES AGAINST AMY PUCHALSKI AS RECIPIENT OF THE FUNDS ON DR. DYCE'S CONVERSION AND CONSTRUCTIVE TRUST CLAIMS?

STATEMENT OF THE CASE

Respondents/Appellants Dr. Dyce and Jamie Curley agree entirely with the Honorable Judge Goodstein's Findings of Fact as set forth in her December 8, 2015 Order. Accordingly, the Statement of Facts section in this initial brief¹ is a verbatim recitation of the facts taken from Judge Goodstein's December 8, 2015 Order.

I. SCENT CASE

Dr. Orville Dyce ("**Dr. Dyce**"), an equal partner, shareholder and an employee of South Carolina ENT, Allergy & Sleep Medicine, P.A. ("**SCENT**"), commenced Case No. 2010-CP-28-323 (the "**SCENT Case**") on March 15, 2010 by filing the March 15, 2010 Complaint – SCENT Case in Kershaw County, South Carolina against SCENT and Robert Puchalski ("**Dr. Puchalski**"). In the March 15, 2010 Complaint – SCENT Case, Dr. Dyce sought: (i) a declaratory judgment that he was entitled to certain financial information from SCENT and Dr. Puchalski; and (ii) an accounting of all financial activities of SCENT.²

SCENT and Dr. Puchalski filed their Answers to the March 15, 2010 Complaint – SCENT Case on April 20, 2010.³ On October 5, 2010, SCENT moved to amend its Answer to add the following five counterclaims against Dr. Dyce: (1) Breach of Contract; (2) Breach of Fiduciary Duty; (3) Conspiracy; (4) Interference with Contractual Relationship; and (5) Violation of the South Carolina Unfair Trade Practices Act. SCENT's Motion was resolved by the Court allowing all parties to amend their respective pleadings. As such, Dr. Dyce filed his October 21, 2011 Amended Complaint

¹ See pages 7-18 *infra*.

² March 15, 2010 Complaint – SCENT Case.

³ SCENT Answer to March 15, 2010 Complaint & Dr. Puchalski Answer to March 15, 2010 Complaint – SCENT Case.

– SCENT Case to add the following five causes of action: (1) damages pursuant to S.C. Code Ann. § 33-18-410(a)(9); (2) Breach of 2008 Shareholders’ Agreement; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of Fiduciary Duty; and (5) damages under S.C. Payment of Wage Statute, S.C. Code Ann. § 41-10-10 *et. seq.*⁴ SCENT filed its Answer to the October 21, 2011 Amended Complaint – SCENT Case on November 8, 2011.⁵ Dr. Puchalski filed his Answer to the October 21, 2011 Amended Complaint – SCENT Case on November 14, 2011.⁶

Dr. Dyce amended his complaint for a second time on May 10, 2012 by filing the May 10, 2012 First Amended Complaint – SCENT Case to add Amy Puchalski as a defendant and to add two more causes of action, namely, conversion and constructive trust.⁷ On June 4, 2012, SCENT, Dr. Puchalski and Amy Puchalski filed their Answer to the May 10, 2012 First Amended Complaint – SCENT Case.⁸ SCENT, Dr. Puchalski and Amy Puchalski asserted the following counterclaims against Dr. Dyce: (1) Breach of Contract (2) Breach of Fiduciary Duty; (3) Civil Conspiracy; (4) Interference with Contractual Relationship; (5) Violation of the South Carolina Unfair Trade Practices Act; (6) Defamation – Libel and Slander per se; (7) payment of debt; (8) shareholder oppression; and (9) breach of contract accompanied by a fraudulent act.⁹ The Honorable DeAndrea Benjamin granted Dr. Dyce’s motion for summary judgment motion, in part,

⁴ October 21, 2011 Amended Complaint – SCENT Case.

⁵ SCENT Answer to October 21, 2011 Amended Complaint – SCENT Case.

⁶ Dr. Puchalski Answer to October 21, 2011 Amended Complaint – SCENT Case.

⁷ May 10, 2012 First Amended Complaint – SCENT Case. As noted above, Dr. Dyce had amended the March 15, 2010 Complaint – SCENT Case in October 2011. The amended complaint filed in May 2012 was styled as the “First Amended Complaint.”

⁸ Answer to May 10, 2012 First Amended Complaint – SCENT Case.

⁹ Answer to May 10, 2012 First Amended Complaint – SCENT Case.

by dismissing the Violation of the South Carolina Unfair Trade Practices Act counterclaim as a matter of law as shown in her August 2, 2012 Order – SCENT Case.¹⁰

II. SCENT Land Case

On March 15, 2010, Dr. Dyce’s wife Jamie Curley (“**Ms. Curley**”), an equal member of SCENT Land Holdings, LLC (“**SCENT Land**”) with Dr. Puchalski’s wife Amy Puchalski, commenced the related SCENT Land case bearing case number: 2010-CP-28-322 (the “**SCENT Land Case**”) by filing a complaint in Kershaw County, South Carolina against SCENT Land and Dr. Puchalski seeking (i) a declaratory judgment that she was entitled to information from SCENT Land; and (ii) an accounting of all financial activities of SCENT Land.¹¹ On April 20, 2010, Dr. Puchalski and SCENT Land each filed an Answer to the March 15, 2010 Complaint – SCENT Land Case.¹² On October 5, 2010, SCENT Land filed its Motion to Amend Answer and add Counterclaims seeking to add the following four counterclaims against Ms. Curley: (1) Breach of Fiduciary Duty; (2) Conspiracy; (3) Interference with a Contractual Relationship; and (4) Violation of South Carolina Unfair Trade Practice Act. SCENT Land’s Motion was resolved by the Court allowing all of the parties to amend their respective pleadings.

As such, Ms. Curley amended her Complaint in the SCENT Land Case as shown by the October 21, 2011 Amended Complaint – SCENT Land Case which added Amy Puchalski as a defendant and sought: (1) a judicial dissolution of SCENT Land; and, (2) judicial supervision of SCENT Land.¹³ On November 8, 2011, SCENT Land filed SCENT Land’s Answer to the October 21, 2011 Amended Complaint – SCENT Land

¹⁰ August 2, 2012 Order – SCENT Case.

¹¹ March 15, 2010 Complaint – SCENT Land Case.

¹² Dr. Puchalski Answer to March 15, 2010 Complaint – SCENT Land Case and SCENT Land Answer to March 15, 2010 Complaint – SCENT Land Case on April 20, 2010.

¹³ October 21, 2011 Amended Complaint – SCENT Land Case.

Case.¹⁴ On November 14, 2011, Dr. Puchalski and Amy Puchalski filed Dr. Puchalski and Amy Puchalski's Answer to the October 21, 2011 Amended Complaint – SCENT Land Case.¹⁵ SCENT Land asserted the following counterclaims against Ms. Curley: (1) Breach of Fiduciary Duty; (2) Civil Conspiracy; (3) Tortious Interference with Contractual Relationship; and (4) Violation of the South Carolina Unfair Trade Practices Act.

On February 24, 2012, Ms. Curley filed a Motion for Summary Judgment seeking dissolution of SCENT Land.¹⁶ The Honorable DeAndrea Benjamin granted Ms. Curley's summary judgment motion in the SCENT Land Case, in part, by dismissing the Violation of the South Carolina Unfair Trade Practices Act counterclaim as a matter of law. On April 11, 2012, Ms. Curley filed a Memorandum in Support of Summary Judgment seeking dissolution of SCENT Land.¹⁷ In her August 2, 2012 Order – SCENT Land Case,¹⁸ Judge Benjamin granted Ms. Curley's summary judgment motion to dissolve SCENT Land.

III. Case Consolidation

The SCENT and SCENT Land Cases were consolidated for trial and discovery. The cases were tried together on the following dates: November 19, 2013 – November 26, 2013; March 31, 2014 – April 2, 2014 and November 24, 2014 – November 25, 2014 (the "**Trial**"). Before the Trial commenced, SCENT, SCENT Land, Dr. Puchalski and Amy Puchalski waived their right to a jury trial. The Honorable Diane Schafer Goodstein

¹⁴ SCENT Land Answer to October 21, 2011 Amended Complaint – SCENT Land Case.

¹⁵ Dr. Puchalski and Amy Puchalski Answer to October 21, 2011 Amended Complaint – SCENT Land Case.

¹⁶ February 24, 2012 Motion for Summary Judgment – SCENT Land Case.

¹⁷ April 11, 2012 Memorandum in Support of Summary Judgment – SCENT Land Case.

¹⁸ August 2, 2012 Order – SCENT Land Case.

presided over the non-jury trial. The transcript consists of four volumes totaling 2,135 pages. Respondents/Appellants Dr. Dyce and Ms. Jamie Curley introduced 321 exhibits; Appellants/Respondents introduced 287 exhibits.

On December 8, 2015, Judge Goodstein issued judgment in favor of Dr. Dyce and Ms. Curley.¹⁹ Her December 8, 2015 Order granted Dr. Dyce and Ms. Curley the following relief:

- (i) A judgment of \$436,496.08 in favor of Dr. Dyce against Dr. Puchalski and SCENT, jointly and severally, on Dr. Dyce's breach of contract claim, accounting claim, constructive trust claim and conversion claim plus pre-judgment interest at the legal rate from December 31, 2008 until the entry of the order of judgment representing the amounts of money Dr. Puchalski and SCENT had failed to distribute to Dr. Dyce as an equal shareholder in 2008;
- (ii) Judgment finding that Mrs. Puchalski is jointly and severally liable for \$25,596.87 of the \$436,496.08 judgment on Dr. Dyce's constructive trust claim and conversion claim plus prejudgment interest at the legal rate from December 31, 2008 until entry of the order of judgment representing some of the amounts of money that SCENT and Dr. Puchalski had paid to Amy Puchalski in 2008 when such monies belong to Dr. Dye;
- (iii) Judgment of \$24,271.03 in favor of Dr. Dyce against Dr. Puchalski and SCENT, jointly and severally, on Dr. Dyce's breach of contract claim, accounting claim, constructive trust claim and conversation claim plus pre-judgment interest at the legal rate from December 31, 2009 until the

¹⁹ December 8, 2015 Order.

entry of the order of judgment representing the amounts of money Dr. Puchalski and SCENT had failed to distribute to Dr. Dyce as an equal shareholder in 2009;

- (iv) Judgment of \$1,809,472.00 in favor of Dr. Dyce against Dr. Puchalski and SCENT, jointly and severally, plus pre-judgment interest at the legal rate from July 8, 2010 until the entry of the order of judgment representing the value of Dr. Dyce's shares in SCENT at the time SCENT should have purchased Dr. Dyce's fifty (50%) percent interest in SCENT, sixty (60) days after he was terminated from SCENT;
- (v) Dismissal, with prejudice, of all counterclaims asserted by Dr. Puchalski, Mrs. Puchalski, SCENT and SCENT Land; and
- (vi) The Court ordered that SCENT Land shall be wound up and appointed Marty Ouzts as the liquidating trustee to assist the Court in winding up the business of SCENT Land.

SCENT, SCENT Land, Dr. Puchalski and Amy Puchalski filed and served Defendants' Motion to Amend December 8, 2015 Order on December 17, 2015.²⁰ They also filed and served Defendants' Objection to Appointment of Receiver the same day.²¹

Dr. Dyce and Ms. Curley served Plaintiffs' Motion to Amend December 8, 2015 Order on December 10, 2015. Respondents/Appellants do not challenge Judge Goodstein's Findings of Fact in the instant appeal; they only raise two unaddressed legal

²⁰ Defendants' Motion to Amend December 8, 2015 Order.

²¹ Defendants' Objection to Appointment of Receiver.

issues based on undisputed facts as set forth in the Statement of Issues in this Initial Brief.²²

Judge Goodstein denied all motions to reconsider and the Objection to Appointment of Receiver by her February 24, 2016 Order.²³

On March 24, 2016, SCENT, SCENT Land, Dr. Puchalski and Amy Puchalski served Defendants' Notice of Appeal, in which they appeal the judgments entered by Judge Goodstein and Judge Benjamin's prior order granting summary judgment in favor of Ms. Curley to dissolve SCENT Land.²⁴ On March 29, 2016, Dr. Dyce and Ms. Curley served Plaintiffs' Notice of Cross of Appeal.²⁵

STATEMENT OF FACTS

Jamie Curley and Dr. Orville Dyce incorporate by reference the Findings of Fact as set forth in the December 8, 2015 Order. The only issues on this appeal are legal ones. For ease of reference, the facts are recited below and taken verbatim from Pages 2 to 12 of the Court's December 8, 2015 Order.

A. At all times relevant to this dispute, SCENT was a Subchapter S corporation.

Dr. Puchalski formed SCENT in 2004²⁶ and elected for SCENT to be a Subchapter S corporation. Pursuant to its initial articles of incorporation dated October 28, 2004, SCENT was only authorized to issue a single class of shares.²⁷ SCENT's amended articles of incorporation filed June 12, 2008, similarly prohibited SCENT from

²² Plaintiffs' Motion to Amend December 8, 2015 Order.

²³ February 24, 2016 Order.

²⁴ Defendants' Notice of Appeal.

²⁵ Plaintiffs' Notice of Cross Appeal.

²⁶ SCENT was originally known as Kershaw Ear Nose and Throat.

²⁷ Plaintiffs' Exhibit 261, ¶4.

authorizing any securities which would cause the corporation to have classes of stock that vary other than by voting rights.²⁸

B. Dr. Dyce became a fifty percent (50%) shareholder in SCENT on February 1, 2008.

In 2005, Dr. Dyce joined SCENT as an employee physician. Beginning in 2007 there was a series of documents executed between SCENT, Dr. Dyce, and Dr. Puchalski. The final agreements executed by the parties were the July 16, 2008 Stock Purchase Agreement²⁹ and the July 16, 2008 Shareholder Agreement.³⁰

In March 2007, Drs. Puchalski and Dyce agreed Dr. Dyce had become a shareholder and would pay for his shares by having his profit distributions paid to Dr. Puchalski until Dr. Dyce's buy-in was complete.³¹ Dr. Puchalski's staff, under Dr. Puchalski's supervision, created a spreadsheet that kept a record of the distributions that would have been paid to Dr. Dyce as an equal shareholder, but which were instead paid to Dr. Puchalski (and/or Dr. Amy Puchalski) pursuant to the March 2007 agreement between Drs. Dyce and Puchalski, to fund Dr. Dyce's buy-in (the "**Dyce Buy-In Spreadsheet**").³² The amounts paid to Dr. Puchalski under this process consisted of (1) \$21,000 profit distributions (or sweeps) approximately every two (2) weeks totaling \$604,000 beginning in March 2007 through January 2008; (ii) additional profit distributions in July, August, September, October, November and December 2007 totaling \$586,000; and (iii) an additional profit distribution of \$178,216 in January 2008. The Dyce Buy-In Spreadsheet's file name is "DyceBuyinandupdates.xls."³³

²⁸ Plaintiffs' Exhibit 108, 110(a)(1).

²⁹ Plaintiff's Exhibit Number 9.

³⁰ Plaintiff's Exhibit Number 7.

³¹ March 31, 2014 — April 2, Tr. 8:11-10:7.

³² November 26, 2013 Tr. 297:12 287: 3.

³³ Plaintiffs' Exhibit 5.

In recognition that Dr. Dyce had become a shareholder in March 2007, SCENT's internal bookkeepers established a K-1 distribution account in SCENT's books in March 2007 to record distributions credited to Dr. Dyce but being paid to Dr. Puchalski pursuant to the March 2007 agreement between Drs. Dyce and Puchalski.³⁴ Importantly, only shareholders receive K-1 distributions in a Subchapter S corporation such as SCENT.³⁵

On or about August 31, 2007, Drs. Dyce and Puchalski executed (i) the August 31, 2007 Shareholders' Agreement³⁶; (ii) a Stock Purchase Agreement³⁷; and (iii) a Bill of Sale.³⁸ The Bill of Sale provides, in part, that Dr. Puchalski "hereby transfers and conveys unto Orville Dyce, MD. ... 50,000 shares of the capital stock in SCENT for \$50,000."

Throughout the rest of 2007 and during January of 2008, SCENT continued to distribute profits to Drs. Robert and Amy Puchalski that were due to Dr. Dyce as an equal shareholder and which payments were recorded on the Dyce Buy-In Spreadsheet and credited to Dr. Dyce as K-1 distributions.

At some point near the end of 2007 or the beginning of 2008, SCENT's outside accountant, Austin Sheheen, advised Dr. Puchalski that the mechanism by which Dr. Dyce was paying for his shareholder interest violated rules applicable to Subchapter S corporations.³⁹ Those rules required that shareholders receive distributions exactly equal to their proportionate share of ownership in the corporation.⁴⁰

³⁴ Plaintiffs' Exhibit 124.

³⁵ March 31, 2014 — April 2, Tr. 410:9-12.

³⁶ Plaintiffs' Exhibit 3.

³⁷ Plaintiffs' Exhibit 4.

³⁸ Plaintiffs' Exhibit 6.

³⁹ March 31, 2014 — April 2, Tr. 414:17-417:16.

⁴⁰ March 31, 2014 — April 2, Tr. 402:16-403:7.

As a result, Drs. Puchalski and Dyce orally agreed to undo their prior agreements and to postpone Dr. Dyce's admission as a shareholder until Dr. Dyce completed his buy-in.⁴¹ Consistent with that approach, the monies recorded in Dr. Dyce's K-1 distribution account in 2007 were zeroed out and the distributions paid to Dr. Dyce in 2007 were reported to the IRS as employee income using a Form 1099.

The actions and testimony of SCENT's outside accountant, Austin Sheheen, confirm that Dr. Dyce had completed his buy-in and became a SCENT shareholder as of February 1, 2008. SCENT and Dr. Puchalski took the position that Dr. Dyce was not yet a shareholder in 2007, therefore Mr. Sheheen directed that Dr. Dyce's 2007 SCENT K-1 distribution account be zeroed out and that his 2007 compensation be reported using a Form 1099.⁴² Under the accounting strategy recommended by Mr. Sheheen and implemented by SCENT, these actions recognized that Dr. Dyce had not yet completed his buy-in by year end 2007 and was not yet, under the parties' new oral agreement, a shareholder. Subsequently, Mr. Sheheen became aware that SCENT established a K-1 distribution account for Dr. Dyce commencing February 1, 2008. Unlike as he had done in 2007, Mr. Sheheen took no steps to alter the account established in February 2008 which showed Dr. Dyce's receiving SCENT K-1 distributions commencing in February 2008.⁴³ Mr. Sheheen testified that it would not have been proper for Dr. Dyce to receive K-1 distributions beginning in February 2008 unless he was a shareholder in SCENT at that time.⁴⁴

⁴¹ Dr. Puchalski testified that this alternate buy-in mechanism for Dr. Dyce was never written down. November 25-26, 2013 Tr. 227:18 — 229:12.

⁴² March 31 — April 2, 2014 Tr. 442:7 — 443:10. See note 23, *supra*, and accompanying text.

⁴³ Mr. Sheheen indicated in his testimony that he explained to both Drs. Dyce and Puchalski many times that if Dr. Dyce was not a shareholder the proper tax treatment would be to pay Dr. Dyce W-2 wages and withhold appropriate taxes rather than issue K-1 distributions.

⁴⁴ March 31 — April 2, 2014 Tr. 443:11 — 446:11.

Commencing February 1, 2008, SCENT began paying Dr. Dyce bi-weekly profit distributions of \$21,000. Dr. Dyce also began receiving additional profit sweeps in the same amount as those that were paid to Dr. Puchalski and/or Dr. Amy Puchalski.

Contrary to Dr. Puchalski's claim that the February-July 2008 distributions to Dr. Dyce were not reported to the IRS as shareholder K-1 distributions, SCENT's tax records establish that SCENT reported the profit distributions it paid to Dr. Dyce beginning February 1, 2008 as shareholder K-1 distributions, not employee wages.

In 2008, SCENT issued Dr. Dyce a Form W-2 reflecting that Dr. Dyce received wages from SCENT in the amount of \$300,500. A review of SCENT's payroll records reflect that all of these monies were paid to Dr. Dyce as salary. In the first twenty-six (26) weeks of 2008, he received \$10,000 every two weeks, totaling \$130,000. In the second twenty-six (26) weeks of 2008, he received \$13,000 every two weeks, totaling \$169,000. Finally, at the end of 2008, he received a \$1,500 payment.⁴⁵ The sum of these three (3) series of payments equal \$300,500.

Contrary to Dr. Puchalski's contention that the payments SCENT started paying to Dr. Dyce in February 2008, and which SCENT labelled K-1 distributions, were actually reported as W-2 wages, none of the compensation reported to have been paid to Dr. Dyce as W-2 employee wages included the profit distributions paid to him commencing February 1, 2008. Dr. Puchalski testified repeatedly that SCENT reported the monies paid to Dr. Dyce between February 1, 2008 and July 16, 2008 as W-2 employee wages.⁴⁶ As noted above, SCENT's records establish conclusively this testimony was incorrect.

⁴⁵ Plaintiffs' Exhibit 304.052.

⁴⁶ November 25-26, 2013 Tr. 204:21 — 205:2; March 31 — April 2, 2014 Tr. 22:14-22.

C. **Dr. Puchalski and Dr. Amy Puchalski took substantially more in distributions from SCENT than did Dr. Dyce after Dr. Dyce became an equal shareholder on February 2008.**

SCENT'S general ledger reflects that between February 1, 2008 and December 31, 2008 SCENT distributed \$872,992.16 more to Drs. Robert and Amy Puchalski⁴⁷ than it distributed to Dr. Dyce. The items comprising the \$872,992.16 are revealed by comparing Drs. Puchalski's and Dyce's K-1 distribution accounts maintained by SCENT, under the monthly supervision of SCENT's outside accountant, Mr. Sheheen, who testified:

Q. Under the assumptions that I've asked you to make [that Dr. Dyce became an equal shareholder on February 1, 2008] Dr. Dyce was entitled to receive the same amount of distributions as Dr. Puchalski during this period of time, was he not?

A. Yes.

Q. And if that's the case, would you agree that he has been shortchanged by the tune of \$872,992?

A. Yes, without any other circumstances.⁴⁸

Between January 1, 2009 and December 31, 2009, Drs. Robert and Amy Puchalski received \$98,542.06 more than Dr. Dyce received. This difference resulted primarily, but not exclusively, from the fact that in the summer of 2009, Dr. Dyce endorsed to Dr. Puchalski a June 2009 SCENT distribution check in the amount of \$50,000.⁴⁹ Dr. Puchalski claims that he was entitled to receive the distribution as additional compensation from Dr. Dyce for his shares.⁵⁰ It is clear that Dr. Puchalski was

⁴⁷ Although Dr. Amy Puchalski received some distributions she was at no time a member of SCENT. Dr. Robert Puchalski testified that any distributions made to Dr. Amy Puchalski were for his benefit.

⁴⁸ March 31— April 2, 2014 Tr. 408:12-18.

⁴⁹ November 19 — 22, 2013 Tr. 252:22-253:19.

⁵⁰ Dr. Puchalski asserted that he was entitled to this additional amount in order to cover taxes that Dr. Puchalski was required to pay as a result of the sale of the stock in SCENT.

not entitled to these additional funds under the agreement of the parties. However, the decision to endorse this check to Dr. Puchalski was completely within the control of Dr. Dyce. It is undisputed that Dr. Dyce freely and voluntarily endorsed the check and there is no cause of action alleged which would entitle Dr. Dyce to recoup this excess distribution from Dr. Puchalski. Therefore, the court finds that between January 1, 2009 and December 31, 2009, Dr. Pulaski received excess distribution from SCENT in the amount of \$48,542.06 (98,543.06 — 50,000.00). Therefore, Dr. Puchalski received a total of \$921,534.22 in excess distributions.

D. Dr. Dyce was terminated without cause effective May 9, 2010.

In March 2010, Dr. Puchalski terminated Dr. Dyce's employment with SCENT with the termination to become effective sixty (60) days later, on May 9, 2010. The termination followed approximately seven (7) months of escalating tension between the doctors in the practice over a number of issues.

In September 2008, Dr. Puchalski formed SCENT Land.⁵¹ However, Drs. Puchalski and Dyce who negotiated on behalf of their wives did not agree on the terms of an operating agreement for SCENT Land until September 2009 when Drs. Robert and Amy Puchalski and Ms. Curley executed the Operating Agreement of SCENT Land Holdings, LLC (the "**2009 SCENT Land Operating Agreement**").⁵² In 2009, SCENT began constructing a medical office building in Lugoff, South Carolina. During this time, Dr. Puchalski was working with the Nelson Mullins law firm to create a new shareholders agreement for SCENT that consolidated much of the decision making

⁵¹ Plaintiffs' Exhibit 17.

⁵² Plaintiffs' Exhibit 16.

authority for SCENT in Dr. Puchalski.⁵³ Dr. Puchalski testified that consolidating power in him was in SCENT's best interest. However, he conceded that Dr. Dyce did not share this view and preferred a more open and participatory decision making process. In February and early March 2010, Dr. Dyce submitted a number of requests for financial and other information to SCENT personnel.⁵⁴ In response Dr. Puchalski placed various conditions upon allowing Dr. Dyce to take possession of copies of SCENT's records. During this time period, mistrust between Drs. Dyce and Puchalski grew exponentially.

In early 2010, Dr. Puchalski wanted to have SCENT Land borrow the construction funding for the Lugoff building. Dr. Puchalski negotiated with First Palmetto Bank and obtained its agreement in February 2010 for SCENT Land to receive the loan without requiring Dr. Dyce to guarantee its repayment.⁵⁵ The bank's approval of the construction loan to SCENT Land without requiring Dr. Dyce to personally guarantee the loan remained in effect until the loan was eventually closed in May 2010.⁵⁶ Despite First Palmetto Bank having agreed to this request on February 17, 2010 in exchange for Dr. Puchalski's pledging additional collateral for the loan; on March 1, 2010 Dr. Puchalski's staff forwarded to Dr. Dyce copies of loan documents that were represented

⁵³ On January 13, 2010, Ed White, an attorney with the Nelson Mullins law firm, emailed Dr. Dyce's attorney, Bruce Armon, a draft of a new shareholder's agreement (the "January 2010 Shareholders' Agreement") (Plaintiffs' Exhibit 12). The draft January 2010 Shareholders' Agreement contained a number of significant changes in SCENT's governance. The changes included: creation of a Board of Directors (§3.2.1) with Dr. Puchalski as CEO and Chairman (Plaintiffs' Exhibit 12.036) empowering the Chairman with a substantial severance package (Plaintiffs' Exhibit 12.036), allocating to the Chairman the right to set other shareholders' compensation (§3.4.3), and the right to determine vacation schedules. The footer on the document indicates it is version 35. [The footer on the July 16, 2008 Shareholders' Agreement bears the same document number, but shows it as version 10.] (Plaintiffs' Exhibit 7.001). Upon receipt of the draft January 2010 Shareholders' Agreement, Dr. Dyce was shocked and asked to see the prior versions. He was never provided the other versions. (November 19-22, 2013 Tr. 261:11-263:4.) Dr. Dyce also requested these drafts in discovery. They were never provided.

⁵⁴ Defendants' Exhibit 40.

⁵⁵ Defendants' Exhibit 37.

⁵⁶ March 31 — April 2, 2014 Tr. 137:10-144:17-18.

to be necessary for the loan closing.⁵⁷ The forwarded documents included a personal guaranty from Dr. Dyce even though First Palmetto Bank had agreed that Dr. Dyce did not need to guarantee the loan.⁵⁸ Dr. Puchalski followed up on March 2, 2010 with his email to Ms. Curley representing to her that a mechanic's lien had been filed against the project and that it was critical that she and Dr. Dyce sign the documents.⁵⁹

When Dr. Dyce received the draft loan documents, he emailed Dr. Puchalski reiterating his request for financial and other information, including, among other documents, a copy of a budget for the project and a proposed closing statement.⁶⁰ In his email, Dr. Dyce stated,

You apparently forgot to tell me in all of your email correspondence that the Bank wants my personal guaranty. I am not prepared to provide it at the present time.

Dr. Puchalski responded,

I did indeed discuss this with you. This is just like the Hartsville deal. It is my understanding that you have personal guarantees on the Hartsville property and the Columbia land currently. If you recall, this is why the bank requested your personal tax returns.

Dr. Puchalski's representation that a mechanic's lien had been filed against the project was incorrect. Dr. Puchalski's representation that Dr. Dyce needed to sign the personal guaranty was also false. When Dr. Dyce did not attend a loan closing which Dr. Puchalski had scheduled for March 3, 2010, Dr. Puchalski prepared the March 3

⁵⁷ Plaintiffs' Exhibit 301. The records subpoenaed from First Palmetto Bank contained only one loan approval memo for the loan. The loan approval memo stated First Palmetto was not requiring Dr. Dyce's guaranty.

⁵⁸ Dr. Puchalski included this personal guarantee in order to avoid providing additional collateral for the loan. Although First Palmetto did not require Dr. Dyce's personal guarantee they did require additional collateral from Dr. Puchalski.

⁵⁹ Defendants' Exhibit 43. The loan was not closed until approximately sixty (60) days later though Dr. Puchalski represented that the closing was critical.

⁶⁰ Plaintiffs' Exhibit 18.

“consent” terminating Dr. Dyce without cause.⁶¹ However, Dr. Puchalski did not immediately make Dr. Dyce aware that this March 3 “consent” had been prepared.

On March 5, 2010, Dr. Dyce forwarded Dr. Puchalski an email listing the SCENT documents that he had requested, but which had not been provided.⁶² On March 10, 2010, Dr. Puchalski delivered the March 3 “consent” to Dr. Dyce, and declared Dr. Dyce’s employment had been terminated without cause to be effective in sixty (60) days.

On March 30, 2010, Dr. Puchalski issued a “management directive” that included a demand that Dr. Dyce “comply with [his] obligations under this directive as well as the provisions of the [July 16, 2008] Shareholders’ Agreement and [the June 1, 2008] Employment Agreement.”⁶³ The “management directive” ordered Dr. Dyce to cooperate in recruiting a new physician, not to disparage the Group, to refrain from soliciting patients and requested that Dr. Dyce advise where he intended to practice after May 9. Dr. Puchalski did not submit the “management directive” for a vote to SCENT’s shareholders.

On May 8, 2010, the day before Dr. Dyce’s last day as a SCENT employee under the March 3 “consent” terminating Dr. Dyce *without cause*, Dr. Puchalski issued the May 8 “consent” purporting to terminate Dr. Dyce for cause, citing as the sole reason, “Dr. Dyce shared numerous pieces of information regarding a proposed contract to other non-shareholder physicians of SCENT to further his own personal position.” Dr. Puchalski did not submit the May 8 “consent” to a vote of SCENT’s shareholders. All of these allegations revolved around the alleged communications between Dr. Dyce and Dr.

⁶¹ This “Consent” was never consented to by Dr. Dyce. This was a mechanism in the operating agreement of SCENT that allowed the members of the corporation to act without holding a formal meeting.

⁶² Defendants’ Exhibit 40.

⁶³ Plaintiffs’ Exhibit 22.

Gunnlauggson which Dr. Puchalski alleges were held to conspire to the detriment of SCENT.

Dr. Dyce did not participate in Dr. Gunnlauggson's setting up or conducting of Dr. Gunnlauggson's medical practice upon his departure from his employment with SCENT.

Dr. Dyce did not practice medicine from the date he left SCENT on May 9, 2010 until October 18, 2010. There is no evidence Dr. Dyce solicited any patients prior to October 18, 2010. There is no evidence that Dr. Dyce maintained malpractice insurance during this time. There is no evidence Dr. Dyce disparaged SCENT at any time. Having not received payment for his stock in SCENT, on October 18, 2010, Dr. Dyce began working for Carolina Pines where he works today.⁶⁴

Under Section 4.6.1 of the July 16, 2008 Shareholder Agreement, SCENT was obligated to commence purchasing Dr. Dyce's shares within sixty (60) days of the effective date of Dr. Dyce's termination, July 8, 2010. At no time has SCENT offered Dr. Dyce anything for his SCENT shares.

I find that there were a total of two shareholders in SCENT at the time of the end of Dr. Dyce's employment with SCENT. I further find that Dr. Dyce was terminated without cause on May 9, 2010. As a result of that termination, SCENT or the remaining shareholder(s) were required to purchase Dr. Dyce's shares according to the formula set out in the Shareholder's Agreement section 4.5⁶⁵ and 4.6.1.⁶⁶

The following undisputed facts were not included in the December 8, 2015 Findings of Facts section issued by Judge Goodstein: (1) Judge Benjamin dissolved

⁶⁴ Plaintiffs' Exhibit 0080.001.

⁶⁵ Plaintiffs' Exhibit 0007.016.

⁶⁶ Plaintiffs' Exhibit 0007.017.

SCENT Land per her August 2, 2012 Order Dissolving SCENT Land; and (2) SCENT's Articles of Incorporation provided a right for attorney's fees and costs to Dr. Dyce.

STANDARD OF REVIEW

"A case with legal and equitable issues presents a divided scope of review." Kuznik v. Bees Ferry Associates, 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000) (citing Perry v. Heirs at Law and Distributees of Gadsden, 313 S.C. 296, 437 S.E.2d 174 (Ct.App.1993)). "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Moore v. Benson, 390 S.C. 153, 160, 162 700 S.E.2d 273, 277 (Ct. App. 2010) (citing Corley v. Ott, 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997)).

In the instant case, Judge Goodstein found in favor of Dr. Dyce on his breach of contract claim, his accounting claim, his constructive trust claim and his conversion claim. The breach of contract and conversion claims are actions at law. Kuznik, 342 S.C. at 589, 538 S.E.2d at 20 ("an action seeking damages for breach of contract is also an action at law and the trial judge's findings of fact will be upheld unless without support"); Moore, 390 S.C. at 162, 700 S.E.2d at 278 ("an action for conversion is an action at law").

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Id. at 590, 538 S.E.2d at 20. "The rule is the same whether the judge's findings are made with or without, a reference." Id. "The judge's findings are equivalent to a jury's findings in a law action." Id. (citing Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975)). Under this standard, the Court should not set aside the trial court's factual determinations unless they are "wholly

unsupported by the evidence” or were “influenced or controlled by an error of law.” Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 127, 631 S.E.2d 252, 255-56 (2006).

Accounting and constructive trust causes of action are equitable claims. Laughon v. O'Braitis, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct.App.2004) (holding “a partition action, as well as an action for accounting, is an action in equity.”); Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) (holding that an action to declare a constructive trust is in equity).

In an appeal from an equitable action, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Laughon, 360 S.C. at 524, 602 S.E.2d at 110 (citing Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995)). However, this scope of review does not require that the Court disregard the trial court’s findings on equitable causes of action, as that judge is “in a better position” to weigh credibility and assess the testimony. Id. (citing Dorchester County Dep’t of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct.App.1996); Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)). Additionally, the appellant bears the burden of demonstrating an error in the trial court’s factual findings. Dorchester County DSS, 324 S.C. at 452, 477 S.E.2d at 480.

ARGUMENT

I. AS AUTHORIZED BY SCENT’S ARTICLES OF INCORPORATION AND TWO SOUTH CAROLINA STATUTES, THE CIRCUIT COURT ERRED BY FAILING TO AWARD DR. DYCE ATTORNEYS’ FEES AGAINST SCENT AND DR. PUCHALSKI, JOINTLY AND SEVERALLY.

As stated in the Statement of Facts section of this initial brief, SCENT is a statutory close corporation, and Dr. Puchalski elected for SCENT to be a Subchapter S

Corporation. The “S” election status presents many advantages to shareholders for various reasons. “[U]nlike a traditional C corporation, S corporations themselves generally do not pay taxes.” Malooof v. C.I.R., 456 F.3d 645, 647 (6th Cir. 2006) (quoting Gitlitz v. Comm’r, 531 U.S. 206, 214 n. 6, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001) (“The very purpose of Subchapter S is to tax at the shareholder level, not the corporate level. Income is determined at the S corporation level ... not in order to tax the corporation ... but solely to pass through to the S corporation’s shareholders the corporation’s income.”)). “Each shareholder of an S corporation thus pays taxes at individual rates on the pro rata share of the corporation’s income (if there is any) and receives the pro rata tax benefits (e.g., losses, deductions and credits) of the corporation.” Id. (citing 26 U.S.C. § 1366(a)(1)). In other words, the S election allows for only one level of taxation, at the shareholder level, rather than two levels of taxation, at both the corporation and shareholder level.

In order for a corporation to maintain its status as an “S Corporation,” distributions to its shareholders must be made equally. As such, SCENT should have made equal distributions to Drs. Dyce and Puchalski, however, it did not. Failure to make equal distributions creates two classes of stock, namely, one entitled to distributions and one not. Creation of two classes of stock expressly violates the rules applicable to Subchapter S corporations and is expressly prohibited by SCENT’s Articles of Incorporation, which provide, in part, that “[t]he corporation is authorized to issue a single class of shares of stock.”⁶⁷

Dr. Dyce in the SCENT Case, among other things, sought to recover his equal share of distributions from SCENT, which not only benefited him, but significantly, his

⁶⁷ Plaintiffs Trial Exhibit 108.001

action benefitted SCENT and Dr. Puchalski by maintaining SCENT's status as an S corporation. If Dr. Dyce did not seek to remedy the wrong committed by SCENT and Dr. Puchalski, namely, failing to make equal distributions to Drs. Dyce and Puchalski, SCENT will lose its S election status.⁶⁸ Accordingly, Dr. Dyce is contractually and statutorily entitled to an award of his attorneys' fees and expenses as shown below.

First, SCENT's Articles of Incorporation provide for a contractual award of attorneys' fees to Dr. Dyce. Paragraph 10(f) states:

Indemnification. The corporation shall, to the fullest extent permitted by applicable law, indemnify, hold harmless and advance expenses to the shareholders...to the extent the shareholders...were or are a party or are threatened to be made a party to or are otherwise involved in the any threatened, pending or completed action, suit or other proceeding, whether civil, criminal, administrative or investigative and whether formal or informal, by reason of the fact that...the shareholders...are or were managing the business and affairs of the corporation in place of a board of directors against all expenses (including attorneys' fees), liabilities, losses, judgments, fines, amounts paid in settlement or other similar costs actually and reasonably incurred in connection with such action, suit or proceeding.⁶⁹

Dr. Dyce brought this action to compel SCENT to conduct its affairs in accordance with its obligations under applicable South Carolina law and in order to preserve SCENT's status as a "S corporation." Dr. Dyce's initial complaint, the March 15, 2010 Complaint – SCENT Case, contained two causes of action, one requesting the production of corporate records to which Dr. Dyce was entitled as a director and the second seeking an accounting, both to determine whether SCENT was being properly managed. This complaint made clear that the information sought was to determine

⁶⁸ Technically, SCENT is currently in danger of losing its S election status since Dr. Puchalski and SCENT have not paid Dr. Dyce the monies he is entitled to pursuant to the December 8, 2015 Order.

⁶⁹ Plaintiffs' Trial Exhibit 108.003.

whether Dr. Puchalski “has, and continues, to mismanage corporate affairs.”⁷⁰ As noted above, Dyce proved at trial that, as Dr. Dyce alleged in his original complaint, Dr. Puchalski had mismanaged SCENT’s affairs.

As previously stated, in order for SCENT to maintain its “S” election status, distributions should have been made equally. Dr. Dyce’s actions benefit the corporation by ensuring SCENT was properly managed so that it would not lose its status as a “S corporation.” As noted above, the trial court rejected Dr. Puchalski’s repeated assertions that any payments made to Dyce before July 2008 were W-2 wages. Whether that testimony was true bore on the question of when Dr. Dyce became a 50% shareholder and therefore a de facto director of SCENT as a South Carolina statutory close corporation.⁷¹ The trial proved Dr. Puchalski had wrongly characterized distributions paid in 2008 and 2009 as W-2 wages, wrongly stating when Dr. Dyce became a shareholder and wrongly distributed more monies to himself (and his wife) than to Dr. Dyce, whose entitlement to equal distributions was because of his position as a 50% owner and director.

Under the very broad indemnification provision in SCENT’s Articles of Incorporation Dr. Dyce is entitled to be indemnified for the attorneys’ fees and expenses incurred in that effort.

Alternatively, South Carolina Business Corporations Act, S.C. Code Ann. § 33-8-520, entitled Mandatory Indemnification, provides as follows:

⁷⁰ See ¶32, March 15, 2010 Complaint – SCENT Case. Paragraph 10 of the original complaint noted that Article III, Section 3.4.4 of the Shareholder’s Agreement charged Dr. Puchalski, “as the President and Managing Shareholder of SCENT, with, among other things, supervising and controlling all of the business affairs of SCENT.” As noted below, SCENT, as a South Carolina statutory close corporation, had elected to operate without a board of directors.

⁷¹ See discussion at page 23, *infra*.

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

As a statutory close corporation, SCENT chose to eliminate any need for a board of directors in its Articles of Incorporation, as amended. Dr. Dyce, as one of SCENT's equal shareholders, was equally responsible for the management of SCENT's affairs and assumed the responsibility that would have been imposed on a board of directors. S.C. Code Ann. § 33-18-210, Cmts ("The shareholders of a statutory close corporation operating without a board of directors have the legal liability imposed by law on directors for managing the business and affairs of the corporation."). Since SCENT had elected to operate without a board of directors, it is clear that Dr. Dyce had pursued this action from the outset in order to address Dr. Puchalski's management of SCENT, thereby squarely falling within the indemnification provision of SCENT's Articles of Incorporation. Dr. Dyce was successful in this lawsuit and is therefore entitled to recover his attorneys' fees incurred in that effort.

The Official Comments to S.C. Code Ann. § 33-8-520 made clear that Dr. Dyce has been "wholly successful" in the instant litigation. "The basic standard for mandatory indemnification under this statute is "that the director has been 'wholly successful on the merits or otherwise.' A defendant is 'wholly successful' only if the entire proceeding is disposed of on a basis which involves a finding of nonliability." In the SCENT Case, Judge Goodstein granted Dr. Dyce judgment in the amounts of \$436,496.08 and \$24,271.03, plus prejudgment interest on his claims for breach of contract and accounting claims as a result of SCENT's failure to make proper distributions in 2008 and 2009

respectively. Judge Goodstein also dismissed with prejudice all of SCENT's and Dr. Puchalski's counterclaims against Dr. Dyce including, without limitation, (1) Breach of Contract (2) Breach of Fiduciary Duty; (3) Civil Conspiracy; (4) Interference with Contractual Relationship; (5) shareholder oppression; and (6) breach of contract accompanied by a fraudulent act. Clearly, Dr. Dyce was "wholly successful" in this litigation and is entitled to an award of attorneys' fees.

Lastly and alternatively, South Carolina's Statutory Close Corporation Supplement provides additional legal support for the grant of attorneys' fees to Dr. Dyce. That statute provides that "[i]f a court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding." S.C. Code Ann. § 33-18-410. The Findings of Fact as set forth in the Court's Order provide ample evidence that Dr. Puchalski did not act in good faith which further entitles Dr. Dyce to an award of attorneys' fees and costs.

In summary, the circuit court erred by failing to award Dr. Dyce attorneys' fees. Dr. Dyce is entitled to such fees under SCENT's own corporate documents and under South Carolina statutory law. Therefore, this Court should remand the case to the circuit court to determine the amount of attorneys' fees Dr. Dyce is entitled.

II. THE CIRCUIT COURT ERRED BY NOT AWARDING DR. DYCE DAMAGES AGAINST AMY PUCHALSKI AS RECIPIENT OF THE FUNDS ON DR. DYCE'S CONVERSION AND CONSTRUCTIVE TRUST CLAIMS.

- A. To the extent Dr. Puchalski is liable to reimburse Dr. Dyce for funds wrongfully distributed in 2008 and 2009, Mrs. Puchalski, as recipient of the funds, is also liable to the extent that she received monies from SCENT for the benefit of her husband and for which she provided no consideration whatsoever.**

Mrs. Puchalski, who was never a SCENT shareholder or employee, received over \$2 million in distributions from SCENT that were ostensibly distributions she received for the benefit of Dr. Puchalski beginning May 8, 2007 and continuing through August 19, 2009.⁷² These distributions were made by SCENT from February 1, 2008 through August 2009, a time when Dr. Dyce was a SCENT shareholder entitled to receive distributions equal to those paid to Dr. and Mrs. Puchalski⁷³ but was being underpaid by a substantial amount as determined by Judge Goodstein. Because Mrs. Puchalski received and exercised ownership over monies in the form of SCENT distributions that rightfully belonged to Dr. Dyce during this time period, Mrs. Puchalski, as well as SCENT and Dr. Puchalski, is liable to Dr. Dyce for conversion.⁷⁴

“Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009) (citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (S.C. 1990)). Notably, a plaintiff need not show fraud or intentional wrongdoing to prevail on a conversion claim. See Green v. Waidner, 284 S.C. 35, 37-38, 324 S.E.2d 331, 333 (S.C. Ct. App. 1984) (discussing the measure of damages where “property is converted by mistake or under a bona fide belief or right (as in the case of an innocent purchaser for value)”); Austin v. Indep. Life & Acc. Ins. Co., 296 S.C. 156, 162, 370 S.E.2d 918, 922

⁷² Although not mentioned in the December 8, 2015 Order, it is undisputed that Amy Puchalski received in total \$2,308,128.95 from SCENT from May 2007 through August 2009. Plaintiffs’ Exhibit 296.10 reflects these payments.

⁷³ As stated above, Mrs. Puchalski was not entitled to receive any SCENT distributions.

⁷⁴ See Footnote 47, 71, 72 *supra*, and page 12, *supra*

(S.C. Ct. App. 1988) (“fraud is not a necessary element of conversion”); United States v. Brabham, 122 F. Supp. 570, 572 (E.D.S.C. 1954).⁷⁵

“Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.” Moore, 383 S.C. at 589, 681 S.E.2d at 878; see also SSI Med. Servs., 301 S.C. at 498, 392 S.E.2d at 792 (concluding that the plaintiff “sufficiently established a determinate amount of money that was converted” by showing that the defendant “wrongfully retained not less than \$121,489.64” and by identifying the account into which this sum was deposited); Georgia Bank & Trust Co. of Augusta v. Trenery, Jr., No. 3:08-2371-JFA, 2010 WL 3271732, at *8 (D.S.C. Aug. 18, 2010) (“[T]he conversion counterclaim seeks a definite sum of money allegedly converted by an individual. In that circumstance a conversion claim is proper.”).

The South Carolina Court of Appeals’ decision in Mullis v. Trident Emergency Physicians, 351 S.C. 503, 570 S.E.2d 549 (S.C. Ct. App. 2002), is instructive. In Mullis, a physician (Mullis) brought a conversion claim against a medical partnership (Trident), her former employer. Id. at 504, 570 S.E.2d at 549. The allegedly converted property consisted of \$20,000 withheld from Mullis’ paychecks with the understanding that the funds would “be used as a ‘buy-in’ to pay for Mullis’ share in the Trident partnership.”

⁷⁵Other jurisdictions similarly hold that good faith, innocence, and mistake are not valid defenses to a conversion claim. See, e.g., Homac Inc. v. Fort Wayne Mortgage Co., 577 F. Supp. 1065, 1071 (N.D. Ga. 1983) (“It is immaterial [to a conversion claim] that the wrongful dominion over another’s property is exercised in good faith without knowledge of the true owner’s title.”); First Union Nat. Bank v. New York Life Ins. and Annuity Corp., 152 F. Supp. 2d 850, 855 (D. Md. 2001) (“[T]he intent required [for conversion] is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff’s rights A mistake of law or fact is no defense.”); Gordon v. Pete’s Auto Serv. of Denbigh, Inc., 838 F. Supp. 2d 436, 440 (E.D. Va. 2012) (“The mental state required for conversion is purely and simply a specific intent to appropriate the property [O]ne may be held liable in conversion even though he reasonably supposed that he had a legal right to the property in question.”) (citations and quotation marks omitted).

Id. at 505, 570 S.E.2d at 550. After Trident's partners voted against making Mullis a partner, she requested a return of the \$20,000, but Trident refused. Id. The jury entered a verdict in favor of Mullins for \$20,000 in actual damages, and the Court of Appeals affirmed despite Trident's argument on appeal that Mullis "fail[ed] to prove an identifiable fund":

[W]e find Mullis need not specifically identify the money as a separate and distinct account. "Conversion" is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner. Green v. Waidner, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct. App. 1984). See Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) (Conversion may arise by the illegal detention of another's property.). "There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff." Richardson's Rests., Inc. v. Nat'l Bank of S.C., 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991). Money, however, may be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990).

We find Mullis need not specifically identify the money as a separate and distinct account under SSI Med. Servs. The buy-in amount was a determinative sum. The fact that the partnership commingled the money does not change its nature as a determinative sum.

Mullis, 351 S.C. at 506-507, 570 S.E.2d at 550-51.

Dr. Dyce likewise identified a determinative sum paid to Mrs. Puchalski—namely, the \$2,308,128.95 she received in the form of SCENT distributions between May 8, 2007 and August 19, 2009.⁷⁶

⁷⁶Plaintiffs' Exhibit 0296.10.

Dr. Dyce had a right to ownership over a defined portion of these funds, as proven at trial - namely \$460,767.11. This amount represents the sums of \$436,496.08 and \$24,271.03, which were the amounts unpaid to Dr. Dyce in 2008 and 2009 respectively.⁷⁷ There is no dispute that these funds were delivered to Amy Puchalski and that she obtained and exercised ownership over these funds, to the exclusion of Dr. Dyce's rights, without providing any consideration and without Dr. Dyce's authorization or permission.⁷⁸ Consequently, the Court erred by not ruling that Amy Puchalski converted funds in the amount of \$460,767.11 belonging to Dr. Dyce, and therefore, Amy Puchalski, Dr. Puchalski, and SCENT are jointly and severally liable to Dr. Dyce under the conversion cause of action in the amount of \$460,767.11.

B. Dr. Puchalski and Amy Puchalski accepted monies that did not belong to them, and therefore, are liable to Dr. Dyce under the cause of action for constructive trust.

The circuit court erred by not finding that Amy Puchalski was liable to Dr. Dyce under the constructive trust cause of action. As with the conversion cause of action, Mrs. Puchalski is responsible for payment of \$460,767.11, representing the distributions wrongfully withheld from Dr. Dyce in 2008 and 2009.

“A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust.” SSI Med. Servs., Inc., 301 S.C. 500, 392 S.E.2d 793-94. “A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it.” Id. 500, 794-795. A

⁷⁷Plaintiffs' Exhibit 0296.3 & 0296.4

⁷⁸Indeed, the July 16, 2008 Shareholders' Agreement did not permit the payment of SCENT distributions directly to Mrs. Puchalski, who was never a SCENT shareholder. See Plaintiffs' Exhibit 5 at § 3.14 (authorizing distributions to SCENT "Shareholders").

constructive trust can result when money has been paid by “accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.” McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998). A party must demonstrate that the money was wrongfully obtained by clear and convincing evidence.

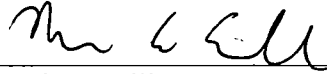
For the reasons set forth above, the circuit court erred in not awarding Dr. Dyce judgment against Amy Puchalski under the constructive trust cause of action, and therefore, Dr. Dyce shall have judgment against Defendant Amy Puchalski in the amount of \$460,767.11.

CONCLUSION

The circuit court erred in (i) not addressing Dr. Dyce’s claim for attorneys’ fees; and (ii) having awarded Dr. Dyce judgment against SCENT and Dr. Puchalski on his conversion and constructive trust causes of action for monies withheld in 2008 and 2009, failing to award Dr. Dyce damages against Amy Puchalski, the recipient of those wrongfully withheld funds, for his conversion and/or constructive trust cause of action based on the undisputed facts.

Accordingly, Appellants/Respondents Jamie Curley and Dr. Orville Dyce respectfully request that the Court reverse the circuit court's decision on these three issues.

Respectfully submitted,



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And

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RESPONDENTS/APPELLANTS JAMIE
CURLEY AND DR. ORVILLE DYCE

July 13, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

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Consolidated Cases for Trial

JUL 15 2016

Case No. 2010-CP-28-00322

Case No. 2010-CP-28-00323

SC Court of Appeals

APPELLATE CASE NO. 2016-000626

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski Respondents,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski and Robert Puchalski, Defendants,

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina ENT, Allergy & Sleep Medicine, P.A., are the Appellants/Respondents.

PROOF OF SERVICE

I do hereby certify that on the 13th day of July 2016, I served a copy of the within
*Initial Brief of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in
Respondents/Appellants' Cross Appeal and Designation of Matter of*

Respondents/Appellants' Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal in the within entitled matter by sending a copy of the same via United States First Class Mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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July 13, 2016

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JUL 15 2016

SC Court of Appeals

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

RE: Jamie Curley, Plaintiff, v. SCENT Land Holdings, LLC, Amy Puchalski, and
Robert Puchalski, Defendants, and Dr. Orville Dyce, Plaintiff,
v.
South Carolina ENT, Allergy and Sleep Medicine, P.A., Amy Puchalski, and
Robert Puchalski, Defendants,
Of Whom Jamie Curley and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalksi, South
Carolina ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

Appellate Case No. 2016-00626

Dear Ms. Kitchings:

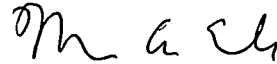
In accordance with the provisions of South Carolina Appellate Rule 208(a)(1) and 209, I am enclosing for filing the original and two copies of the *Initial Brief of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal*, as well as the *Designation of Matter of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal*, the *Certification of Compliance*, and *Proof of Service* in the above action. Please return a file-stamped copy to me via the enclosed self-addressed, stamped envelope.

By copy of this letter with enclosures, we are the serving the same on all parties.

Thank you in advance for your attention to this request. Please do not hesitate to call with any questions or concerns.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership



Morris A. Ellison, Esq.

MAE/kbk
Enclosures: as stated

cc w/encl: Vincent A. Sheheen, Esq.
Michael D. Wright, Esq.
Orville Dyce (via email)
William C. Cleveland, III, Esq. (via email)

After Five Days Return To
WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP


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Charleston, SC 29402

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


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SC Court of Appeals