THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

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SC Court of Appeals

CASE NO. 2016-000474

C. GORDON LOVINGOOD, JR., C3 INVESTMENTS, INC., and PPC12, LLC

Appellants,

v.

VICTOR APAT, ANTHONY MCALLISTER, J. ERIC WADE d/b/a CT TOURING, and PEARL CO. SC, LLC, Defendants, of whom,

ANTHONY MCALLISTER; J. ERIC WADE d/b/a CT TOURING; and PEARL CO. SC, LLC are

Respondents.

APPELLANTS' INITIAL REPLY BRIEF

David B. Marvel
P.O. Box 22734
Charleston, South Carolina 29413
Ph. (843) 853-4877
Fax (843) 380-3025
Email: dave@marvel.lawyer

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LAW AND ARGUMENT

I. Applying South Carolina's LLC Act to the Operating Agreement of PPC12, LLC is not "Interpretive Acrobatics"

The relationship amongst the members of a South Carolina Limited Liability Company is controlled only by The Uniform Limited Liability Company Act of 1996 (S.C. Code § 33-44-101 *et seq.*), the LLC's Operating Agreement (if any), and the interpretive decisions of this Court and the South Carolina Supreme Court. Remarkably, in the twenty-nine pages of very well written argument submitted by the Respondents, they have not cited to one statement in any of those edicts that would allow this court to affirm the decision of the Circuit Court.

Containing this case to those three factors and ignoring matters of subjective debate, there can be no dispute that

1) Every Member of PPC12, LLC is obligated to pay the fixed and variable expenses of the aircraft. (Operating Agreement, Art. 3.6). Appellant PPC12, LLC has the absolute right to demand payment from all members for such expenses.

2) Appellant Lovingood has the absolute right to demand indemnity from PPC12, LLC for any expense incurred "in the ordinary course of the business of the Company or for the preservation of the Company's business or property." (Operating Agreement, Art. 8.2(c)). It has never been, and could not be, disputed that the expenses in excess of $500,000 spent to repair the aircraft are recoupable from the LLC under that Article of the Operating Agreement.

3) Under Section 1.6 of the Operating Agreement, all of the parties to this lawsuit are "Members" until they have ceased to be a member. (Operating Agreement, Article 1.6).

4) There is no provision of the Operating Agreement that defines when a Member ceases being a member.

5) There is no provision of the South Carolina Uniform Limited Liability Act that supports the argument that the Respondents ceased being members of PPC12, LLC by their purported dissociation. Cf. S.C. Code § 33-44-603.

The phrase "fixed and variable expenses" is not defined in the Operating Agreement or the LLC Act. Under Treasury Regulations, the phrase is generally used only for the purposes of disallowing deductions for personal trips on business aircraft. In that context, the IRS views a member's "fixed and variable expenses" as "the total expenses for the year by the number of occupied seat hours or occupied seat miles to determine a per-seat or per mile rate". 26 CFR 1.274-10; Treasury Decision 9597, 2012-34 IRB 258 (IRS July 31, 2012).

The entire argument advanced by the Respondents and applied by the court below confuses the terms dissociation with dissolution, despite the fact that the South Carolina Legislature and the drafters of the Uniform LLC Act chose to set those events into separate chapters. The salient point is quite simple: even if the Respondents dissociated from PPC12, LLC, which is vigorously disputed, the LLC was not dissolved. Some period of dissolution remained, under which the terms of the Operating Agreement and the LLC Act would have applied to calculate the final responsibility of each Members to the LLC.

This Court cannot interpret the Act to prohibit Lovingood or PPC12, LLC, a right of action against the respondents for the fixed and variable expenses they were responsible for as member of the LLC. Therefore, this Court must reverse the decision of the court below, and remand this matter for trial.

II. Eric Wade, Anthony McAllister, and Edwin Pearlstein Never Dissociated from PPC12, LLC.

Respondents argue only that they dissociated based on "notice of the member's express will to withdraw" as required by S.C. Code § 33-44-601(1). There are few cases in which a court has reviewed a purported dissociation under such language. In Storage On Site, LLC v. Slodden, 57 V.I. 94, 96-97, (V.I. Super. Ct. 2012), the Court found that a member had properly dissociated (over that member's objection) because his lawyer had faxed and mailed a notice to the LLC's registered agent on explicit behalf of the members exercising their power to dissociate. In Marrara v. Ripley Assocs., LLC, 755 S.E.2d 120, 121(W.Va. 2014), the Supreme Court of West Virginia noted no dispute as to actual dissociation when "on November 4, 2011, the Trust tendered its notice of dissociation" the defendant. In WighTech Inc. v. LightSwitch Invs., LLC, 998 N.E.2d 719 (Ill. App. 2011), the court appears to have found that a letter from Wightman, the sole member of the defendant, to the sole shareholder of the plaintiff, confirming that "'management ha[d] decided to accept' the 'employment resignation' that [Wightman] had tendered" was ineffective to affect Wightman's dissociation from the LLC.

If there is any theme running through these interpretations of the uniform LLC Act, it is only that a member of an LLC should be expected to express dissociation through some means other than simply by using his cell phone to call another member on his cell phone to tell him that he and other members are "moving in a different direction."

Setting aside the multitude of possible interpretations of that statement, the respondents do not contend they did anything more.

South Carolina law cannot sanction a vague phone call as an express determination of will to resolve all outstanding matters between business associates of this acumen who are members of an LLC that owns a multi-million dollar aircraft that was purchased so that the members of the LLC can transact global business throughout the United States and the Caribbean. This Court must find error in the lower Court's determination that the Respondents properly dissociated from PPC12, LLC, and reverse.

III. There is more than sufficient evidence establishing Appellant Lovingood's claim for breach of fiduciary duties

Respondents admit the facts in support of Lovingood's claim under S.C. Code § 3-44-409. The brief and argument below ignore the real question of first impression, which should be decided by a jury. That question is whether it is possible to compete in a company such as PPC12, LLC, where the sole goal is for the members to realize the benefit of the LLC's assets. Lovingood and PPC12 assert that question must be answered affirmatively.

PPC12, LLC was formed

> to engage in aircraft operations, including but not limited to air transportation, aircraft ownership, aircraft charter pursuant to Part 135 of the Federal Aviation Regulations (FAR), and to carry on any other lawful business or activity in connection with the foregoing or otherwise, and to have and exercise all of the powers, rights and privileges that a limited liability company organized pursuant to the Act may have and exercise. Any aircraft owned by the Company may be referred to hereinafter as "the Aircraft."

(Operating Agreement Article 2.6).

The respondents make no attempt to dispute that they formed another LLC to purchase another aircraft and fulfill exactly the same purpose that they had agreed to

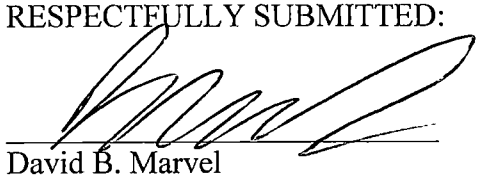
fulfill with PPC12, LLC. Respondents do not dispute that the only way that the purposes of their new LLC or PPC12, LLC could possibly be fulfilled is to ensure the continued loyalty of each member to the other. The Respondents admit that they searched the planet for a similar aircraft, purchased an extraordinarily similar aircraft, and began plans to use that aircraft for the same purposes as they had agreed to use the PPC12, LLC aircraft, all while they had the same fiduciary duties to PPC12, LLC and Lovingood.

The fact that the N217EB suffered a catastrophic engine failure and didn't actually compete with N561GG after October 2012 is fortuitous at best. Any reading of the record establishes that the respondents would have never disavowed their membership in PPC12, LLC unless they already owned another aircraft prior to the incident. The Respondents' own testimony proves that each of them violated their fiduciary duties to Lovingood. This Court must Reverse the decision of the court below, and remand this case for trial.

CONCLUSION

The Circuit Court erred in granting summary judgment to Wade, McAllister, and Pearlstine. There remains a significant factual question of whether the Respondents properly dissociated from the LLC at any time. Even if they did, their actions prior to dissociation were a breach of their statutory fiduciary duties as members of the LLC, and their ultimate responsibility following dissolution of the LLC remains to be resolved. Appellants C. Gordon Lovingood, Jr., C3 Investments, Inc., and PPC12, LLC respectfully request that this Honorable Court reverse the Order of the Charleston County Court of Common Pleas, and remand this case for trial.

RESPECTFULLY SUBMITTED:



David B. Marvel
P.O. Box 22734
Charleston, South Carolina 29413
Ph. (843) 853-4877
Fax (843) 380-3025
Email: dave@marvel.lawyer

Charleston, South Carolina
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