

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

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SC Court of Appeals

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.

**FINAL REPLY BRIEF OF APPELLANTS JOHN GANDIS AND
ANDREA COMEAU-SHIRLEY**

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I. INTRODUCTION

This is a business case. The business issues in this case are complicated and not run of the mill issues addressed in state court. This case presents important issues for the internal management and governance of limited liability companies in South Carolina. From a practical perspective, the decision of the lower court concludes that a 45% owner owed no fiduciary duties to his company and other members and that the majority owners' decision not to make a distribution for the taxes of the 45% owner was oppression of the shareholder. This case is anomaly that must be corrected.

Benjamin Franklin is credited with the quote that “[i]n this world nothing can be said to be certain, except death and taxes.” Taxes are a business reality—creating a burden on businesses where it is often said that the tax tail wags the dog. A difficult tax situation involving phantom income and strategies associated with business planning led to a precarious slip in the relationships of the owners. Federal tax rules regarding phantom income created a complicated tax situation that required complex strategies and solutions for CCC’s owners. In this complicated tax scenario, strategies and options were proposed. Here, the tax tail certainly wagged this dog. In the end, one owner claimed that the management of these issues resulted in oppression. The lower court agreed with that member’s narrative.

The Order of the lower court disregards the business judgment rule, fiduciary duty obligations, and expands the concept of “shareholder oppression” to an area with no restraints which reframes the ability to manage South Carolina limited liability companies. This expansive opinion puts management in a bind when a member places their self-interest for compensation and distributions over the interest of the business and other members.

The Order and its fallout may move LLCs in South Carolina to the realm of unknown consequences and expand individual member's financial exposure. Management is placed in a "double bind" – a situation in which a person is confronted with two irreconcilable demands or a choice between two undesirable courses of action. In this case, the Order creates a double bind for Gandis and Shirley - and if affirmed, every other LLC in South Carolina. Do what the minority member demands or face an oppression suit. Likewise, if you engage in robust discussions over email, snippets of the emails may create a pathway for an enterprising advocate to piece together a creative oppression case—even when the member claiming oppression controls the company's sales and purchasing, created the inventory issue, created the cash shortage, initiated a buyout discussion, threatened dissolution, erased company computers, replaced SIM cards in company phones, shared confidential and trade secret company information in seeking a new investor partner, had numerous options to assist on the tax issue, and held a superior position to the success or failure of the company due to the control of its sales and customers.¹ Somehow, not acquiescing to a member's demands equals oppression. It is a no-win situation in which the minority members become dictators over the managers as they can claim oppression

¹ The issue of Wilson's extended quotations of portions of Shirley's emails are difficult to address with page limitations on brief. It should be noted, however, that Shirley and Gandis submitted extensive affidavits that dealt with the utilization of snippets from their emails out of context. The Affidavit of Shirley contains a comprehensive timeline, gives business context, explains tax consequences, and labors through the efforts that Shirley and Gandis went through with Wilson, who singularly held sales and purchase power of CCC (lifeblood of a company) in his hands. Wilson would not communicate options to move forward, but instead dictated to the other owners, caused frustration, and caused concern over his ultimate intention of looking out for himself to the detriment of CCC. Gandis and Shirley crave reference to those affidavits and the comprehensive treatment of the business circumstances in this matter. (R. pp. 1957-2036; R. pp. 2037-75). Likewise, the extensive record in this case, and not just the myopic narrative referred by Wilson, exhibits a lengthy effort to run a responsible business that paid its debts, built a long term market reputation and ultimately was successful for all owners.

when they are simply being outvoted or, as this case demonstrates, when their personal interests are not elevated above the interests of the company.²

II. REPLY ARGUMENT

A. The Trial Court Erred by Applying the Wrong Legal Standard to Find Wilson Did Not Breach His Fiduciary Duties to CCC and His Fellow LLC Members

1. *Gandis and Shirley have standing to challenge the trial court's finding*

As an initial matter, Gandis and Shirley have standing to appeal the lower court's finding on the breach of fiduciary duty issue. "Only a party aggrieved by an order...may appeal." SCACR 201. "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). Wilson inaccurately claims Gandis and Shirley lack standing to appeal the trial court's ruling on the breach of fiduciary duty claims against Wilson as he alleged the claims "were raised by CCC alone." (Wilson Br. at 41-42). Gandis and Shirley's respective Answers and Counterclaims to the Second Amended Complaint explicitly adopted the counterclaims sought by CCC and were tried before the trial court. (R. p. 2356; R. p. 2323).³ Therefore, Gandis and Shirley have standing to appeal the trial court's finding that Wilson did not breach his fiduciary duties by usurping CCC corporate opportunities.

² Another important implication of the opinion is the chilling effect it has on a non-voting member such as Shirley where the concept of a non-voting member of an LLC is converted to a situation of individual liability with serious financial consequences to that non-voting member. Such a decision radically changes LLC law in South Carolina.

³ Each cited paragraph states "Defendant adopts the Counterclaims concurrently being sought by CCC."

2. Wilson had fiduciary duties to CCC and its members

Wilson's partnership with Gandis and his managerial role in CCC required him to uphold certain fiduciary duties to the company and his fellow members. Specifically, from the outset, as a partnership, Wilson and Gandis were equal partners in CCC (initially 50-50 and later 45-45 when each transferred 5% to Shirley). (R. p. 1774)("[T]he parties agreed that Gandis and Wilson founded the business as equal partners."). This relationship evolved into an LLC. The two men agreed Gandis would manage CCC's operations while Wilson was to manage the sales arm of the business. (R. p. 56, ln. 23 – p. 57, ln. 1-2). Wilson acted as the company's Vice President of Sales and Purchasing responsible for all sales activities, including oversight of the sales force and inventory purchasing and management. (R. p. 415; R. p. 1774). Wilson's activities represented almost 100% of the cash flow opportunities of CCC. The company was organized as a manager-managed LLC with the Articles of Incorporation identifying Gandis as a manager, and although drafted, no written operating agreement was ever completed. (R. p. 1774). This did not alter Wilson's or Gandis' respective ownership interest, position, or managerial roles within the company and cannot serve to alleviate Wilson of his fiduciary duties to CCC and its members.

On brief Wilson selectively cites to the LLC statute and claims that he "owed no special duty to the LLC or Appellants simply by being a member of CCC...." (Wilson Br. at 38). While it may be true that merely being a member of a manager-managed LLC does not necessarily impose fiduciary duties upon a party, Wilson was never just a member of CCC. Wilson was a Vice President responsible for sales and purchasing. As an equal partner with Gandis, he had managerial responsibilities within the company. Wilson was

essential to the success or failure of CCC and exercised management rights. Wilson's status at CCC imposed fiduciary obligations upon him. Specifically, under § 33-44-409(h)(3):

A member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standard of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this chapter.

S.C. Code Ann. § 33-44-409(h)(3). Subsections (b) through (f) specify the fiduciary obligations of a LLC member to the company and its members to include a duty of loyalty:

(1) to account to the company and to hold as a trustee for it any property, profit, or benefit derived by the member in the conduct...of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

(2) to refrain from dealing with the company in the conduct...of the company's business as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

S.C. Code Ann. § 33-44-409(b). A member also has a duty of care to the LLC and its members to refrain from engaging in intentional misconduct or knowing violation of the law and to discharge these duties "with the obligation of good faith and fair dealing." S.C. Code Ann. § 33-44-409(c)-(d).

The absence of a formal operating agreement cannot and should not alleviate a member with managerial authority who owns an equal majority share of the company from the fiduciary obligations imposed upon managers by the LLC statute, particularly when that member demanded and exercised managerial rights throughout his participation in the

venture. Wilson's technical argument that he did not owe any fiduciary duties due to being a member of a manager-managed LLC ignores the undisputed nature of his relationship with Gandis and role in CCC. Furthermore, due to the undisputed fact that CCC started as a simple partnership between Gandis and Wilson, the standard of fiduciary duty in the partnership context also applies in this case. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) ("Partners are fiduciaries to each other and their relationship is one of mutual trust and confidence imposing upon them requirements of loyalty, good faith and fair dealing."); (see also R. p. 1774; Apps. In. Br. at 19-24). That duty from Wilson to Gandis was there and survived the formal creation of the LLC.

Wilson was a manager in CCC and equal partner with Gandis, and his actions should have been scrutinized in that capacity by the trial court in evaluating Appellants' breach of fiduciary duty claims. His insistence that he remain a partner even to this day without any obligations to the LLC is perverse.⁴ Instead, the trial court erred in not applying the correct fiduciary standard in this case. Wilson violated his fiduciary duties to Gandis, Shirley, and the company in a multitude of ways:

3. *Wilson breached his fiduciary duties to CCC and its members*

a. *Wilson violated his fiduciary duty to Gandis to fully and honestly disclose material facts*

As Gandis' partner, Wilson had a fiduciary duty to fully and honestly disclose material facts and refrain from concealment or misrepresentation. *Moore*, 360 S.C. at 251, 599 S.E.2d at 472. This Court has stated a fiduciary's duty of disclosure imposes an "obligation of *refraining from taking any advantage of one another by the slightest*

⁴ See Bond Order July 24, 2015 at para. 2 (R. p. 1791).

misrepresentations or concealment.” Id. at 252(emphasis in original). That duty necessarily entailed clearly identifying any EFS customer Wilson planned to exclude from the deal by not bringing them into CCC. The evidence presented at trial showed Wilson failed to fulfill his duty of full and honest disclosure to his partner.

Instead, when Gandis was attempting to determine the value of what Wilson was bringing to CCC, he requested and Wilson provided a list of all EFS accounts and their two year sales volumes so that Shirley could estimate their value and evaluate the propriety of the \$8,000 monthly payment Wilson demanded. (R. pp. 990-99; R. pp. 1752-56; R. pp. 1000-01; R. pp. 1529-30).⁵ That list contained the three accounts Wilson now claims were excluded from the deal; without any indication, within the document itself or other evidence presented at trial, that these three accounts were excluded from the deal. Wilson’s final pitch to justify his monthly payment reflected the plan to bring all EFS customers into CCC – “The real question is this – are the customers, vendors and margins I am bringing to the table worth the salary we are proposing? If I am to focus *all my efforts* in the film business on CCC, I am foregoing opportunities to earn money on those opportunities outside of CCC.” (R. pp. 1000-01; *See also* R. pp. 1529-30)⁶(*emphasis added*). Wilson had a duty to clearly identify and disclose any EFS accounts he wished to exclude from the deal. Rather than fulfilling that duty, Wilson submitted a listing of all his EFS accounts to justify his monthly \$8,000 payment, did not identify any he planned to exclude, and proceeded to receive those monthly payments based upon the list and sales figures

⁵ Def. 8 includes the three accounts Wilson claims were excluded from the deal – Lamborn, Modular Metal, West Carrollton. (*See* Wilson Br. at 7).

⁶ Looking back on this arrangement on April 3, 2009, Wilson said this of the understanding: “The payments I received last year was basically a salary which I required since I was taking my customers from EFS and putting them into CCC reducing my ability to earn a living.” (R. pp. 1529-30).

provided. (R. p. 78, ln. 8-19). Had Wilson fulfilled his fiduciary obligations to Gandis, any excluded accounts would have been clearly identified and not considered in evaluating the value of what he was bringing to CCC. Furthermore, if those three accounts were not part of the deal, then Wilson's inclusion of them in the list of EFS customers provided to Gandis was a deliberate act of deceit to inflate the value of what he planned to bring to CCC. After he began to receive his monthly payment, Wilson continued to do side deals outside of CCC, including conducting substantial business with Steve Norvell. (See Apps. In. Br. at 25-26). Stated simply, Wilson was a Vice President of a firm company where he was responsible for sales and purchasing while he also ran side deals outside of CCC depriving CCC of millions of dollars in sales. (R. pp. 1318-27; *see infra* p. 8-9).

b. Wilson violated his fiduciary duties to CCC and its members by competing with the company

Wilson also breached his statutorily mandated fiduciary duty to "refrain from competing with [CCC] in the conduct of the company's business...." both while he worked for the company and following his departure. S.C. Code Ann. § 33-44-409(b)(3). Wilson unequivocally admits he ran side deals through EFS after CCC became operational, even while he received \$8,000 a month for supposedly bringing all of EFS's business into the company. (R. pp. 1318-27; R. pp. 1525-27; R. pp. 475-478; R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22). He attempts to excuse this flagrant breach of fiduciary duty by claiming his agreement with Gandis carved out three accounts. (R. p. 378, ln. 25 – p. 379, ln. 18).⁷ As detailed in Appellants' Initial Brief and above, this was not the case.

⁷ Of particular note, Wilson argues on brief that the three accounts were import accounts. (Wilson Br. at 7). However, one of the three accounts listed, Modular Metal, was never an import account. Furthermore, evidence presented at trial showed Wilson was doing side deals in addition to "the three" he claims were excluded from the deal. (R. p. 406, ln. 18 – p. 407, ln. 1-25).

(Apps. Int. Br. at 3-7). That position is further belied by the fact that (1) Wilson actively concealed his competitive activities from Gandis; (2) never utilized his CCC email address to conduct side deals; (3) did not copy Gandis on side deal correspondence; and (4) did not inform him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). His campaign of unlawful competition continued immediately after leaving CCC when he went to work for a competitor (Neologic).⁸ Wilson's competitive activities both during his time at CCC and following his departure constitute flagrant breaches of his fiduciary duty not to compete with the company.⁹

c. Wilson violated his fiduciary duties to CCC and its members by misappropriating confidential and trade secret information

Wilson also violated his statutorily mandated fiduciary duty of loyalty by misappropriating CCC's confidential and trade secret information. *See* S.C. Code Ann. § 33-44-409(b)(1). Specifically, after leaving CCC Wilson went to work for a competitor Neologic/Freshwater. The trial court found that Neologic/Freshwater used CCC's confidential information to compete with the company. (R. p. 1788).¹⁰ Wilson provided Neologic this confidential information in clear violation of his fiduciary duty to hold the

⁸ It should be noted that in January 11 & 16, 2012 Wilson had negotiated with a company named Filmtech stating he was disassociating from CCC for a monthly salary/draw of \$8,000 with a "goal to move as much business *I manage* at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective businesses that CCC has been working on qualifying over the past 3 to 6 months." (R. p. 1692)(*emphasis added*).

⁹ Gandis caught Wilson in a side deal in Christmas 2010 and Wilson explained it away as needing money for Christmas. (R. p. 1963 at para. 26; R. p. 215, ln. 6-14; R. p. 1528).

¹⁰ "Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim." (R. p. 1788).

company's property in trust and refrain from competing with it. *See* S.C. Code Ann. § 33-44-409(b)(1), (3).¹¹

Wilson owed Gandis, Shirley, and CCC fiduciary duties including to fully and honestly disclosure material facts, refrain from concealment or misrepresentation, not to compete with the company and to hold company property in trust; all of which he indisputably breached. In addition, Wilson destroyed company property by deleting all information off of one company computer, running erasure programs on another computer, and replacing the SIM card on the company blackberry. (R. p. 250, ln. 13 – p. 253, ln. 10). The trial court committed error by disregarding these duties and evaluating whether or not the evidence established Wilson agreed to transfer three import accounts to CCC in 2008. Its evaluation was more akin to a breach of contract analysis rather than a breach of fiduciary duty claim. The appropriate inquiry was whether the evidence showed Wilson fulfilled his fiduciary duties to Gandis, Shirley, and CCC by acting in good faith, disclosing material facts to Gandis, and refraining from competing with CCC before its dissolution. This constitutes an error of law because the trial court placed the burden of proof on the wrong party. The proper analysis/inquiry yields but one conclusion – Wilson violated his fiduciary duties to CCC, its members and Gandis as his partner. The trial court committed an error of law by applying the incorrect standard for evaluating the breach of fiduciary duty claims against Wilson necessitating reversal of its holding on these cause of action.¹²

¹¹ This breach of fiduciary duty would be independent of the claims possessed by CCC and addressed by CCC on brief.

¹² An action for breach of fiduciary duty is one at law. *Verenes v. Alvamos*, 387 S.C. 11, 690 S.E.2d 771 (2010). “In an action at law, the appellate court will correct any error of law, but it must affirm the [trial court’s] factual findings unless there is no evidence that reasonably supports those findings.” *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (internal citation omitted).

B. No Shareholder Oppression Occurred in this Case

1. The Order's grounds for oppression fail when considered in context

Wilson's narrative successfully sold to the trial court and maintained on brief is one devoid of context or recognition of personal obligation, responsibility, the realities of business markets, or economic reality. The context of the actions deemed oppressive indicates the error of the trial court and warrants reversal of the Order.

In retrospect, the impetus for the discord among the members of CCC was a large tax liability due to federal tax rules related to phantom income. Specifically, in 2010 CCC had a banner year generating over \$1 million in net income. Wilson, as Vice President of CCC in charge of sales and purchasing poured much of the company's cash back into purchasing inventory. (R. pp. 1763-69; R. p. 145, ln. 22 – p. 146, ln. 1). Wilson alone bore the responsibility for both sales and purchasing; and liquidating film stocks to generate cash. (See R. p. 1532 at para. 4). Due to Wilson investing the vast majority of CCC's net profit into film stock and failure to make sales on the resulting inventory, the company did not have cash to distribute to its members in 2011. (R. pp. 1616-20; R. p. 1621). The inventory buildup led to an impending tax scenario that would be the owners' and not CCC's responsibility.¹³

Everything that happened after that point was fall out from Wilson's creation of this tax liability. Wilson inaccurately portrays Gandis and Shirley's actions as a coup to

¹³ A LLC is taxed as a pass through entity, which means that its owners pay the income taxes on profits rather than the company. This is commonly referred to in the accounting world as "phantom income." For pass-through entities, phantom income is often synonymous with undistributed income. Phantom income is an accounting term given to taxable income reported to the Internal Revenue Service but not actually pocketed by the owner. It is called "phantom" because it does not generate cash flow that year, only existing on paper, but the IRS expects tax revenue on business assets or investments. An example illustrates the point. On paper an LLC may have \$80k in distributable profit in a given year, but if it uses \$40k to purchase inventory the owner is still taxed on the full \$80k. The IRS expects the owner to pay taxes on \$80k.

get him out of the business, when in reality they were taken to address inventory reduction plans, payment of vendors, and the looming tax liability. Wilson's accusations of oppression were actually his partner's efforts to address these issues and help him deal with the tax obligation. Preferential treatment had to end and Wilson needed to be treated as an owner.

The other owners spent a substantial amount of time and effort in trying to help Wilson.¹⁴ The absence of cash in CCC, huge inventory, and large tax obligations required management and strategic planning. In this case, Wilson and his counsel have utilized cuttings and snippets of emails regarding business management strategies to paint a picture of oppression in a vacuum, devoid of tax requirements or the vagaries of business market realities. In reality, high level strategic alternatives were explored by the owners in seeking a "win-win." Wilson, it turns out, was only interested in how business impacted his personal finances. When Wilson was treated like the other owners; he left CCC.

a. CCC could not pay tax distributions to cover members' personal tax liabilities for 2010

The trial court concluded that Gandis wrongfully used CCC funds to repay a line of credit held by Gandis that he previously funded the company with rather than dispersing that money to Wilson as a tax distribution. (R. p. 1777). This finding basically challenges the payment of debt rather than making a distribution to Wilson. That finding failed to consider CCC's financial situation, applicable legal restraints on member distributions, ignored the business judgment rule, and the fact that Gandis did not have to use personal

¹⁴ Wilson acknowledges by email on January 6, 2012 that Gandis' efforts were to help him and his family. (R. pp. 1673-76).

lines of credit to fund CCC. Is it the position of a court to tell a business that they have to pay a member distribution as opposed to paying its debt?

On brief, Wilson argues in support of this finding without citation to any supporting legal authority. (Wilson Br. at 10, 24-36). Rather, he points to his personal expectation the company would cover his tax bill. (Wilson Br. at 10). If CCC did not make a distribution, Wilson's logic was that the failure to do so was oppression. Wilson's expectation that CCC would foot his tax bill because it had done so in the past was simply a personal desire. (Wilson Br. at 10) ("In the past a tax distribution was made to each member, and funds had been set aside for a tax distribution for 2010. Wilson reasonably believed such a practice to continue."). In the course of a page Wilson goes from characterizing his "personal expectation" the company would make a tax distribution to deeming it an "agreement" although none is cited or evidenced in the record. (Wilson Br. at 10). It is a tortured argument to reach an inaccurate end. Regardless, Wilson morphed his own unrealized personal economic expectations into an accusation of wrongdoing because Gandis utilized his own money to pay his personal tax liabilities rather than funding the company and making a distribution to Wilson. Such an argument is fantasy considering the realities of business and co-ownership. Likewise, the argument and holding is inapposite to the business judgment rule.¹⁵

First and foremost, CCC repaying debt in priority over member distributions was not wrongful. In fact, Wilson agreed that the company should operate without debt – "I think we need to have a plan for distributions that we both agree on and that makes sense

¹⁵ "[M]embers and managers of LLCs are subject to the business judgment rule, which immunizes them from liability 'where there is a reasonable basis to indicate the transaction was made in good faith.'" *In re Medical Management Group, LLC*, 534 B.R. 646, 654 (Bk. D.S.C. 2015)(internal citations omitted).

for us to operate the company without debt. I don't know what that should look like but I think we should have some idea so we can plan our personal finances based on how the business is doing." (R. pp. 1529-30). Repaying debt rather than making a distribution is a valid and reasonable business decision.¹⁶

Furthermore, an LLC's ability to make distributions to members is restricted, requiring adequate assets to repay vendors, suppliers, and other creditors (outstanding liabilities) before funds can flow to members by way of distributions.

(a) A distribution may not be made if:

- (1) The limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or
- (2) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

(d) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

S.C. Code Ann. § 33-44-406(a), (d). Likewise, a member's entitlement to a distribution is subject to additional restraints, including a requirement that distributions be made in equal shares among members. S.C. Code Ann. § 33-44-405. Wilson succeeded in convincing the trial court to ignore these statutory restraints and hold that because Wilson was not given priority treatment he was an oppressed shareholder. The fact of the matter is that each member of CCC, including Wilson, was responsible for their own tax liability. CCC's

¹⁶ This fact is especially pertinent in that CCC was seeking funding from Bank of America and BOA expected the company to pay down debt and show worthiness of the lending risk prior to providing a line of credit to CCC. (R. p. 654, ln. 1-13; *see also* R. p. 106, ln. 19-21, R. p. 109, ln. 9-13, R. p. 236, ln. 20 – p. 237, ln. 5).

assets were sunk into inventory Wilson purchased, inventory was not converted back to cash, and there was no cash available to distribute to members to assist them with their tax obligations. (R. pp. 1616-20; R. p. 1621; R. pp. 1038-39). Thus, the company's finances at the time were strained and it was not in a position to make distributions to members to cover their individual taxes. (*Id.*; R. p. 112, ln. 14-16).

Furthermore, Gandis would have violated his obligations to CCC by acquiescing to Wilson's demand the company issue him a distribution if doing so made CCC unable to pay its debts or made it so the total assets would be less than total liabilities plus the amount necessary to pay preferential rights if it were wound up or dissolved.¹⁷

Wilson claims "Gandis used CCC funds set aside for the 2010 tax liability to pay off CCC's obligation on the line of credit, and then used the line of credit to pay his own taxes." (Wilson Br. at 10). Wilson's position, erroneously adopted by the trial court, is that CCC should have foregone payment of its debts, in the form of repaying loans pulled from Gandis' lines of credit (not CCC lines of credit), and instead made a distribution to Wilson to cover his personal tax liability. That money was owed to Gandis as a creditor of CCC, and the decision to utilize company funds to service debt is an appropriate business decision. The fact is that CCC did not have cash to distribute and was saddled with large inventory amounts created by Wilson, and until sales moved the inventory and cash came in from customers there would not be a distribution. Financial reality is not shareholder oppression.¹⁸

¹⁷ See *In re JK Harris & Company, LLC*, 512 B.R. 562 (Bk. D.S.C. 2012) (Manager of LLC violated fiduciary duty of loyalty imposed by South Carolina statute by authorizing member distributions to himself when the LLCs were insolvent, thereby deepening their insolvency for his personal benefit.).

¹⁸ This is especially true when the shareholder in question created the huge inventory – low cash – large tax liability scenario.

Furthermore, CCC's repayment of its debt to Gandis is inconsequential under the circumstances. First, if CCC's payment of its debt to Gandis did not leave enough funds in the company to pay tax distributions, then there were not sufficient funds for a distribution in the first place. Second, the amount CCC paid to service its debt to Gandis would not have come close to covering Wilson's tax liability. Specifically, the debt payment Wilson complains of was for a total of \$50,000. (R. p. 1013). At trial Wilson testified he owed roughly \$200,000 to the federal government. (R. p. 411, ln. 14-15). Therefore, had that money remained in the company and a tax distribution been made pro rata, it would not have come close to covering Wilson's tax obligation.¹⁹ Importantly, Wilson ignores his role in creating CCC's financial circumstances and his own tax liability. Rather than take responsibility for creating his tax liability, he demanded preferential treatment. This is a glaring example of Wilson's me-first attitude and demands that he was able to hide under a veil of false victimhood in the lower court.

An LLC's ability to make distributions is limited. It is obligated to pay its vendors, employees, and creditors before making distributions to members. Distributions are prohibited if making it would render the LLC unable to pay its vendors, creditors and employees in the ordinary course of business. S.C. Code Ann. § 33-44-406. CCC did what it was obliged to do – put repayment of creditors ahead of distributions to members. There was no agreement CCC would fund the members personal tax liabilities and Wilson's "personal expectation" or belief has no bearing on whether CCC should have made a distribution to cover his taxes.

¹⁹ Wilson's share of a \$50k distribution as a 45% owner would have totaled approximately \$22,500, reducing his tax obligation by about 11%.

Wilson, as a member of CCC, was only entitled to distributions the company could make when it had adequate funds to do so. The simple fact is that Wilson was not entitled to a tax distribution from CCC. No other member received a distribution. Equal treatment is not oppression.

b. Gandis and Shirley attempted to address Wilson's financial predicament by offering him options to minimize tax consequences

There were lengthy meetings, discussions, and emails between the owners seeking to minimize the phantom income taxation. Gandis and Shirley offered Wilson various options to address his financial situation, including remaining a member. At trial and on brief Wilson portrays these actions as bad faith efforts to restructure his interest in the company by “flipping” him to a salaried officer. (Wilson Br. at 12-16). The lower court erred by accepting Wilson’s narrative and disregarding the business planning and prerogatives present in this matter.

In the fall of 2011, in an attempt to help Wilson’s tax situation, Gandis reached out to Shirley for tax strategy advice. (R. p. 225, ln. 18-23). Wilson mischaracterizes the ensuing attempts to address his financial woes as a coordinated effort to “flip” him from an owner to an employee with a non-compete. (Wilson Br. at 26). In reality, these proposals were aimed at alleviating Wilson’s tax burden by reducing or eliminating his ongoing exposure to taxes from phantom income. Importantly, one of the three options offered in the course of these discussions was for Wilson to simply remain a member of CCC (no longer receiving preferential distributions or monthly loans). (See Apps. In. Br. at 13). Wilson was essential to CCC and Gandis was seeking alternatives to help Wilson with the tax obligation, assuming that Wilson could not convert the excess film inventory

into cash under an inventory reduction plan in process. Without cash to pay the tax, CCC and its owners had to get creative.

In the fall of 2011 Gandis proposed the first arrangement meant to address Wilson's onerous tax burden. The idea (simplified here) was that if Wilson were to convert from a member to an employee, and CCC allocated various losses to him, the latter loss allocations could flow back into past tax years and reduce his tax liability. (R. pp. 1047-49; R. p. 143, ln. 1-12; R. p. 228, ln. 24 – p. 229, ln. 3; R. p. 666, ln. 7-15; R. p. 669, ln. 9-17). This proposal was not well received by Wilson. He remained single-mindedly focused on having CCC cover his tax obligations and threatened to ruin the company should Gandis not succumb to his demands. (*See* Apps. In. Br. at 12). Wilson threatened that if the company did not start making regular accruals and distributions to cover tax liabilities he would leave and compete with CCC or simply resign and dissociate; forcing CCC to purchase his interest, and if the other members were "unable or unwilling to buy" him out, he would force a liquidation. (R. p. 1609). Wilson held the power.

Despite Wilson's aggressive response, Gandis and Shirley continued to try and help him address his financial situation. After receiving Wilson's threatening email, Gandis proposed three options (1) stay a member and be treated as such (no longer receiving preferential distributions or monthly loans); (2) buy-out his interest and become a salaried officer; or (3) the earlier proposed membership modification to eliminate his tax bill and become a salaried officer with a bonus plan. (R. pp. 1616-20). Each of these options kept Wilson in CCC, and Gandis made it clear he was fine with any one of them. (R. p. 1619). Wilson refused to engage and continued to demand CCC cover his tax bill. If this were

oppression, how can Wilson make such threats without Gandis telling Wilson to take a hike? Why would Gandis continue to seek high level tax planning options for Wilson?

Wilson recognized he was in the driver's seat and initiated buy-out negotiations, during which Wilson believed Gandis and Shirley were trying to leverage him down to below fair value by altering the numbers. (R. p. 1655; R. p. 156, ln. 17 – p. 157, ln. 3; R. pp. 421-26; R. p. 670, ln. 23 – p. 671, ln. 2).²⁰ Accordingly, Wilson said he would buy Gandis and Shirley out using *their valuation numbers* for his equity. (R. p. 670, ln. 23 – p. 671, ln. 2; *see also* R. p. 1655). Gandis and Shirley accepted his offer. (R. pp. 1627-28; R. p. 1671; R. p. 156, ln. 17-20). The offer to purchase Wilson's interest could not have been oppressive since they were willing to and in fact did accept the same offer. (*See* Apps. In. Br. at 36). On brief Wilson attempts to undermine this conclusion by arguing the buyout offer was made in bad faith and oppressive due to Gandis and Shirley's negotiation of certain terms. (Wilson Br. at 33-36). This ignores the simple fact that the parties were negotiating a buyout of their interest and proposing purchase terms is simply part of that process. Wilson could have rejected those terms if he wished. Ultimately, the additional terms proposed within the negotiations are irrelevant and do not undermine the fact that Gandis and Shirley offered to buy Wilson's interest in CCC or sell theirs to him utilizing the same valuation. Wilson offered, Gandis and Shirley accepted the offer, but Wilson did not perform.²¹

²⁰ A January 2, 2012 email from Steve Norvell discusses potential acquisition of CCC stating "Dave wishes to stay on, others will be moving on...In the event of an acquisition, only Dave would remain and the other Seller's move-on [*sic*]." (R. p. 1655).

²¹ Incredibly, trial testimony established that Wilson had the financial backing of Steve Norvell but chose not to go through with the deal. (R. p. 244, ln. 7-20; R. p. 454, ln. 17-19; R. p. 517, ln. 3-10). Norvell testified he had the financial ability to close a deal of this size without bank financing. (R. p. 758, ln. 12-14).

Wilson mischaracterizes Gandis' and Shirley's attempts to address Wilson's tax situation as a coordinated effort to deprive him of his membership interest. (Wilson Br. at 26-33). In reality, the options Gandis and Shirley offered were to address Wilson's self-professed financial hardships and keep him in the business. None of this mattered to Wilson. He wanted the company to cover his tax liabilities, continue to receive monthly loans/advances that had climbed to \$12,000 per month by 2011, and retain his membership interest. Wilson wanted the upside of ownership, none of the downside, and the security of a paycheck (employee treatment). When Gandis made it clear the company could not and would not continue to provide preferential treatment to allow CCC to grow, Wilson set out to take CCC's stock of customers to a competitor.

The trial court erred in finding that these actions constituted oppression or were attempts to "freeze out" or "squeeze out" Wilson from CCC. Being offered various options to address a large tax obligation or simply remain a member and be treated as such do not constitute acts of shareholder oppression. Staying in the black in business happens every day, otherwise, bankruptcy looms and a business ceases to exist.

c. Gandis and Shirley took necessary and appropriate steps to protect the business from a rogue member

The lower court found the monitoring of Wilson's company emails, limiting his access to CCC financial information, removing his signatory authority and ability to make wire transfers, locking him out of the business, demanding he return company property, and terminating his cell phone and health plans were all acts of oppression perpetrated by Gandis and Shirley in their efforts to freeze Wilson out of CCC. (R. pp. 1777-78). These were not oppressive acts in the context in which these actions were taken. These were necessary and reasonable measures taken to protect CCC from a rogue member bent on

serving his own interests. The evidence corroborates Wilson's self-dealing to the detriment of CCC.

First, by mid-2011 Gandis and Shirley were faced with a disgruntled business partner who controlled the lifeblood of the business. Wilson also threatened to put CCC's 23 employees out of work during the 2011 holidays. From that time through early 2012 events unfolded and troubling information came to light causing Gandis and Shirley to become concerned about Wilson's actions harming the company. Specifically, Gandis discovered that unknown to him, Wilson continued to run side deals with EFS. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22; *See* Apps. In. Br. at 16). Then, there was growing concern that Wilson was sharing confidential and trade secret information with competitors in the process of courting a buyer for CCC during the buyout negotiations. (R. p. 1673; Apps. In. Br. at 14). Wilson however was not simply looking for potential buyers, he was in the process of leaving the company and taking "as much of the business [he] *manage[d]* at CCC to Filmtech as quickly as possible" and planned to "work to bring prospective business that CCC has been working on or qualifying over the past 3 to 6 months." (R. p. 1692)(*emphasis added*). Under these circumstances Gandis' monitoring of Wilson's archived company email was a reasonable and appropriate measure undertaken to protect CCC.²² Likewise, removing signatory authority on CCC accounts and the ability to make wire transfers was a common sense cautionary measure to protect CCC.

Then, on January 17, 2012 when Gandis learned Wilson intended to leave CCC, he acted on the advice of counsel to protect the company's confidential information by locking

²² Indeed, the company handbook specifically states that there is no expectation of privacy in company email and it could be monitored. (R. pp. 1401-27 at p. 1421 para 3).

Wilson out of the business, demanding the return of company property and, as with any former employee, terminating his cell phone which contained CCC's advertised number. (R. p. 163, ln. 18 -p. 165, ln. 8; R. p. 252, ln. 8-15).

Under the circumstances it was a reasonable and prudent decision for Gandis to monitor Wilson's company emails and to take measures to minimize the potential harm he could do to the business. Despite Gandis' efforts, Wilson still managed to abscond with CCC property, including its confidential and trade secret information which he took with him to his new employer Neologic.²³ Consideration of the context in which Gandis and Shirley undertook these actions demonstrates they were for the purpose of protecting CCC from a rogue member acting solely in his own interest. Protecting a company is not oppression.

d. Wilson's claims of financial fraud are without merit

Wilson makes accusations that CCC's financial records were purposefully manipulated to devalue his interest and conceal "fraudulent activity." (Wilson Br. at 22-24, 35-36). Indeed, there was no financial fraud perpetrated by Shirley or Gandis in this case. Any discrepancies in CCC's financial records were the result of having to reconcile the company's inventory. Wilson was well aware of the inventory's value being incorrect in the corporate books. (R. p. 483, ln. 6-18).²⁴ Del. Bradshaw, the court appointed

²³ CCC presented testimony that Wilson and Neologic/FWS were improperly conducting business based on information gained through the discovery process. (R. p. 876, ln. 18 – p. 877, ln. 7; R. p. 882, ln. 4 – p. 883, ln. 4; R. pp. 1394-1400).

²⁴ Q: She is going to be shocked when she, finally, realizes our inventory is \$400,000 lower than what QuickBooks says it is; right?

A: Yes.

Q: So you knew QuickBooks was grossly overstated; right?

accounting expert, was also aware of the issue. (R. p. 573, ln. 22-24). Wilson engages in a lengthy discussion of Bradshaw's testimony in an effort to imply Shirley manipulated the financial records to conceal fraudulent activity. (Wilson Br. at 22-24). That long discussion fails to mention Del Bradshaw's testimony that he found no indicia of fraud in the accounting records save one instance—a loading dock sale. (R. p. 576, ln. 11 – p. 577, ln. 18).

2. *The hallmarks of shareholder oppression are absent*

a. *Wilson did not face the prospect of a “trapped investment”*

“The primary vulnerability of a minority shareholder is the specter of being locked in...having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.” *Kiriakides*, 343 S.C. at 604-05. The *Ballard* Court noted that an oppressed minority shareholder “faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* at 595. Wilson did not face such circumstances.

First, Wilson was not a minority shareholder in CCC; powerless and vulnerable to the actions of his fellow members. He and Gandis held equal shares of the business and Wilson controlled the lifeblood of the company by being responsible for sales and purchasing. Second, Wilson's only investment into CCC was EFS customers and his time. As discussed above, he held back several lucrative customer accounts from CCC, side dealing to these and other customers to the tune of over \$1.7 million. (R. pp. 1318-27; R. pp. 221-222). More relevant to the oppression issue is the fact that upon leaving the

A: Yes.

(Tr. 487, ln. 23-25 – 488, ln. 1-3).

company Wilson took many of those customers with him and actively courted other CCC customers' business for his new employer Neologic. (R. p. 1333; R. p. 883, ln. 17-24).²⁵ Thus, his investment in CCC was marketable and easily portable as demonstrated by Wilson himself.²⁶ Third, Wilson was not locked into the business without any expectation of receiving a return on his investment. On the contrary, from the outset Wilson knew he would and in fact did receive a return in the form of monthly payments of \$8,000 regardless of the sales or profits he generated. In addition, CCC paid out substantial distributions to Wilson during its profitable years and to this day he remains substantially ahead of Gandis and Shirley in distributions received. Therefore, Wilson did not face the specter of being locked into CCC without expectation of seeing a return, powerless against an oppressive majority shareholder. On the contrary, Wilson received substantial return on his investment above and beyond what an LLC member is entitled to and upon leaving the company took much of his investment to Neologic to compete with CCC, while demanding a buyout as if such assets remained in CCC beyond his reach. The trial court erred in not reducing his buyout for the damage his removal created within CCC.

b. Wilson held and welded immense power over CCC

Wilson takes great pains to vilify Gandis' business decisions and Shirley's advice. In furtherance of that campaign, Wilson portrays himself as a powerless victim forced out of CCC by those in power. His argument and inaccurate portrayal is belied by the fact that Wilson held tremendous power over CCC and its members by controlling integral aspects

²⁵ A list of Neologic customers submitted at trial showed that 23 out of the 27 were CCC customers. (R. p. 1333).

²⁶ This is exhibited by the buyout ("Texas draw") where Wilson had the opportunity to buyout the other members with their own offer price.

of the operation; namely sales and purchasing. He therefore controlled the lifeblood and viability of the business. Wilson was well aware of the power he held over CCC and unabashedly welded it in his continual pursuit of preferential treatment, including in October of 2011 when he threatened the ongoing viability of CCC and the jobs of its 23 employees if the company did not cover his tax liabilities. (*See* Apps. Int. Br. at 12-13). Oppression requires exploitation of a power imbalance between the parties. One holding tremendous power over his alleged oppressors cannot be oppressed.²⁷

III. CONCLUSION

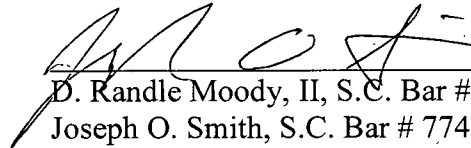
Wilson wanted all the upside of business ownership, none of the downside of ownership, and the security of being an employee. Wilson wanted it all, and the lower court disregarded the realities of business (including taxes) and gave Wilson what he wanted. The Court applied an incorrect legal standard to conclude that Wilson did not breach his fiduciary duties to Gandis and Shirley. That was an error. The Court also erred in applying a myopic view of Wilson's personal financial situation, detached from business and economic realities in finding oppression. Equal treatment of owners is not oppression. Thus, for the reasons set forth above, the Circuit Court's Order of January 9, 2015 should be reversed.

(signature page to follow)

²⁷ (*See* Apps. Int. Br. at 35-42)(Discussing additional evidence and circumstances that undermine the lower court's oppression finding including the fact that Wilson controlled his own destiny, took all the good out of CCC, remained substantially ahead of Gandis and Shirley in cash distributions, the fact that Gandis initiated a meeting with him to discuss an exciting business prospect the day Wilson later resigned.).

Respectfully Submitted,

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June 20, 2016

Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

RECEIVED

JUN 22 2016

SC Court of Appeals

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,

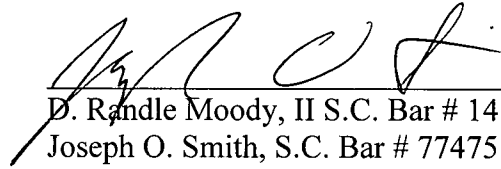
and

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellants John Gandis and Andrea Comeau-Shirley complies with Rule 211(b), SCACR.

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June 21, 2016
Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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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.

PROOF OF SERVICE

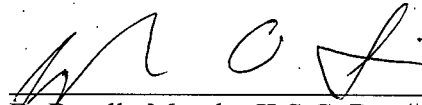
I certify that I have served the Final Reply Brief of Appellants John Gandis and Andrea Comeau-Shirley by depositing a copy of same in the United States Mail, postage pre-paid, this 21th day of June, 2016, addressed to the attorneys of record as follows:

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June 21, 2016

VIA FEDERAL EXPRESS

Hon. Jenny Abbott Kitchings
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RECEIVED
JUN 22 2016
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:

Enclosed please find the original and fifteen (15) copies of the **Final Reply Brief of the Appellants** in the above-referenced appeal. Also enclosed is a Proof of Service for the same. Please file the enclosed documents in your usual manner and kindly return one filed, clocked copy of the same to me in the stamped, self-addressed 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

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Ellen S. Griffin
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Enclosures: (as stated above)

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