

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY

S.C. Supreme Court

Court of Common Pleas

Marvin Dukes, III, Master in Equity

Opinion No. 2012-UP-274 Filed May 2, 2012

Appellate Case Tracking No. 2012-212-958

Bill P. Passaloukas and Susie H. Passaloukas,
Individually and as Shareholders Derivatively
On Behalf of Zorba's, Inc.,.....Petitioners,

v.

Cynthia Bensch, Gary Bensch and Zorba's, Inc.....Defendants

Of whom Cynthia Bensch and Gary Bensch are the.....Respondents.

PETITION FOR WRIT OF CERTIORARI

Frank F. Pape, Jr.
2952 Crosswycke Forest Circle
P.O. Box 190009
Atlanta, Georgia 31119
1-404-846-0228
Petitioners' Attorney

Other Pro Se Parties:

Cynthia M. Bensch
Gary M. Bensch
29 Martingale West
Bluffton, SC 29910
1-843-681-3112
Respondents, Pro Se

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on June 22, 2012.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err by deferring to the Master's determinations and by not issuing an opinion which addressed every point raised on appeal with supporting reasons?
- II. Did the Master err in failing to place the burden of proof on the Bensches to strictly account for their management of Zorba's assets?
- III. Did the Master err by failing to rule that Zorba's was wrongfully ejected?
- IV. Did the Master err by determining that the Bensches were entitled to Zorba's assets because they were entitled to mitigate?
- V. Did the Master err by failing to determine that restaurant was valued at \$75,000 or that the \$75,000 sales price of the restaurant was revenue from the disposal of Zorba's assets?
- VI. Did the Master err by failing to determine that the leasehold improvements were assets of Zorba's and were not forfeited by termination of the lease?
- VII. Did the Master err by failing to determine that Zorba's is entitled to the imposition of a constructive trust upon the leasehold improvements?
- VIII. Did the Master err by failing to determine that reimbursement of insurance premium, last month's rent, security deposit, cash on hand and stock in trade were assets which belong to Zorba's and establish their value?
- IX. Did the Master err by failing to determine that Zorba's was entitled to a proportionate share of the rents received by the Bensches as revenues from the disposal of Zorba's assets?
- X. Did the Master err by failing to determine that Bill Passaloukas was owed a salary in the sum of \$14,400?

- XI. Did the Master err by failing to determine that attorneys fees incurred by the Passaloukases for defending an employee claim must be reimbursed?
- XII. Did the Master err by determining that the Bensches were entitled to be reimbursed certain debts incurred by the Bensches for winding up the business?
- XIII. Did the Master err by failing to determine that Zorba's and the Passaloukases are entitled to interest on sums owed to Zorba's and the Passaloukases?
- XIV. Did the Master err by failing to determine that Zorba's and the Passaloukases are entitled to punitive damages for the wilful and reckless acts of the Bensches?
- XV. Did the Master err by failing to determine that the Passaloukases are entitled to attorneys fees for prosecuting this lawsuit?
- XVI. Did the Master err by determining that the Bensches were entitled to be reimbursed certain debts incurred by the Bensches for winding up the business?
- XVII. Did the Master err in finding that Zorba's was a failed business?
- XVIII. Did the Master err in his final accounting?
- XIX. Did the Master err by failing to determine that the Bensches converted or misappropriated assets of Zorba's and the Passaloukases?
- XX. Did the Master err in dismissing the statutory and common law actions for dissolution?

STATEMENT OF THE CASE

Passaloukas I Ordered Full De Novo Review and Strict Accounting

This is the Passaloukases' second appeal. The first appeal resulted in a decision of the Court of Appeals, Unpublished Opinion No. 2004-UP-506, Submitted September 14, 2004 - Filed October 11, 2004. (hereafter "Passaloukas I") R.p. 12. The Court of Appeals reversed and remanded the case to the Master "for a strict accounting followed by full de novo review of all legal and equitable issues". R. p. 14. The Master was specifically directed to "detail the contributions by the parties; the identity and value of equipment, furnishings, and other items

belonging to Zorba's at the time of the eviction; the disposal of any property belonging to Zorba's; any revenues from the disposal of Zorba's property; and Zorba's debts, both paid and currently outstanding." R. p. 14.

Passaloukases' Claims for Accounting

Petitioners Bill P. Passaloukas and Susie H. Passaloukas (hereinafter "Passaloukases") own 50% of the shares of a statutory close corporation known as Zorba's, Inc. (hereinafter "Zorba's"). Cynthia Bensch and Gary Bensch (hereinafter "Bensches") own 50%. The Passaloukases and Bensches were directors. R.¹ p. 247 (Plts' Ex #7; R.p. 283 (Plts' Ex #11)). Zorba's was formed to operate a restaurant in Bluffton, South Carolina. The Passaloukases managed the restaurant. To conduct its business Zorba's leased Unit 101 Towne Center from the Bensches. R.p. 260 (Plts' Ex #1).

The Passaloukases' Amended Verified Complaint dated May 9, 2005, seeks a broad range of common law and statutory remedies. R.p. 15-29. They seek an accounting and an award on behalf of Zorba's in the sum of \$379,578.67 as a result of the Bensches' wrongful misappropriation of certain specifically identified assets which were owned by Zorba's.² Those assets alleged to have been misappropriated are identified in paragraph 17 of the Amended Complaint. R.p. 22. They include a restaurant valued at \$75,000; leasehold improvements valued at \$60,344.09; value of insurance policy valued at \$896.25; refund of insurance policy valued at \$481.00; Paper supplies valued ta \$500.00; Juice supplies valued at \$200.00; coffee supplies valued at \$200.00; wine, beer and Champagne valued at \$2,000.00; food valued at \$3,000.00; stale checks valued at \$94.15; \$404.00 in cash; rents received from lease of premises valued at \$109,243.44; security deposit in the sum of \$1,885.00; and last month's rent in the sum of \$1,885.00. The Passaloukases asked for dissolution, liquidation and distribution of these assets

¹ "R" here and hereafter refers to the original "Record on Appeal and "SR Vol I" and "SR Vol II" refer to "Volume I" and "Volume II", respectively, of the "Supplemental Record on Appeal" filed with the Court.

² The accounting statement which supports the \$379,578.67 is at pages 51-53 herein.

under authority of S.C. Code Ann., 1976 § 33-14-300. There is a common law derivative action which seeks actual and punitive damages for misappropriation of corporate assets; a judgment directly against the Bensches for actual damages as “aggrieved parties” under authority of S.C. Code Ann., 1976 § 33-18-400(a); actual and punitive damages for conversion of certain personal property belonging to the Bensches as a result of the ejectment; wages owed to Bill Passaloukas in the sum of \$14,400 earned pursuant to the provisions of a written agreement; repayment of loans made to Zorba’s in the sum of \$29,375.16; and interest.

Bensches’ Answer

The Bensches’ Answer contains a general denial, several affirmative defenses asserting estoppel, payment, laches, arbitration, and several counterclaims seeking damages for conversion, breach of contract, waste and indemnification. R.p. 30. The Bensches do not seek an accounting.

The Master’s Interim Order Requiring Passaloukases to Retain Accountant

The Honorable Marvin Dukes, III, Master-in-Equity for Beaufort County entered an interim “Order (not ending case)” dated April 1, 2008. This Order directed the Plaintiffs to hire an accountant to undertake an accounting. R.p. 1-4 (Order not ending case).

The Master’s Final Order

The Master entered a final Order dated January 11, 2010 (hereinafter “Order”). R.p. 6. The Order denies all causes of action of both parties. The Master did not require an accounting of the Bensches. He identified a few pieces of equipment defined as “non-fixtured assets” valued at \$1439. The Order finds that the ejectment was not wrong and that all of Zorba’s assets, except for “non-fixtured assets”, were forfeited to the Bensches. The Order determined there was no conversion. The Order determined that the Bensches were entitled to “mitigate” Zorba’s losses, that there was no deadlock and that no dissolution, liquidation or distribution is required. The Order rules against the Passaloukases on all other issues, including the claim for unpaid wages.

Passaloukas II: The Second Appeal

The Court of Appeals issued the memorandum opinion which is the subject of this Petition (hereafter “Passaloukas II”). App.³ p. 2. As authority the Court cited Rule 220(b)(1), SCACR (memorandum opinion allowed where the case has no precedential value and, if dispositive, the trial court’s factual findings are not clearly erroneous or no error of law appears); *Wilder Corp. v. Wilke*, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct.App. 1996)(Court may resolve questions of fact in accordance with its view of the preponderance of the evidence); and *Laughon v. O’Braitis*, 360 S.C. 520, 224-25, 602 S.E.2d 108, 111 (Ct. App 2004)(Court not required to disregard trial court’s findings or ignore the fact that the master was in a better position to assess credibility).

Statement of Facts

The Passaloukases and Benschkes incorporated “Zorba’s, Inc.” as a statutory close corporation under S.C. Code Ann. §33-18-101, et seq. by the filing of “Articles of Incorporation” with the Secretary of State on April 16, 1999. Plts’ Ex #6. Three written agreements dated August 15, 1999, set forth the understandings. They are a “Shareholder’s Management Agreement” (R.p. 247 (Plts’ Ex #7))(hereafter “Shareholders’ Agreement”); a “Written Consent in Lieu of an Organizational Meeting for Zorba’s, Inc.” (R.p. 283 (Plts’ Ex #11))(hereafter “Written Consent”) to which is an attachment entitled “Exhibit ‘A’ to Organizational Minutes/Consents”; and a “Commercial Lease Agreement” (R.p. 225 (Plts’ Ex #1))(hereafter “Lease”) for the lease of Suite 101, 27 Mellichamp Dr, Bluffton, S.C., where the restaurant business was operated. The Benschkes were the landlord. Zorba’s was the tenant.

Zorba’s failed to timely pay the rent owed to the Benschkes which was due and payable on December 15, 1999. R.p. 225 (Plts’ Ex # 1); R.p. 266 (Plts’ Ex # 8). The Benschkes sent two letters to Zorba’s concerning the December rent. The first was a letter dated December 21, 1999, sent by the Benschkes’ attorney. R.p. 453 (Plts’ Ex # 32). This letter advises only that the Benschkes intend to charge late fees if payment is not made and does not mention termination. A

³ “App.” refers to the Appendix filed in this case.

second letter dated December 28, 1999 was mailed informing Zorba's that the lease was terminated. R.p. 266 (Plts' Ex # 8). Bill Passaloukas did not receive the letter until December 31, 1999. R.p. 268 (Plts' Ex # 8); R.p. 132, l. 4-7; p 133, l. 1 - 4; p 315, l. 17-22.

Without utilizing judicial process, the Bensches went to the restaurant on Sunday morning January 9, 2000 and changed the locks on the doors. R.p. 269 (Plts' Ex # 9); p. 82, l. 11-16; p 83, l. 14 – p. 84, l. 6. They threatened criminal prosecution if the Passaloukases attempted to enter the restaurant. R.p. 269 (Plts' Ex # 9). The Bensches took possession of all of Zorba's assets⁴: a restaurant worth \$75,000 (R.p. 270 (Plts' Ex # 10)); equipment and furnishings provided by the Passaloukases for which they paid \$27,184.02 (R.p. 485 (Defs' Ex # 5)); leasehold improvements worth \$60,248.57 (R.p. 237 (Plts' Ex # 4)); stock-in-trade worth \$6,000 (R.p. 353 (Plts' Ex # 23); R.p. 399 (Plts' Ex # 24); R.p. 115, l. 5 – p. 119, l. 13; p. 120, l. 5 – p. 122, l. 15; p. 123, l. 8-16); a commercial lease of Unit 101 Towne Center (R.p. 225 (Plts' Ex # 1)); \$404, cash R.p. 296 (Plts' Ex # 13)); and a cash refund on an insurance policy in the sum of \$481 (R.p. 333 (Plts' Ex # 18)).

On or about May 2, 2000, the Bensches, through their company Nicoli's, sold the restaurant to "MiTierra's" for the sum of \$75,000. R.p. 270 (Plts' Ex # 10). The restaurant is the same one which was operated by Zorba's at Unit 101. R.p. 89, l. 13-16. The sale included all of the equipment and furnishings contributed by the Passaloukases. R.p. 86, l. 1-5, p. 87, l. 8-13.

The Bensches entered into a five year lease of the restaurant premises, Unit 101, to MiTierra's. R.p. 297 (Plts' Ex # 14). The Bensches received \$163,898.50 in rents from the lease of Unit 101 to MiTierra's from May 2, 2000, to May 1, 2005. R.p. 331 (Plts' Ex # 16).

SCOPE OF REVIEW

A de novo review of all factual and accounting issues is required of this Court on

⁴ These are the only assets for which a strict accounting is sought. The Bensches have made no claim for an accounting of any assets.

petitions for writs of certiorari to the court of Appeals. Article V, § 5 South Carolina Constitution; *Lewis v Lewis*, 392 S.C. 381, 709 S.E.2d 650 (S.C. 2011). De novo review is required notwithstanding the presence of evidence which supports the Master's findings. Respect for the Master's findings may not serve as a license to lessen the de novo standard of review. *Id.*, 392 S.C. at 390. The only instance when deference to the Master's factual findings is allowed is where those findings are based on issues of credibility where the Master is in a superior position to the Court of Appeals. *Id.*, 392 S.C. at 391. There is one exception. When the evidence is based, not upon an oral history of events, but upon documentary evidence, the Court should not defer to the Master. *Pool v Dial*, 10 S.C. 440 (SC 1879)(The Court's jurisdiction "...is very different in equity cases; and when the testimony is in writing, as in this case, the Supreme Court is as competent as the Referee to pass upon questions of fact...")(emphasis added). Further, as will be seen from the argument below, the Master's determinations are not findings of fact but conclusions of law.

ARGUMENT

I. The Court of Appeals erred by deferring to the Master's determinations and by not issuing an opinion which addressed every point raised on appeal with supporting reasons.

The Court of Appeals erred by issuing a memorandum opinion under authority of Rule 220(b)(1), SCACR. There are several reasons the Court erred.

All Points Distinctly Stated Addressed And Reasons Subject to Narrow Exceptions

Opinions must address every point raised on appeal and provide reasons unless the trial court's judgment "is based upon findings of fact which are not clearly erroneous" or "when no error of law appears." S.C. Code §18-9-280; Rule 220(b)(1), SCRAP. In *Passaloukas II* the Court of Appeals cited Rule 220(b)(1) as authority to issue a memorandum opinion. That is error. The Master's determinations are clearly erroneous. The applicable law and written agreements have been misapplied or ignored. These points find support in the analysis which is set forth

hereafter.

***Passaloukas I* Requires Full De Novo Review and Strict Accounting**

Another reason is that the Court of Appeals erred by failing to enforce *Passaloukas I*, cited above, which ordered a “strict accounting” for each of several accounting components which it identified. *Passaloukas I* ordered a full de novo review of all legal and equitable issues. The injunction for a full de novo review and a “strict accounting” is a reminded of the trial court’s responsibility to make its findings “specially” and state conclusions of law “separately”. SCRCP, Rule 52 (a). See the further analysis of the Master’s errors herein below in support of this point. Failure to comply with *Passaloukas I* is clearly erroneous.

Improper Deferral to Master’s Findings Based Upon Credibility

Passaloukas II erred because it improperly deferred to the Master’s factual determinations by concluding that the Master was in a better position to evaluate credibility of witnesses. The error in this respect is clearly erroneous for several reasons.

A. Proof of claims Based Upon Written Documents

The first reason that *Passaloukas II* must not defer to the Master is because the material issues are resolved by examination of written documents. *Pool v Dial*, 10 S.C. 440 (SC 1879)(The Court’s jurisdiction “...is very different in equity cases; and when the testimony is in writing, as in this case, the Supreme Court is as competent as the Referee to pass upon questions of fact...”)(emphasis added). This is especially true in this case because the core issue before the Court is a “strict accounting” of specifically identified and limited number of assets which the Benschés misappropriated. A “strict accounting” may not be proved by an oral history of events, but must be proven by written documents. *Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705, 711 (1933). It is true also because the burden of proof is cast upon the Benschés arising from the fact that they exclusively possessed and controlled Zorba’s assets when they ejected Zorba’s. It is their obligation to prove with written documents, checks and invoices, that they managed and

disposed of the assets for the benefit of Zorba's.⁵

Accounting Evidence

The accounting evidence is all in writing. In addition to the written Shareholders' Agreement, Written Consent and Lease agreement, cited above, and the written default notices, it includes the following documents which meet the requirements of a strict accounting.

Contributions. The parties stipulated that the Passaloukases contributed \$68,875.16⁶ to Zorba's and that they were reimbursed the sum of \$9,500.00. R. 234, 235 (Plts' Ex # 2); SR Vol I, p. 75, l. 22 - 24. They stipulated that the Benschkes contributed the sum of \$62,995.09. R.p. 237 (Plts' Ex # 4).

Operating Bank Account. The Passaloukases presented all of the monthly bank statements through the end of December, 1999, including all deposits and checks. SR Vol II, p 829-367 (Plts' Ex #21). This exhibit shows all income and expenses. Attached to these statements are copies of all checks drawn from the account at all times during which the Appellants held control of the corporate records.

General Ledger. A general ledger was prepared by the Benschkes' witness accountant Gil Fisher. And was entered into evidence. SR Vol II, p. 918 (Defs' Ex #16). This shows all income and expenses from May 18, 1999, through December 31, 1999.

Payroll Account. Accountant Gil Fisher prepared a statement concerning Zorba's payroll which was presented into evidence. SR Vol II, p. 928, 929 (Defs' Ex # 17). This statement shows payments to employees through December, 1999. It was prepared on April 21, 2000 following the ejection. It does not show any money being paid to the Petitioners. Accountant Gil Fisher, witness for the Benschkes, testified that, based on his review of the payroll account, as well as the

⁵ Issue II, pages 14 - 16, addresses the law applicable to the burden of proof.

⁶ The Master incorrectly determined that the Passaloukases had contributed only \$59,375.16. What the Master did was to subtract reimbursements to the Passaloukases from the contributions. R.p. 234 (Plts' Ex # 2)(Detailed statement of the capital account.)

other accounts (presumably referring to the operating and cash accounts), that there would be nothing in any of the accounts for the parties to divide up. SR, Vol II, p. 645, l. 9-18. Also see SR Vol II, p. 665 l. 13 - p. 666, l. 2, where the parties stipulate that there was nothing in the accounts.

Balance Sheet. Accountant Gil Fisher prepared a balance sheet as of December 31, 1999. SR Vol II p. 917 (Plts' Ex # 31). This balance sheet shows all liabilities and assets of Zorba's. The balance sheet was prepared on April 21, 2000, long after the Respondents ejected Zorba's and the Appellants from Unit 101. The values assigned by this balance sheet provide substantial support for the values of Zorba's assets determined through the substantial evidence presented at trial. This balance sheet values "Leasehold improvements" at \$69,037.51, whereas the Passaloukases' accounting values the leasehold improvements at \$60,248.57. It values "Furniture and fixtures" at \$18,689.93 and "Equipment" at \$32,063.47, whereas the restaurant, including good will, furnishings and equipment was sold for \$75,000 and appraised at \$75,000 by Mr. Steinberg.

B. Master's Determinations Not "Factual Findings" But "Legal Conclusions"

The second reason that *Passaloukas II* must not defer to the Master's determinations is that they are not "factual findings" which require deference. His determinations are "legal conclusions" which this Court has found to be entitled to no deference. See *In the Matter of the Treatment and Care of Luckabaugh*, 351 S.C. 122, 132, 568 S.E.2d 338, 343 (2002).

Luckabaugh identifies the kind of determinations upon which the Supreme Court places no reliance. The following determination is an example of the kind which the Court found to be only a "legal conclusion" which allows no deference:

Upon hearing the evidence I find that the State failed to prove beyond a reasonable doubt that the Defendant meets the definition of a 'sexually violent predator'... [e]ven if Defendant suffers from the personality disorder known as sexual sadism, the State failed to show this condition makes it likely that the Defendant will engage in future acts of sexual violence if not confined in a secure facility for longer term control, care and treatment.

Id., 351 S.C. at 350.

Rule 52(a), SCRPC, requires "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." This means that trial courts must write their findings specially and separately to allow a reviewing court to determine from the record whether the legal conclusions which underlie it represent a correct application of the law. *Id.*, 351 S.C. at 132. The Supreme Court held that detailed findings are required:

The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Id., 351 S.C. at 132.

The absence of factual findings makes the task of an appellate court impossible because the trial court's rationale in support of its decision would be left to speculation. *Id.*, 351 S.C. at 132. In *Luckabaugh* the Supreme Court concluded, "To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give deference." *Id.*, 351 S.C. at 133.

This is especially a problem in the case at bar because the pro se Respondents have completely failed to cite any evidence from the record in support of the Master's conclusions. This Court now has the "chore of sorting through the record to review contradictory testimony" a task which is not properly placed on the Petitioners or this Court. In the twelve year history of this lawsuit no court, trial or appellate, has cited the evidence or the written agreements to support the Master's determinations.

C. Standard by Which Master Weighed the Evidence Is Erroneous

The Master's determinations are entirely dependent upon which standard he used to weigh the evidence. The burden rested with the Benschers because they became fiduciaries when they took exclusive possession and control of certain specifically identified assets.⁷ If he had

⁷ See full argument, with authority, on this point, hereinafter in issue II, pages 14 - 16.

correctly placed the burden on the Bensches he should have reached a different result, as is evidenced by some of his determinations.

As evidence that he placed the burden on the Passaloukases, the Master ordered the Passaloukases to undertake the accounting by hiring an accountant. R.p. 3 (Order (not ending case)). In his final Order the Master ruled that the Passaloukases had failed to comply. (R.p. 8). The Master did not criticize the Bensches for not presenting the same kind of accounting evidence. On every issue his ruling leans heavily in favor of the Bensches, in spite of the fact that South Carolina law disfavors forfeitures and places the burden of proof of a strict accounting on fiduciaries.

As further evidence that he placed the burden on the Passaloukases, in spite of the fact that *Passaloukas I* had ordered a “strict accounting” which requires written documents such as checks and invoices as proof, the Master accepted evidence from the Bensches which did not meet that burden. For example, with respect to the disposition of the \$75,000 received from the sale of the restaurant, the Master concluded that “there was no competent testimony to link any value of these items⁸ to the sale or lease value of the Mi Tierra transfer as that restaurant sale included consulting fees and additional square feet.” R.p. 10 (Order). The basis of this determination is, as the Master states it, that the “sale” includes “consulting fees” and “additional square feet”. Yet, the Bensches offered no document as evidence to establish the value of the “consulting fees” or “additional square feet”. The sales agreement itself allocates no value to “consulting” or “additional square feet”, only equipment and good will. The failure to value the “consulting fees” or the “additional square feet” lies on the party who bears the burden of proof, the Bensches. Was \$500 the value of the consulting? Was \$10,000 the value added as a result of additional square feet? Did the restaurant, when it was in the hands of Zorba’s on the day of the ejectment, not have any value at all? Was the \$75,000 sales price solely due to the “consulting

⁸ Referring to the non-fixture assets which he determined belonged to Zorba’s and valued at \$1,439.00.

fees” and “additional square feet”? Because the Bensches failed to offer any competent evidence on this issue (documents as opposed to oral testimony) the only inference is that the Master had improperly placed the burden of proving that issue on the Passaloukases.⁹

D. Master Failed to Address Material Determinative Legal and Equitable Issues

In addition to not properly allocating the burden of proof, among the material legal and equitable issues which are clearly erroneous, are the Master’s failure to examine the following issues:

1. The Master failed to address any of the provisions of the Shareholders’ Agreement or the Written Consent concerning the conveyance of leasehold improvements, the Bensches’ obligation to lend \$20,000 to Zorba’s or the obligation to pay a salary to Mr. Passaloukas. Except for contracts which are illegal or against public policy the people of this state are free to make contracts, even imprudent ones, which will be enforced by the Courts. *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983)(It is not the function of the court to rewrite contracts for parties.)

3. The Master failed to address the provisions of the Lease concerning events of default, the Bensches’ right to eject Zorba’s or the applicable legal and equitable principles customarily applied to such events.

4. The Master failed to address this Court’s long established policy for disfavoring forfeitures. The Master determined that the lease was forfeited and that Zorba’s assets were forfeited except for \$1439 in “non-fixture” equipment and furnishings. Disfavoring forfeitures is a fundamental moral value which enjoins people from obtaining windfalls at the expense of others through forfeiture of property rights arising from correctable deficiencies in performance. *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928)(“Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of

⁹ The Master’s error in failing to include the \$75,000 value of the restaurant is addressed in detail, with supporting authority, hereafter at pages 26 - 30, issue V.

justice.")

5. The Master failed to address the law of fixtures and ignored *Pope v. McMillan*, 232 S.C. 100, 101 S.E.2d 55, 59 (1957) ("We know of no legal barrier to the voluntary sale of a common-law fixture, separate from the land upon which it is located, by the owner of both.")

E. Master's Misstatement of Testimony

Passaloukas II must not defer to the Master's determinations because he misstated the testimony of the Passaloukases' expert witness Robert Steinberg concerning the \$75,000 value of the restaurant.¹⁰ Not only was the testimony misstated but the Master ignored the fact that there was other undisputed evidence that the restaurant was worth \$75,000. It was sold for \$75,000. He ignored the incontestable fact that in February, 2000, prior to selling the restaurant, the Bensches signed a resolution declaring that Zorba's assets would be held in trust for the benefit of Zorba's until the assets are either liquidated or sold. R.p. 332 (Plts' Ex # 17). The assets were not liquidated. The assets were sold for \$75,000. The Master further ignored the provision contained in the sales agreement which states that "Zorba's, Inc., an entity owned by the Seller's principal, Gary Bensch was terminated as of the date of this Purchase and Sale Agreement, no lawsuits or claims have been asserted by the remaining shareholders with respect to the leasehold interest or tenant improvements and that no action has been taken to liquidate or dissolve Zorba's, Inc." R.p. 271 (Plts' Ex # 10, ¶ 7.6). The sales agreement further states that there are no actions pending or to be asserted except for such actions as may be made by Zorba's. R.p. 272 (Plts' Ex # 10, ¶ 8.3). This contradicts the Master's conclusion that the assets were liquidated and clearly ties Zorba's to the restaurant and sale.

II. The Master erred in failing to place the burden of proof on the Bensches to strictly account for their management of Zorba's assets.

The Master required the Passaloukases to hire an accountant to undertake an accounting. R.p. 3 (Order). Although the Passaloukases hired an accountant who testified and presented a

¹⁰ The analysis of this testimony and the Master's error is addressed in detail in issue V at pages 28 - 29 herein.

compilation report, the Master stated: "Despite the fact that Plaintiffs failed to comply with this Order, the trial proceeded, for the second time, over the course of several days." R.p. 8 (Order). That was error.

The Master did not ask that the accountant undertake an audit for the purpose of ascertaining and determining the validity and authenticity of Zorba's financial records. The Master did not ask that the accountant take testimony or report back to the Court as to his findings about the validity and authenticity of the financial records. Absent such instructions, an accountant cannot be engaged to act as an auditor, make findings of fact as to the identity of the contributions, the value of assets or the revenues. That is the Court's task. The only accounting issue before the court was to determine what the Bensches did with certain specifically identified assets: the restaurant and its equipment and furnishings, the leasehold improvements and any rents generated with them, stock in trade, insurance policy, a security deposit, first month's rent and cash on hand. No accountant could establish the existence or non existence of these items, their validity or authenticity of the Passaloukases' claims or the value of the assets. Detailed evidence supporting the validity and authenticity of the Passaloukases' claims was presented to the Master through sworn witnesses and documents.

The only thing which an accountant might do, as was done in this case, is to prepare and present a compilation report, a summary which is subject to the rules of evidence. Rule 1006, SCRE. Summaries require proof of the underlying data. Nothing was to be gained from the testimony of an accountant except the compilation report which the Passaloukases presented as R.p. 406 (Plts' Ex # 27). The report was admitted into evidence and based upon the testimony and exhibits already introduced into evidence. R.p.183, l. 4 - p. 193, l. 17.

If an accountant was required to present an accounting it is the Bensches who are required to do so. The Passaloukases had asked that the Bensches strictly account for misappropriating certain specifically identified corporate assets. Paragraph 17 of the Amended Complaint. R.p. 22. The Bensches bear the burden of that accounting because they became dominant shareholders

when they took exclusive possession and control of those assets by ejecting Zorba's from Unit 101 on January 9, 2000. As dominant shareholders the Benschers owe fiduciary duties. *Lesesne v Lesesne*, 307 S.C. 67, 413 S.E.2d 847, 848 (Ct.App. 1991); S.C. Code Ann., 1976 § 33-18-400 (a)(1)(Those in control of a corporation are subject to special scrutiny for oppressive or unfairly prejudicial behavior); *Island Car Wash, Inc. v Norris*, 292 S.C. 595, 358 S.E.2d 150, 152 (Ct.App. 1987)(Courts of equity zealously scrutinize transactions between parties occupying confidential relationships, particularly those transactions in which a dominant party secures any profit or advantage at the expense of the person to whom he owes a fiduciary duty.)

Compare *Talbot v James*, 259 S.C. 73, 190 S.E.2d 759 (1972). In *Talbot* a 50% shareholder/officer entered into a contract with his corporation thereby breaching his fiduciary obligation to the corporation. The Supreme Court required him to disgorge, not only all of his profits, but also his overhead expenses. *Id.* at 766.

The party having peculiar knowledge of the facts or control of evidence has the burden of the evidence. *Roberts v. Roberts*, 296 S.C. 93, 99, 370 S.E.2d 881, 884 (Ct.App., 1988). The Passaloukases had no records after the Benschers ejected them. The Benschers took everything, including inventories (R.p. 172, l. 15 – p. 173, l. 3), checks, check book (R.p. 178, 169, l. 12-16; p. 179, l. 12-14; R.p. 196, l. 3-18; p. 197, l. 1-6), and invoices (R.p. 217, l. 17-22). The Passaloukases were locked out and could not get access to their personal property. R.p. 214, l. 7-16.

Fiduciaries are held to a strict accounting. *Peeples v. Hornik*, 153 S.C. 321, 150 S.E. 802, 805 (1929). They are charged with the duty to keep a record of their transactions in the corporate assets. *Lawson v Rogers*, 312 S.C. 492, 435 S.E.2d 853, 857 (1993). Fiduciaries must produce documentary evidence of their transactions with the corporate assets. A "...strict accounting would require a receipted bill as evidence... [and]...a check...should be sufficient evidence of the payment of that debt..." *Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705, 711 (1933).

It is not sufficient for the Benschers to offer oral testimony that they incurred expenses in

their management of the corporate assets of which they held exclusive control. Compare *Lawson v Rogers*, supra, where the defendants produced no document to account for their claims that they used partnership assets to benefit the partnership. The Court held that every presumption must be made against the fiduciary. Oral testimony was insufficient. *Id.* at 857.

III. The Master erred by failing to rule that Zorba's was wrongfully ejected.

The Master found that there were legitimate questions as to the timing of the default notice but still found that there was no wrongful eviction. R.p. 8 (Order). He ruled: "I find no wrongful eviction." R.p. 11 (Order). The Master ruled "I find that, at the time of the default, no party was obligated to further fund the corporation to prevent such default". R.p. 9 (Order). The Master cited no provision of the Shareholder's Agreement, the Written Consent or the Lease concerning defaults and notices. He failed to cite the actions of either party. He cited no law in support. This is only a legal conclusion which violates the standard of *Luckabaugh*, supra. It is not entitled to deference.

Notices are Deficient

Applicable Law

There are several sources of authority which must be applied to this case. *Hardin v. Horger*, 252 S.C. 298, 166 S.E.2d 215 (1969)(Forfeitures are allowed only when intent is clear and no other reasonable construction is possible); *Clardy v. Sovereign Camp, W.O.W.*, 193 S.C. 444, 8 S.E.2d 748 (1940)(Courts will seize upon even slight evidence to prevent a forfeiture; *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct.App. 1986)("Forfeiture provisions of a lease are strictly construed and when a forfeiture depends upon giving a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content."); and *Kiriakides v United Artists Communications*, 312 S.C. 271, 440 S.E.2d 364 (199)(Default in payment must be material.). Given these injunctions of the law, and the way it has been applied by this Court, the clear

preponderance of the evidence is that either one of three things was true. Zorba's was not in default. If it was in default the default notices did not comply with the requirements of the Lease. If there was a default and the default notices did comply, the alleged default was not material. In either of these three instances the ejection was wrongful.

No Default in Payment

There was no default in payment of the December rent because payment was to be made "at the Landlord's office". R.p. 226 (Plts' Ex # 1, Paragraph 2.a). No mailing address is identified. The persuasive reasonable inference is that delivery in person was the method contemplated by the parties. The rent check had always been picked up on the 15th day of each month by Mrs. Bensch. R.p. 135, l. 4-7; p. 141, l. 20-22; R.p. 176, l. 12-24. The conduct of the parties is entitled to great weight in interpreting an ambiguous contract. *Langston v Niles*, 265 S.C. 449, 219 S.E.2d 829, 834 (1975).

The Passaloukases were waiting for the Bensches to pick up the rent check. R.p. 163, l. 12-24. After receiving the ejection notice, the undisputed evidence is that Mr. and Mrs. Passaloukas attempted to contact the Bensches at "the Landlord's office" after December 31, 1999. R.p. 134, l. 24 – p. 135, l. 3; p. 144, l. 6-25; p. 145, l. 10-14; R.p. 216, l. 6-25. They tried to call the Bensches, leaving messages. R.p. 135, l. 9-25. The Bensches never contacted them. R.p. 135, l. 12-14. The Bensches had gone out of town, R.p. 138, l. 11-22. The failure to pay the December rent was not the fault of Zorba's. It was due to the Bensches' failure to pick it up as was the practice and to make themselves available to receive the rents at "the Landlord's office".

The Two Default Notices Do Not Comply With Terms of Lease

First Notice Dated December 21, 1999, Waived Right to Terminate

Paragraph 11. a) of the Lease allows three alternative remedies in the event of a default. Subpara. 11. a)(I) allows the Bensches to "cancel and terminate". Subpara. 11. a)(ii) allows the Bensches to re-enter the premises. Subpara. 11. a)(iii) allows the Bensches to assess a late payment charge. R.p. 229, 230 (Plts' Ex # 1). In their first notice the Bensches elected to proceed

under the latter provision, paragraph a)(iii) and assess a late payment charge rather than terminate or re-enter. R.p. 453 (Plts' Ex # 32). This notice did not mention termination. By first proceeding under paragraph a)(iii), the Bensches created uncertainty. A defendant cannot take advantage of the uncertainty created by his own wrongdoing. *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (Ct.App. 1984). Compare *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct.App. 1986)(Although the Court did not identify the landlord's conduct as a waiver, the landlord's inconsistent conduct in handling the notices seemed to play a factor in the Court's decision.)

Second Notice Is Defective for Several Reasons-

Failure to Allow Ten Days Notice

Paragraph 11 (a)(I) provides that the Bensches may "Cancel and terminate this Lease on not less than ten (10) days' prior written notice to Tenant, and on the date specified in such notice". R.p. 229 (Plts' Ex # 1). The second notice did not comply. It was delivered by certified mail return receipt requested and is dated December 28, 1999. R.p. 266 (Plts' Ex # 8); R.p. 215, l. 18 - p. 216, l. 5. It was accepted by Mr. Passaloukas on December 31, 1999. See handwritten receipt indicating "12 31 99" in the box entitled "Box 4a. Article Number". No data is entered in the box entitled "7. Date of Delivery". The only inference is that the date of delivery was merely entered into the wrong box. R.p. 268 (Plts' Ex # 8). Mr. Passaloukas stated that he received it on December 31, 1999. R.p. 132, l. 4-7; p. 133, l. 1-4; p. 315, l. 17-22. Zorba's had until January 10, 2010, to comply. Ten days following delivery on December 31, 2008, is January 10, 2009. The ejection occurred one day early, on January 9, 2000.

Wrong Delivery Address

This second notice failed to comply with the provisions of Paragraph 15 of the Lease requiring all notices to be mailed to "William Passaloukas, 27 Able Street, Bluffton, S.C. 29910". R.p. 231 (Plts' Ex # 1). The notice was addressed, instead, to "Zorba's Restaurant, Bill Passaloukas, P.O. Box 1667, Bluffton, S.C. 29910." R.p. 266 (Plts' Ex # 8). The general rule is

that "notice to one at a specified place is not given until it is received by the person to be notified at the place specified." 66 C.J.S. Notice § 18, p 463, and cases there cited. Compare Litchfield Co. of South Carolina, Inc. v. Kiriakides, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct.App. 1986)(Notice must be given in strict compliance with the contract both as to time and content.) Because it was not addressed to "27 Able Street", the notice is defective.

Right To Cure

The Master's Order (R.p. 6) found that Zorba's had a right to cure. He found: "Zorba's lease with Defendants... clearly stated eviction could occur if default was not cured within ten days of notice". Ten days had not expired before Zorba's was ejected.

The Termination Date Described in the Second Letter Does Not Comply

Paragraph 11 (a)(I) provides that the Benschers may "Cancel and terminate this Lease on not less than ten (10) days' prior written notice to Tenant, and on the date specified in such notice". R.p. 229 (Plts' Ex # 1). The second notice specifies that the termination date is December 28, the date of the letter. It says: "As of this date December 28, 1999, you are given notice that your lease is terminated." A December 28 termination date is not in compliance with not December 28, 1999, because termination requires ten days prior notice. Assuming that the letter is interpreted to mean that January 8, 2000, is the termination dated, that date does not comply either. That date is eight days after the letter was delivered on December 31.

Default not "material"

The Master determined that the Benschers received a **windfall**. He said it twice. R.p. 6, 8 (Order). A **windfall** is something which is not earned and is the very reason that the Courts of South Carolina in these cases examine the circumstances very carefully. As landlords, the Benschers bargained only for payment of rents. They did not bargain to purchase the restaurant. The right to declare a forfeiture was therefore intended only as security to obtain payment of the rents. If payment can be made there is no equitable reason to provide a windfall to a landlord if the landlord's bargain can be satisfied.

First examine and compare *2606 Building v. Mica or I Inc.*, 334 Ore. 175, 186, 47 P.3d 12, 18 (2002) where the Oregon Court, citing Story, 3 Equity Jurisprudence § 1727, at 343, and § 1728, at 345, found that the failure to pay rent can amount to “excusable neglect” where the tenant’s loss is disproportionate to the landlord’s injury. Compare *Lewis v Premium Investment Corporation*, 351 S.C. 167, 568 S.E.2d 361 (2002) a case involving the enforcement of forfeiture provisions in land installments sales contracts. The Supreme Court held that where these termination provisions cause disproportionate damage to the buyer they amount to unenforceable penalties and equity will not enforce them. *Id.*, 351.S.C. at 171, 172. The disproportionate harm is the forfeiture of the buyer’s equity versus the seller’s right to payment of an installment. The right to terminate Zorba’s lease is similarly disproportionate. Zorba’s invested \$60,000 in the leasehold improvements and a restaurant valued at \$75,000. The forfeiture of these assets is an unenforceable penalty in light of the fact that the Bensches had other means of securing payment of the rent. *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct.App. 1986)(Landlord denied the right to terminate in part based upon its view of the disproportionate harm to the tenant.)

Kiriakides v United Artists Communications, 312 S.C. 271, 440 S.E.2d 364 (1994), seems to have finally settled these concerns over **windfalls** and disproportionate damage. The Supreme Court now enjoins the Courts to measure the tenant’s disproportionate loss against the landlord’s right to the rents. “A landlord’s right to terminate is not unlimited and...the court’s decision to permit termination must be tempered by notions of equity and common sense [and]...a forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced.” 440 S.E.2d at 366.

Kiriakides requires an examination of five factors to determine whether Zorba’s breach was “material”. The factors are set out at 440 S.E.2d at pp. 366, 367.

Factor No 1. The extent to which the injured party will be deprived of the benefit which he reasonably expected: *Kiriakides* endorses the reasoning of the Restatement (Second) of

Contracts, § 241 (1981). 440 S.E.2d at 366. The Official Comments provide that where an installment contract calls for installment payments, a default as to one installment does not justify treating the whole contract in default unless the default as to the one payment “substantially impairs” the value of the whole contract. Restatement (Second) of Contracts, § 241, Comment b., p. 239. The Official Comments provide that if the injured party already has some security for the defaulting party’s performance it is less likely that the default will be considered to be material. Restatement (Second) of Contracts, § 241, Comment e., p. 241. Declaring a forfeiture was not the Bensches’ only means of obtaining payment. The Bensches held \$2,885, the last months rent (\$1,885) and the security deposit (\$1,000). R.p. 234 (Plts’ Ex # 2). The Bensches had access to a \$20,000 fund, their obligation to lend \$20,000 to Zorba’s. The Bensches were shareholders and had effective means of controlling Zorba’s through the corporate by-laws. They could call a board meeting and, if that was not successful, they could proceed with arbitration, as provided by Article VI of the Shareholders’ Agreement. R.p. 261 (Plts’ Ex # 7). The Bensches also had security in the value of the business, leasehold improvements worth \$60,000 and a restaurant valued at \$75,000.

Factor No. 2. The extent to which the injured party can be adequately compensated by damages for the part of that benefit of which he will be deprived. The evaluation presented in Factor No. 1 applies with equal force.

Factor No. 3. The extent to which the party failing to perform or to offer to perform will suffer forfeiture. The Official Comments of the Restatement provide that a breach is less likely to be regarded as material if it occurs after substantial preparation or performance. It is also less likely to be regarded as material if such preparation or performance cannot be returned to or salvaged by the defaulting party. Restatement (Second) of Contracts, § 241, Comment d., pp. 239-240. Zorba’s lost valuable assets. The Passaloukases lost their life savings, \$59,375.16, the value of their labors, wages in the sum of \$14,400, their share in the equity of the business. The ejectment devastated the Passaloukases. R.p. 217, l. 24-25. As a result they eventually lost their

home. R.p. 218, l. 4-9.

Factor No. 4. The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances.

Zorba's had the ability to pay the rent. The Bensches owed Zorba's \$20,000. Zorba's owned leasehold improvements and a restaurant. The Passaloukases believed the Bensches would never eject them because they were partners who had issues to address. R.p. 177, l. 18-23. The reason the rent was not paid was because the Bensches had failed to undertake all of the repairs. R.p. 138, l. 5-10. When previously faced with a dispute the Passaloukases had placed the November rent in escrow to force the needed repairs. They had hired an attorney and sought to resolve their differences at a shareholders' meeting which was held on December 15, 2009. R.p. 236 (Plts' Ex # 3); R.p. 241 (Plts' Ex # 5); R.p. 105, l. 13 – p. 106, l. 4. The Passaloukas had the ability to pay the rents on behalf of Zorba's. R.p. 136, l. 22-25; p. 137, l. 18 - p. 138, l. 4. The Passaloukases had a history of infusing money into the business, cash totaling \$30,200. R.p. 234 (Plts' Ex # 2). To show their utmost good faith, the Passaloukases had even paid the first rents (\$4,770) on March 23, 1999, several months before the Bensches made the premises ready to be occupied. R.p. 234 (Plts' Ex # 2). Mr. Passaloukas had worked from February, 1999, through January, 2000, without pay. R.p. 139, l. 12-25.

Factor No. 5. The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. The Passaloukases did not fail to comport with standards of good faith and fair dealing. See the evaluation of the evidence set forth in Factor No. 4.

Respondents Cannot Take Advantage of Their Own Default

A party cannot take advantage of his own default in the performance of a contract. *Willms Trucking Co., Inc. v. JW Const. Co. Inc.*, 314 S.C. 170, 442 S.E.2d 197, 201 (Ct.App. 1994). On the date of the ejectment the Bensches were in prior default of their obligations in at least three respects.

Failure to lend Zorba's \$20,000.

The Benschkes had an obligation to contribute a \$20,000 loan, in "cash" to Zorba's. R.p. 255 (Exhibit "A" attached to Plts' Ex # 11, ¶ F. 1., "Shareholder Loans"). Under that heading the Benschkes are required to make a loan in the sum of "\$20,000". ¶ F.2. describes the loan as "cash". The Passaloukases asked the Benschkes for cash. R.p. 174, l. 12-25. The Benschkes never funded their \$20,000 loan obligation. R.p. 237 (Plts' Ex # 4); R.p. 93, l.18 - p. 94, l. 14; R.p. 175, l. 6-13.

Compare *Kuznick v. Bees Ferry Associates*, 538 S.E.2d 15, 342 S.C. 579 (Ct.App. 2000), where the partners argued that they were not required to put more money into a failing business. The partners refused to respond to a capital call which resulted in default in the payment of a mortgage and the collapse of the partnership. The Court disagreed and found that the partners' failure to fund the capital call was a breach of their fiduciary obligations.

Failure to pay for certain of the leasehold improvements.

Zorba's funded the cost of these leasehold improvements which the Benschkes' were supposed to undertake, \$1,990.92. R.p. 113, l. 14 - p. 114, l. 25; R.p. 336 (Plts' Ex # 19)(document entitled "Payments From Zorba's Account for Items That Should Have Been Paid By Bensch's").

Failure to Make Repairs.

A tenant is entitled to an off-set for failure to make repairs. *Holliday v. Pegram*, 71 S.E. 367 (S.C. 1911). The Benschkes failed to make repairs which they had promised to make following a November meeting between the parties. Not repaired were the kitchen floor, the odor in the bathrooms, the dust from the driveway, the carpet, the patio and countless other problems. R.p. 124, l. 16 – p. 131, l. 1. The Passaloukases sent a repair list to the Benschkes. R.p. 403 (Plts' Ex # 25) (list of items to be repaired). What is stricken out on Plts' Ex # 25 are repairs which were completed. The remaining repairs were never done. R.p. 130, l. 11 – p. 131, l. 1; R.p. 171, l. 4 - 10.

IV. The Master erred by determining that the Bensches were entitled to Zorba's assets because they were entitled to mitigate.

The Master dismissed the Passaloukases' common law and statutory actions for misappropriation and conversion of corporate assets because he concluded that the Bensches were entitled to "mitigate damages". The Master reasoned that: "When faced with a premature vacancy as a result of a tenant default, it is incumbent upon the landlord to mitigate damages by attempting to re-lease the space. Failure to so mitigate is a forfeiture of the landlord's rights. Subsequent to Zorba's default, landlords had both the obligation and the right to attempt to re-lease the space, including the fixtures which became the property of the landlord upon default. The fact that the landlord was ultimately very successful in this mitigation attempt does not entitle the Plaintiffs to share in the windfall occasioned by the Tenant's default." (emphasis added) R.p. 8 (Order). The findings supporting his conclusion on this issue are not sufficient enough for an appellate court to ensure the law has been faithfully executed and, based upon the facts cited hereafter, the Master's view of the law is erroneous. This is a legal conclusion which is not entitled to deference under *Luckabaugh*, supra.

As a preliminary matter the Master did realize one thing which happened as a result of the Bensches' ejection, wrongful or not. The Master determined that the Bensches received a "windfall" which resulted from the misappropriation and dealings with assets belonging to Zorba's. A "windfall" is something which is unearned and is the very heart of the issues addressed in the forfeiture cases cited hereinafter. The Bensches' duties arise from the fiduciary obligations which arose when they took exclusive possession and control of Zorba's assets.

The Bensches even acknowledged their fiduciary duties. In February, 2000, they signed a resolution stating that **"Nicoli's shall maintain any equipment and assets owned by Zorba's and hold same in trust until that company is dissolved. Upon the liquidation or sale of the assets of Nicoli's Café, all such assets or funds received from said assets shall be maintained in trust by Nicoli's Café until such time as the assets and liabilities of Zorba's are resolved**

by written agreement of the shareholders of Zorba's or Order of the Court.” (emphasis added) R.p. 332 (Plts' Ex # 17).

Where a fiduciary receives or retains the assets of his beneficiary he can be required to pay damages arising from the breach of his fiduciary duties. *Premium Investment Corporation v Green*, 283 S.C. 464, 324 S.E.2d 72, 78 (Ct.App. 1984). Accordingly, *Passaloukas I* instructed the Master to undertake a detailed accounting to determine whether the Bensch misappropriated corporate assets and to “identity and value” assets owned at the time of the eviction and to account for revenues generated from the disposal of those assets.

The Bensch disposed of Zorba's assets, receiving \$75,000 from the sale of the restaurant. They took possession of the leasehold improvements owned by Zorba's valued at \$60,248.57. They then received an additional \$91,898.50 in rents between May 2, 2000, to May 1, 2005, attributable solely to added value of the leasehold improvements. These assets are identified hereafter.

V. The Master erred by failing to determine that restaurant was valued at \$75,000 or that the \$75,000 sales price of the restaurant was revenue from the disposal of Zorba's assets.

The Master ruled that “A restaurant without a lease, according to Plaintiff's expert testimony, has value only in the discounted break-up value of its non-fixture assets.” R.p. 8 (Order). He further stated that: “I find that Zorba's had neither goodwill, nor any other valuable asset at the time of closing. Therefore, the total value of Zorba's was equal to the value of the non-fixture items listed above.” R.p. 10 (Order). The Master identified sixteen (16) pieces of equipment as “the non-fixture items” and found that they had a total liquidated value of \$1439.00. R.p. 9 (Order). He found that these were “non-fixture assets of Zorba's”; that they “were last in the possession of the landlords Bensch and that the Bensch should repay to the Passaloukases one-half of the value of said items.” He found that “no competent testimony...would allow me to link any value of these items to the sale of lease value of the Mia

Tierra transfer as that restaurant sale included consulting fees and additional square feet. R.p. 10 (Order). These findings are erroneous. Zorba's owned all leasehold improvements contributed by the Bensch and all equipment and furnishings contributed by the Passaloukases and they were not forfeited as a matter of law and as a matter of equity.

Purchase and Sale Agreement

Exhibit "A" of the "Agreement of Purchases and Sale of Business Assets" (Plts' Ex # 10) lists fifty (50), not sixteen (16), separately identified items sold to MiTierra's. Paragraph 13 of the agreement allocates \$37,500 to "equipment, furnishings and fixtures". Among these items are the very same items that Mr. Passaloukases testified that he had paid \$27,184.02 to buy only months earlier. R.p. 485 (Defs' Ex # 50; R.p. 147, l. 13-24; p. 148, l. 1-5; p. 149, l. 13 - p 150, l. 8.) Compare this testimony with Plaintiff's Exhibit # 2 which lists all equipment and furnishings purchased by the Passaloukases for the restaurant totaling about \$29,500. R.p. 234. Mr. Bensch admitted that the equipment and furnishings which he sold to Mi Tierra's were the same that the Passaloukases had contributed to Zorba's. R.p. 86, l. 1-5. He testified that the restaurant which was sold was the restaurant which then existed at the location operated by Zorba's. R.p. 85, l. 12-6. This is entirely credible, uncontradicted and conclusive.

The Master's conclusion that the only equipment and furnishings owned by Zorba's was the list of sixteen items he cited is not comprehensible. A list of 50 items sold to the purchaser is attached to the sales agreement. \$37,500 was allocated to the sales price. It was equipment and furnishing which were owned by Zorba's. The Bensch admitted it. R.p. 85, l. 12-6. Without that equipment and furnishings the Bensch could not have sold the restaurant at all. The Bensch have not presented any evidence that any part of the \$75,000 was allocated to anything but a restaurant owned by Zorba's or that they enhanced the \$75,000 sales price by any amount or what the amount might be. To award them any part of the \$75,000 would be based upon speculation only. The Bensch have not met their burden which requires strict proof that they used Zorba's assets for the benefit of Zorba's.

Business Must Be Appraised at Sale Price

The Master erroneously focused on the “liquidated” value of the restaurant. The restaurant was not liquidated. The Benschers, through their company Nicoli’s, sold it for \$75,000. The Benschers’ own corporate resolution, cited above, contemplates either liquidation or a sale. R.p. 332 (Plts’ Ex # 17). They did not liquidate. They sold it for \$75,000. A business should be valued, not at liquidated value, but at its fair market value as a going business. *Mazloom v Mazloom*, 382 S.C. 307, 675 S. E. 2d 746 (2009). In *Mazloom* the Court of Appeals found that the business which was the subject of that lawsuit was actually sold to a third party in an arm’s length transaction for \$345,000. The Court therefore concluded that the fair market value of that business was the sale price \$345,000. In this case, as in *Mazloom*, Zorba’s restaurant was actually sold. It sold for \$75,000.

Mistaken View of Expert’s Testimony

The Master’s focus on liquidated value is based upon a mistaken view of the testimony of the valuation expert, Robert Steinberg. Mr. Steinberg never testified that a restaurant without a lease has value only in the discounted break-up value of its non-fixture assets. Mr. Steinberg testified that the restaurant had a value of \$75,000 as of January 8, 2000. R.p. 159, l. 17 - p. 192, l. 25. With respect to the need for a lease he stated, “Now as far as value you can’t sell the business without a lease.” R.p. 163, l. 14-22. He then emphasized, “But it has nothing to do with a value”. (emphasis added) R.p.164, l. 4. He emphatically expressed his opinion that “Whether there’s a lease in place now or not, its still valued at \$75.000 and the purchaser will sit down with the landlord if there is not a lease and acquire a lease that they feel comfortable with. If they can’t acquire a lease there’s no sale.” (emphasis added) R.p. 165, l. 6-11. Mr. Steinberg testified only that in most cases there is only a short amount of time left in the lease and that the sale will be subject to a “contingency”. He stated, “In most situations when you are selling the restaurant one of the contingencies is that you can assume an existing lease and have the landlord give you an extension because most of the time there’s only a short period of time left on the lease.”

(emphasis added). R.p. 163, l. 14-19.

Mr. Steinberg made the determinative point several times: no landlord will liquidate the restaurant's assets if there is a buyer who will pay full value and lease his premises. He testified that "But I don't know of any landlord on Earth that has a facility that's fully equipped that is not going to give someone a lease." R.p. 165, l. 13-15. When again asked, he emphasized, "I don't know of any landlord on Hilton Head Island that - unless like you said, they're going to tear the building down." R.p. 168, l. 12-15. "The only reason a landlord would turn it down is, number one, maybe he checked the people out and they weren't solid enough, number one, in credit; and number two maybe he didn't feel comfortable with what they wanted to do in the facility." R.p. 170, l. 10-16. The Bensches were no exception. They entered into a lease agreement with MiTierra's and sold the restaurant for \$75,000. That is the true value of Zorba's restaurant.

The Master's determination on this issue seems as if he was embracing a theory rather than the pragmatic reality about which Mr. Steinberg testified. The "theory" would be that at the moment the lease was terminated there was no lease and that its only value would be the liquidated value. Not only does the theory ignore the pragmatic reality which Mr. Steinberg described, it also ignores the fact that the Bensches did not liquidate the restaurant. Instead, they treated as though it had substantial value. They operated the restaurant for a period of time and then sold it. Further, and most important, the Master's theory ignores the instructions of *Passaloukas I* to account for the revenues from the disposal of the assets. If the restaurant, in theory, had only a liquidated value on the day of the ejectment, \$75,000 in revenues were generated from the sale of the restaurant.

There was a lease in place. Zorba's held a lease with an unexpired term through August 14, 2001 (twenty months) with an option to renew for five more years. R.p. 225 (Plts' Ex # 1.)

Sale of Restaurant for \$75,000 is revenue from disposal of Zorba's Asset

By ignoring the \$75,000 sale, the Master violated the Court of Appeals' mandate to identify the revenues from the disposal of Zorba's assets. The Master found that Zorba's could

not be awarded any part of the \$75,000 from the sale of the restaurant because the sale included consulting fees and additional square feet. R.p. 10 (Order). The Master's conclusion is erroneous and without evidentiary support. The sales agreement does not allocate any sum of money to consulting fees or additional square feet. R.p. 270 (Plts' Ex # 10). The only allocation made in the agreement is set forth in Paragraph 13 of the agreement. \$37,500 is allocated to "equipment, furnishings and fixtures" and \$37,500 is allocated to "good will".R.p. 274. The Bensches offered no evidence of any value which was placed on consulting or additional square feet. It is not sufficient to simply make the claim. The Bensches have the burden to strictly account for their dealings with corporate assets, they have an obligation to keep a record of their transactions and their failure to do so requires every presumption to be made against them. How can the Master conclude that the entire \$75,000 must be offset? Might it be simply \$500? There was no acceptable evidence. It would be speculation.

VI. The Master erred by failing to determine that the leasehold improvements were assets of Zorba's and were not forfeited by termination of the lease.

The Master found that the leasehold improvements which had been contributed to Zorba's by the Respondents were not the property of Zorba's and had been forfeited to the landlord upon default in payment of the December rent. R.p. 10 (Order). This was error. It is also only a "legal conclusion" for which the Master cited no evidence from the Shareholders' Agreement, the Written Consent, the Lease and no applicable law.

The Agreement Which Expressly Conveys "Fixtures" to Zorba's

The "Written Consent in Lieu of an Organizational Meeting for Zorba's, Inc." with attached "Exhibit 'A' to Organizational Minutes/Consents" (Plts' Ex # 11, at page 4 of Exhibit "A", R.p. 288) unambiguously conveyed the leasehold improvements to Zorba's:

The undersigned, by the execution of this Exhibit "A", do hereby transfer, grant and convey the assets and interests referenced above and further agree such conveyances, transfer and assignments, and agree that such transfers are being made free and clear of all liens or other

encumbrances except as is otherwise provided above. The undersigned acknowledge by execution of this Exhibit "A" that they are irrevocably making and completing such transfer, and further agree to execute such other and additional documentation as is necessary to give further or recorded notice of such transfer. (emphasis added)

The "Leasehold improvements" are the only "assets and interests" which are "referenced above" and are therefore what were conveyed. R.p. 289 (Plts' Ex # 11, page 4 of Exhibit "A"). "Leasehold improvements..." are the only words which follow the words "Description on nature and type of capital contribution". By filling in the blank space the only reasonable interpretation is that the parties intended to identify the "Leasehold improvements..." as the property being contributed by the Bensches. Compare *Detroit Edison Co. v Commissioner of Internal Revenue*, 131 F.2d 619, 623 (6th Cir.)(The use of the phrase "contribution to capital" describes the property agreed to be contributed by the shareholders and when contributed becomes irrevocably devoted to the satisfaction of all obligations of the corporation.)

The Law of Fixtures

The law of fixtures does not negate the transfer. It is the expressed intention of the parties which determines ownership of a fixture. *Saye v. Hill*, 100 S.C. 21, 84 S.E. 307, 308 (1915)("While the manner in which a thing is attached to the soil may be of some value in determining whether it is a fixture or not, it does not afford an absolute or conclusive test. The intention with which it is so attached is usually a more controlling factor. Yet all the circumstances should be considered, especially as they throw light upon the intention."); *Pope v. McMillan*, 232 S.C. 100, 101 S.E.2d 55, 59 (1957)("We know of no legal barrier to the voluntary sale of a common-law fixture, separate from the land upon which it is located, by the owner of both.")

The resolution of these disputes over the ownership of fixtures depends upon the relationship between the parties. *Hyman v. Wellman Enterprises, Inc.*, 337 S.C. 80, 522 S.E.2d 150, 152 (Ct.App. 1999): "It has been noted that the principal cause of confusion in the law of

fixtures is the failure to recognize the fact that there are various relationships under which the question may arise, and the same rule does not apply to all. Rather, the particular case must be considered with reference to the relation of the parties.” Also, *Caulk v. Caulk*, 211 S.C. 57, 43 S.E.2d 600 (1947).

The dispute in this case is one between shareholders arising out of the Shareholders’ Agreement and Written Consent. It is not between landlord and tenant. The leasehold improvements were irrevocably conveyed to Zorba’s by the terms of the Written Consent, not the Lease. The improvements were constructed and in place in Unit 101 before the Lease was signed, before the Shareholders’ Agreement and Written Consent was signed and before the leasehold improvements were “irrevocably conveyed” to Zorba’s. R.p. 80, l. 7 - p. 81, l. 1. When the Lease was terminated, the Shareholders’ Agreement and Written Consent were not terminated. They remained fully enforceable.

The “fixture” cases seem to always involve situations in which the landlord and tenant have failed to make an express agreement about ownership of the fixtures. In this case the shareholders expressed their intent with certainty in the Written Consent. The “fixture” cases usually involve a dispute in which the tenant claims he is entitled to remove the fixture from the real property. In the case at bar the Petitioners are not asking the Court to remove fixtures, but to enforce an express trust which irrevocably conveyed the leasehold improvements to Zorba’s and to require an accounting of the Bensches for the revenues received from the use of the leasehold improvements.

Parol Evidence

The Master allowed some testimony from the Bensches admitting that they conveyed the leasehold improvements to Zorba’s. Yet, the rulings were inconsistent. The Master sustained two objections to questions concerning the Bensches’ intentions to convey the improvements. R.p. 95, l. 1 – p. 96, l. 9. The Master should have ruled that the parol testimony is admissible and is not prohibited by the parol evidence rule. He should have found that the Bensches’ parol

testimony supports a finding that the Benschers did convey the leasehold improvement to Zorba's. At other times he did seem to rule that the parol evidence was admissible. For example, he stated "Well, if there's an ambiguity or something in the contract, you can ask it." (R.p. 98, l. 21-23); and "Well, I can see what the words are. I mean if you want to ask him what his take on what it means is, I would be happy to hear that." R. p. 99, l. 5-6. Yet, in response to an objection that the contract speaks for itself, the Master stated, "It does and now if you can cut through some of that. If it says it, you don't have him read it again." R.p. 101, l. 8 - 14.

The Benschers admitted that they received \$30,000 worth of stock in Zorba's in consideration for the conveyance of the "leasehold improvements" to Zorba's and that the "leasehold improvements" were owned by Zorba's. R.p. 202, l. 10 - p. 205, l. 14. Mr. Bensch admitted that their "contributions" were the leasehold improvements. R.p. 93, l. 12 - 17. Mr. Bensch admitted that between February, 1999, and August 15, 1999, that he contributed leasehold improvements to the corporation, that it was his obligation to do so and that it was the "central feature of [his] obligations to what was to become the corporation". R.p 205, l.17 - p. 206, l. 7.

One of several views allow the Court to conclude that this parol evidence must be considered in interpreting the parties' intentions.

Reference to \$30,000 is a mere recital.

"... [P]arol evidence is admissible to show a different consideration from that expressed in a written instrument when language of consideration is intended as a mere recital, but not when it is contractual." *Iseman v Hobbs*, 290 S.C. 482, 351 S.E.2d 351, 352 (Ct.App. 1986). Reference to \$30,000, cash, is merely a recital as to what was paid and is not contractual. The \$30,000 is referred to in the past tense using the phrase "Consideration Paid". See the top of page 4 of Exhibit "A" to Plts' Ex # 11, R.p. 289. This is not a promise to pay. It is confirmed by the "Shareholders' Management Agreement". R.p. 247 (Plts' Ex # 7). "Article II, Capital and Loan Contributions" 2.1. also speaks in the past tense. It states, "The items listed on the attached

Exhibit "A" pertaining to construction or providing equipment has as of the date of this Agreement been satisfied". R.p. 251. Finally, we know that the \$30,000 was in fact never paid. R.p. 237 (Plts' Ex # 4). The reference to \$30,000 is merely a recital. Parol evidence is therefore admissible in this case to show why the \$30,000 was never paid. The Bensch's parol testimony explains it, definitively.

The language is ambiguous.

When there is some indefiniteness or double meaning in the language of a written agreement parol evidence is admissible to determine the true intent of the parties. *Penton v J.F. Cleckly & Company*, 326 S.C. 275, 486 S.E.2d 742, 745 (1997).

The Bensch's, contrary to the great weight of their testimony, tried to argue that they contributed money, not leasehold improvements. R.p. 88, l. 5 - 16. Their argument raises an issue as to the meaning of the Written Consent and the intent of the parties.

The Bensch's parol testimony is merely an admission:

Only those understandings which were made contemporaneously with, or prior to, the execution of the written agreement, are precluded by the parol evidence rule. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577, 581 (1990). The testimony in this instance is merely after the fact, in court, non self-serving, admission, made under oath. These admissions were made neither contemporaneously with, nor prior to, the execution of the written agreements.

Conduct of Parties

Finally, the conduct of the parties is entitled to great weight in interpreting an ambiguous contract. *Langston v Niles*, 265 S.C. 449, 219 S.E.2d 829, 834 (1975). The Bensch's testified that they conveyed the leasehold improvements to Zorba's. They did not contribute \$30,000, cash.

VII. The Master erred by failing to determine that Zorba's is entitled to the imposition of a constructive trust upon the leasehold improvements.

Even if Zorba's did not hold legal title to the leasehold improvements, equitable

principles allow the imposition of a trust upon the leasehold improvements to prevent the Bensches' unjust enrichment at their expense.

No party shall be permitted to deprive another of his fruits and labors if the interests of all parties can be protected. See *Bank of Swansea v. Rucker*, 156 S.C. 29, 152 S.E. 712, 716 (1930):

A court of equity will not allow one man to deprive another of the fruits of his labors and expenditures if such an unconscionable result may be avoided consistently with the security to each of them of the full measure of all that he is entitled to claim. ***and if, in the course of [the co-tenant's] use and occupation, he makes improvements on a part of the common property, in good faith, and without any intention of embarrassing or obstructing a partition, or gaining an advantage therein, there is no good reason why he should not be allowed to retain the part improved by him, if his improvements in fact do not constitute a hindrance or obstacle in the way of the other co-tenants getting their full shares on the division of the property. A court of equity will simply so order the partition as to secure the rights of all parties without visiting an unnecessary hardship upon any of them. (emphasis added)

Courts of equity can imply a constructive trust to protect an equitable interest in property.

See *Smith v. South Carolina Retirement System*, 336 S.C. 505, 520 S.E.2d 339, 352 (Ct.App. 1999):

In general, a constructive trust may be imposed when a party obtains a benefit 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 as where 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.

"Under the familiar doctrine that equity considers as done that which was agreed to be done, a contract for the sale of land operates as an equitable conversion." (emphasis added) 17 *Williston on Contracts* § 50:42 (4th ed.) "The theory of equitable conversion provides that under an executory contract for the sale of real estate, the equitable estate passes to the purchaser and the bare legal title for security purposes remains in the vendor." *Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I*, 315 S.C. 474, 476, 445 S.E.2d 630, 632 (1994).

The trust created in this case is more like what has been described by the courts as a "resulting trust". "Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another."(emphasis added). *McDowell v. South Carolina*

Dept. of Social Services, 296 S.C. 89, 92, 370 S.E.2d 878, 880 (Ct.App., 1987). The Benschers conveyed the leasehold improvements to Zorba's. Now it is claimed that Zorba's cannot hold title because the leasehold improvements are real estate and not removable fixtures. Zorba's has paid for the property. It was the intent that Zorba's own the property. Equity therefore must impose a resulting trust.

Compare *Coggins v. McKinney*, 112 S.C. 270, 99 S.E. 844 (1919). The Supreme Court determined that a son-in-law was entitled to be reimbursed for the cost of his leasehold improvements while he was a tenant on property which belonged to his father-in-law. The son-in-law had erected the improvements in good faith, with the knowledge and consent of the father-in-law, and with the intention of enjoying them in the event he eventually became the owner of the land. The Court reasoned that the land benefitted from the leasehold improvements; that the father-in-law received increased rents above and beyond those he would have received had the leasehold improvements not been constructed; that the father-in-law was not harmed; and that there was no reason not to compensate the son-in-law. The Court rejected the dissent's argument that there could be no compensation unless there was an enforceable agreement to convey the property to the son-in-law.

See *Gheen v. Gheen*, 276 S.C. 404, 279 S.E.2d 361 (1981). The Supreme Court, citing *Coggins v. McKinney*, supra, held that the tenant was entitled to the value of the leasehold improvements made by him. In that case the tenants had rented a residence and held an option to purchase.

VIII. The Master erred by failing to determine that reimbursement of insurance premium, last month's rent, security deposit, cash on hand and stock in trade were assets which belong to Zorba's and establish their value.

Last Month's Rent

The Master made no factual finding. On January 9, 2000, Zorba's had interest in a \$1,885 deposit which had been given to the Benschers as the last month's rent under the Lease. R.p. 234

(Plts' Ex # 2).

Security Deposit

The Master made no factual finding. On January 9, 2000, Zorba's had an interest in a \$1,000 deposit which had been given to the Bensches as a security deposit under the "Commercial Lease Agreement". R.p. 234 (Plts' Ex # 2).

Cash on Hand

The Master made no finding. On January 8, 2000, Zorba's had, in a cash bag awaiting deposit and use, \$404.00 in cash. R.p. 296 (Plts' Ex # 13). The Bensches took exclusive possession and control over them.

Stock in Trade

The Master made no finding. On January 9, 2000, Zorba's owned stock-in-trade worth approximately \$6,000. Mr. Passaloukas testified that he estimated the value of inventory as of the date of the ejectment to be about \$6,000. He supported his testimony with copies of checks paid to vendors for a period of four months, August, 1999, through January, 2000. Plts' Ex # 23. He supported his testimony with a handwritten inventory which the Passaloukases had prepared on December 15, 1999. R.p. 399 (Plts' Ex # 24); p. 115, l. 19 – p. 119, l. 13; p. 120, l. 5 – p. 122, l. 15; p. 123, l. 8 - 16. This written inventory totals about \$6,000.

Reimbursement of Insurance Premium

The Master made no finding. The Bensches cashed in an insurance policy which had previously been purchased by Zorba's and received \$481, cash, from Kinghorn Insurance when they terminated the policy. R.p. 333 (Plts' Ex # 18); R.p. 110, l. 3 - 6.

IX. The Master erred by failing to determine that Zorba's was entitled to a proportionate share of the rents received by the Bensches as revenues from the disposal of Zorba's assets.

On January 9, 2000, Zorba's owned a lease which had an unexpired term until August 14, 2001, another twenty (20) months. It also held an option to renew the lease for an additional five

years. R.p. 225 (Plts' Ex # 1). After Zorba's was ejected, the Benschers leased the premises to a third party, including the leasehold improvements which had been irrevocably conveyed to Zorba's. R.p. 297 (Plts' Ex # 14)(Commercial Lease Agreement). The lease was for a period of five years commencing May 2, 2000, and expiring May 1, 2005. The Benschers received the sum of \$163,898.50, gross rents, for the five year period. R.p. 331 (Plts' Ex # 16).

Unit 101, leased to Mi Tierra's, had rental value only because of the leasehold improvements. R.p. 89, l. 10 - p. 90, l. 21. Unimproved, it could be used as a warehouse only. R.p. 91, l. 4-7. The Benschers never found anyone to rent it. R.p. 92, l. 1-3. It could not be rented for more than \$1,200 to \$1,500 per month. R.p. 90, l. 1-14. Because the Benschers have the burden of proof they should not receive the benefit of any doubt as to what the rents for a vacant space would have been. The Court must therefore find that the rental value for Unit 101, unimproved, was \$1,200 per month. Over the five year lease term with MiTierra's the Benschers would have received rents in the sum of only \$72,000 without the leasehold improvements. Because of the value added by the leasehold improvements owned by Zorba's the Benschers received an additional \$91,898.50.

Compare *Coggins v. McKinney*, 112 S.C. 270, 99 S.E. 844 (1919). This Court determined that if the owner of the land must pay the increased rents to the son-in-law because the increase was "the fruit of Coggins' expenditure, and it belonged to him". *Id.*, 99 S.E. at 845. Also *Carjow, LLC v Rev. John D. Simmons*, 349 S.C. 514, 521, 563 S.E.2d 359 (2002)(Lost rents allowed based upon the difference in the rental value with and without fixtures.)

X. The Master erred by failing to determine that Bill Passaloukas was owed a salary in the sum of \$14,400.

The Master concluded only that the "...claim for unpaid salary to be unproven and therefore denied." R.p. 10 (Order). The evidence was undisputed that Mr. Passaloukas was entitled to a monthly salary in the sum of \$3,000 per month by virtue of Article IV, ¶ 4.2, p. 8, of the "Shareholders' Management Agreement". R.p. 254 (Plts' Ex # 7). He had worked from

February, 1999, through January 8, 2000, without pay. R.p. 139, l. 12-25; p. 146, l. 10-14. The records indicate that Mr. Passaloukas was not paid any salary (SR Vol II. p.928, 929 (Defs' Ex # 17)) and that is supported by testimony of accountant Gil Fisher. R.p. 646, l. 9-18. For that period of time he is entitled to the sum of \$14,400 to be paid as a debt of Zorba's from funds brought back into the corporate pot.

Bill Passaloukas withdrew monies from Zorba's, but it was not as salary. It was reimbursement of loans. Article IV, ¶ 4.2 of the Shareholders' Agreement addresses this issue. The provision allows Bill Passaloukas to "defer" salary and to receive "repayments on such loans in amounts equal to the salary being deferred." R.p. 254 (Plts' Ex # 7 (¶ 4.2)).

Reimbursements were made to the Passaloukases but it was not salary. There were reimbursements of capital contributions and are itemized in Plaintiffs' Exhibit # 2. R.p. 234, 235. The Passaloukases contributed \$68,875.16 and were reimbursed the sum of \$9,500.00. R.p. 235 (Plts' Ex# 2). The net balance in the Passaloukases' capital account would be \$59,375.16. In spite of this evidence the Master ruled that the Passaloukases had contributed only \$59,375.16. R.p. 9 (Order). The error could have caused the Master some confusion if he believed that the \$9,500 in reimbursements of capital were actually salary. No salary was ever paid to Mr. Passaloukas.

XI. The Master erred by failing to determine that attorneys fees incurred by the Passaloukases for defending an employee claim must be reimbursed.

The Master made no finding. The Passaloukases personally incurred attorneys fees in the sum of \$1,576 in defending wage claims by one of the employees of Zorba's. R.p. 407 (Plts' Ex # 28). They are entitled to reimbursement because of the special relationship between them and Zorba's. S.C. Code Ann., 1976 § 33-8-520 (2006) ("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.”); *Toomer v Norfolk Southern Railway Company*, 344 S.C. 486, 544 S.E.2d 634, 636 (Ct.App. 2001)(Equitable indemnity allowed where some special relationship exists .)

XII. The Master erred by determining that the Bensches were entitled to be reimbursed certain debts incurred by the Bensches for winding up the business.

The Master found that the “Defendants Bench undertook to pay the debts of the failed business” and that “in attempting to wind up the affairs of Zorba’s, the Defendants Bench incurred the following expenses: \$300 for accountant’s final bill and \$950.00 paid to former employee Nick Eletheriou.” R.p. 4 (Order). The Master’s conclusion is erroneous because it does not meet the legal standard of proof which requires a “strict accounting”.

The \$300 allegedly paid the accountant is not evidenced by any document or check, only testimony of a witness. The proof fails as a matter of law because a strict accounting requires an invoice or a check to support the claim. *Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705, 711 (1933).

The payments to Nick Eleftheriou were evidenced by several checks paid to Mr. Eleftheriou. R.p. 490 (Def’s Ex # 27). No check was paid by the Bensches, only Bensch-Mark Custom Builders. No check indicates that it was for wages owed by Zorba’s. Check number 6163 shows a payment in the sum of \$10.00 but does not indicate what it was for. Check number 6164 shows a payment of \$440.00 but says that it is “toward debt owed”. Check number 6529 in the sum of \$500.00 indicates a “Loan to (Nicoli’s) Nick”.

All of the checks to Mr. Eleftheriou are dated in January, 2000. The checks could not have been for wages owed by Zorba’s because the undisputed evidence is that Mr. Eleftheriou brought a lawsuit against Mr. Passaloukas at a later date, March, 2000, asking Mr. Passaloukas to pay the wages owed by Zorba’s. R.p. 407 (Plts’ Ex # 28); R.p. 206, l. 17 – p. 209, l. 15; p. 210, l. 1-6

XIII. The Master erred by failing to determine that Zorba’s and the Passaloukases are

entitled to interest on sums owed to Zorba's and the Passaloukases.

The Master erred in failing to account for interest on the assets. The lack of findings makes it difficult for an appellate court to ensure the law has been faithfully executed and the Master's failure to account for interest is erroneous.

Pre-judgment interest at the legal rate must be awarded on the assets converted by the Bensches. "As a general rule, the measure of damages in a case for conversion of personal property is the value of the property with interest thereon and the jury may give the highest value up to the time of trial." *Industrial Welding Supplies, Inc. v. Atlas Vending Co., Inc.* 276 S.C. 196, 199, 277 S.E.2d 885, 886 (1981). If the sum is certain or capable of being reduced to certainty, prejudgment interest is allowed from a point when the parties agreed, or the law provides, payment was demandable. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87, 93 (Ct.App. 1994). The legal rate of interest is 8.75% per annum. S.C. Code Ann., 1976 § 34-31-20.

The value of each asset which was converted or misappropriated by the Bensches is capable of being reduced to a sum certain value. Nevertheless, equity courts have jurisdiction to award interest on unliquidated sums. *QHG of Lake City v McCutcheon*, 360 S.C. 196, 600 S.E.2d 105 (2004), citing *Anderson v Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951), stating that "interest will be allowed according to the equity of the case" and that "upon demands not bearing interest at law, equity usually allows interest, but in its discretion withhold it." In the case at bar, if the Court were to determine that the value of the assets are not capable of being reduced to a sum certain, because of the unduly long period of time that the Bensches deprived Zorba's of the use of its assets (in excess of twelve years), this case demands an award of interest on the value of all of Zorba's assets. Interest is owed on the value of the following assets:¹¹

¹¹ Interest is also payable on the initial loans made by the Passaloukases and the Bensches or any other amounts which may be owed to either party. These incidental interest items are detailed in the final accounting.

1. Interest must be awarded on the \$75,000 sales price of the restaurant from the date of the sale to MiTierra's, May 2, 2000.

2. The Bensches earned net rents totaling \$91,898.50 which was due to Zorba's for rents from May 2, 2000, to May 1, 2005. The net rents totaling \$91,898.50 should have been paid to Zorba's no later than May 1, 2005, the last day of the Bensches five year lease to MiTierra's. It is appropriate therefore to assess interest on the net rents from and after May 1, 2005, at the legal rate.

3. The value of the leasehold improvements is \$60,248.57. If the court awards rents from May 2, 2000, through May 1, 2005, it would be appropriate to award interest on the value of the leasehold improvements from May 1, 2005.

4. Interest on the \$404 cash should accrue from the date of the ejectment, January 9, 2000.

5. Interest on the \$481 insurance premium cash refund should accrue from the date of the ejectment, January 9, 2000.

6. The stock in trade is valued at \$6,000. Interest should be awarded on this sum from the date of the ejectment, January 9, 2000.

7. Interest on the \$1,000 security deposit from the date of the ejectment, January 9, 2000.

8. Interest on the last month's rent, \$1,885, from the date of the ejectment, January 9, 2000.

9. Interest on the \$14,400 salary should accrue from the date of the ejectment, January 9, 2000.

XIV. The Master erred by failing to determine that Zorba's and the Passaloukases are entitled to punitive damages for the wilful and reckless acts of the Bensches.

The Master erred by not addressing the issue of punitive damages. Based upon the Master's view of the law which refused to acknowledge any actual damages, he would not consider punitive damages because punitive damages may be awarded only upon finding actual

damages. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354 (1991). Because of the absence of any findings to the contrary, and because of substantial errors of law, this Court can review the record to determine whether punitive damages are proper.

Punitive damages protect not only the interests of the larger society as punishment or a warning and an example to deter such conduct, they also serve to vindicate private rights when there is proof of wantonness, willfulness or malice. *id.*

There is clear and convincing evidence of the Bensches' oppressive, willful, intentional and malicious conduct in the record. From the record cited, *supra*, the Bensches, with conscious disregard and indifference to the rights of the Passaloukases and Zorba's to their assets, ejected Zorba's from the leased premises, without recourse to judicial process in spite of being advised by their attorney to use judicial process. R.p. 222, ll 24 - p. 224, l. 16. They could have called a board meeting. They could have sought arbitration pursuant to Article VI of the Shareholders' Agreement. R.p. 247 (Plts' Ex # 7). They brought policemen with them to the restaurant, in a show of force and threatened the Passaloukases with criminal prosecution if they attempted to re-enter the restaurant. R.p. 269 (Plts' Ex # 9). R.p. 82, l 1.1-16; p. 83, l. 14 - p. 84, l. 6.

The Passaloukases had invested in excess of \$60,000 in the restaurant and had labored without payment of wages for many months. The Bensches pocketed all of the money from the sale of the corporate assets.

The Bensches otherwise displayed an open hostility, oppression, indifference and maliciousness which is reflected by Mr. Bensch's ordering Mrs. Passaloukas from the restaurant in spite of the fact that she was a shareholder and had responsibilities under the Shareholders' Agreement for operating the restaurant. Mr. Bensch pointed his finger in Mrs. Passaloukas' face demanding that she leave the restaurant. R.p. 211, l. 25 - p. 212, l. 10. Mr. Bensch was very abrasive. R.p. 212, l. 24 - p. 213, l. 9.

The Bensches are financially able to respond to an award of punitive damages. They sold the shopping center for an amount in excess of \$2,000,000. R.p. 107, l. 1-5. They

misappropriated approximately \$250,000 of assets belonging to Zorba's as a result of the breach of their fiduciary obligations. See final accounting.

XV. The Master erred by failing to determine that the Passaloukases are entitled to attorneys fees for prosecuting this lawsuit.

The Master refused to award attorneys fees and costs. He ruled: "I find no persuasive evidence of oppressive or unfairly prejudicial behavior on the part of Defendants." R.p. 10 (Order). He ruled: "I find no deadlock, illegal, fraudulent, unfair, or oppressive conduct by any party. R.p. 11 (Order). He also ruled: "I award no attorneys fees to any party." R.p. 11 (Order). The lack of findings, or their insufficiency, makes it difficult for an appellate court to ensure the law has been faithfully executed and the Master's conclusion is erroneous.

The Passaloukases offered evidence of their attorneys fees and costs totaling \$86,815.01. R.p. 409 (Plts' Ex # 29). Expert witness Steinberg testified that he was owed \$250 for services rendered to the Passaloukases for his testimony. R.p. 169, l. 14-20. Expert witness accountant Ray Warco testified that he was owed \$1500 for services rendered to the Passaloukases in preparing for his testimony. R.p. 194, l. 13-17.

Zorba's is a South Carolina statutory close corporation. R.p. 243 (Plts' Ex # 6). If the court finds that a party to the suit has acted arbitrarily, vexatiously or otherwise not acted in good faith it may award the other parties their reasonable expenses, including counsel fees. S.C. Code Ann., 1976 § 33-18-410.

The Bensch's actions in this case have been arbitrary, vexatious. They have shown bad faith both in their actions which lead to this lawsuit and during the course of the litigation and trial. Examine the facts cited elsewhere herein concerning punitive damages. Attorneys fees and the costs of this lawsuit are proper.

Attorneys fees may also be awarded pursuant to the "common fund" rule. A court of equity may award attorneys fees out of the common fund or property created or preserved where the attorney represents a party who, at his own expense, has maintained a suit for the recovery,

preservation, protection, or increase of a common fund. *Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21, 23 (1941). The main thrust of this lawsuit is for the benefit of Zorba's. A pot of money will be paid to Zorba's. From the pot, the debts of the corporation will be paid, followed by a distribution of the remaining funds to the parties. Equity and fairness dictate that since Zorba's benefits it should pay the Passaloukases reasonable fees incurred in recovering the fund.

XVI. The Master erred by determining that the Benschers were entitled to be reimbursed certain debts incurred by the Benschers for winding up the business.

The Master erred in failing to account for the \$6,288.32 in reimbursements made to the Benschers. The lack of findings makes it difficult for an appellate court to ensure the law has been faithfully executed and the Master's failure to conclude that the Benschers' capital account must be debited for the \$6,288.32 is erroneous.

The Benschers were reimbursed \$6,288.32, a portion of the capital contributions which they made to Zorba's. R.p. 295 (Plts' Ex # 12); R.p. 97, l. 9 - 13.

XVII. The Master erred in finding that Zorba's was a failed business.

The Master determined that Zorba's had failed due to the failure of the income to meet operating expenses during the four and one half month period of its existence. The Master held: "Just months into the restaurant's operation, Zorba's had yet to turn a profit..." R.p. 6 (Order); that "It is well known that many small business do not survive their first year." R.p. 8 (Order); that "The corporation failed because the gross revenues failed to exceed the expenses. There was no testimony that led me to believe that this business had long term potential." R.p. 8 (Order); that "I am further convinced that these Defendants did what was necessary under the circumstances to wind down the business of the failed corporation and to mitigate their damages as landlords." R.p. 9 (Order). The findings supporting his conclusion on this issue are not sufficient enough for an appellate court to ensure the law has been faithfully executed and, based upon the facts cited hereafter, the Master's conclusion is erroneous.

First, it is irrelevant that Zorba's was having a cash flow problem. Cash issues were the reason that the Written Consent required the Passaloukases and Benschel to contribute \$20,000 in cash. The Benschel never did tender the \$20,000, cash.¹² *Kuznick v. Bees Ferry Associates*, 538 S.E.2d 15, 342 S.C. 579 (Ct.App. 2000)(Partners' failure to fund the capital call was a breach of their fiduciary obligations in spite of the fact that the business was failing.)

The Benschel cannot take advantage of uncertainty created by their own wrongdoing. *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (Ct.App. 1984). Until the business is built, during the first year or two every restaurant needs someone to lend money. Testimony of Bill Passaloukas, R.p. 140, l. 9-14. The Passaloukases needed someone to provide "cash" during the first year. R.p. 112, l. 1-13. The Benschel were to provide the back-up when needed. R.p. 142, l. 23 - p. 143, l. 3. The Benschel were supposed to lend \$20,000 when it was needed. R.p. 143, l. 9-16.

This restaurant was in business for only four and one-half months and was, at the time of the ejection, in the middle of what was expected to be a slower season. R. p. 219, l. 5-13.

Zorba's was not insolvent. By the date of the ejection, from August 15, 1999, to December 31, 1999, the restaurant was grossing almost \$20,000 per month. R.p. 345-352 (Plts' Ex # 22)(Monthly statements and calculator tapes). On the date of the ejection Zorba's owned a restaurant worth \$75,000. Zorba's owned leasehold improvements worth at least \$60,000. Zorba's had \$1,410 in its operating account as of January 31, 2000. R.p. 481 (Defs' Ex # 2). Zorba's had a line of credit, committed, but unpaid, by the Benschel in the sum of \$20,000. Zorba's was entitled to be reimbursed by the Benschel for expenses it had paid in the sum of \$1,990 but which were truly obligations of the Benschel. R.p. 336 (Plts' Ex # 19). Zorba's owned inventory worth \$6,000. R.p. 353-402 (Plts' Ex # 23, 24). The Benschel held the last month's rent, \$1885, and a security deposit, \$1,000. R.p. 234-235 (Plts' Ex # 2).

¹² See the argument on this point in issue III, above, at page 23.

XVIII. The Master erred in his final accounting.

The Master's final accounting is as follows:

I find that the Bensch (sic) contributed \$62,995.09 and the Passaloukas contributed \$59,375.16 (a difference of 3,619.93). This account should be further increased by the final salary and accounting payments set forth hereinabove, leading to a total difference in contributions which favors the Bensch by 3,619.93 plus 1,250.00 or \$4,869.93. I find that from the fixture assets of the corporation, listed above, the Passaloukas should be compensated for one-half of the value or \$719.00 and further compensated in the amount of \$1,000 for the unpreserved personal items. Based on these calculations, I find that the Passaloukas Defendants would owe the Bensch Defendants the amount of \$3,150.93. However, I decline to award this amount to the Bensch, based on their failure to preserve the personal items and based upon their failure to pursue or seek such damages from the individual Plaintiffs.

This is not the correct method for settling accounts between shareholders. It is based on the method for settling accounts between partners under S.C. Code § 33-41-510 who share profits and losses equally. It is adequate but does not properly account for the fact that shareholders have no personal obligation to share the losses unless there is some express or implied obligation to indemnify other shareholders. Subparagraph (1) thereof provides for partners to be repaid their contributions, whether by way of capital or advances, and further provides that they must share equally in the profits subject only to the liabilities which include those owed to the partners. It is instructive, nevertheless to examine the Master's accounting to evaluate what is wrong with it. The Passaloukas remain confident that the method offered by accountant Ray Warco in his compilation report is the correct method. R.p. 406 (Plts' Ex # 27)

Table A: Master's Accounting.

Table A sets forth the Master's accounting. The Bensch's resulting capital account is \$64,245.09 ($\$62,995.09 + 1,250.00$). The Passaloukas' resulting capital account is \$60,094.16 ($\$59,375.16 + 719.00$). What the Master did wrong is to equalize some of the items of the account while failing to equalize other items. The Master balanced the ledgers by awarding the Passaloukas \$1,000.00 as actual damages for the loss of their personal property which was left behind at the restaurant and \$3,150.93 as a non-compensatory award for the Bensch's failure to

preserve the personal assets and purse those damages.¹³ These latter awards are direct awards against the Bensches and are not a part of the partnership accounts. They must therefore be treated separately as the Master seems to have done.

Items	Bensch Account Contribute	Bensch Account Withdraw	Balance of Bensch Account	Passaloukas Account Contribute	Passaloukas Account Withdraw	Balance of Passaloukas Account
Capital Account	\$62,995.09			\$59,375.16		
Accountant's Final Bill	\$300.00					
Pay to Eleftheriou	\$950.00					
Non-Fixture Items ½ of Total Value (\$1,439.00)				\$719.00		
Totals:	\$64,245.09	\$0.00	\$64,245.09	\$60,094.16	\$0.00	\$60,094.16
Resulting Imbalance			\$4,150.93			
Awards to Passaloukas		\$4,150.93		Net Owed by Passaloukas:		\$4,150.93
Penalty Adjustment to Passaloukas	\$3,150.93					
Conversion of Personal Property:	\$1,000.00					

Table B: Using the Master's Items of Account, the Proper Accounting of the Capital Accounts and Direct Awards Against the Bensches

The Master's accounting fails to credit the Passaloukases' for the full value of their "non-fixture" assets which they had contributed, found to be \$1,439.00. He only gave the Passaloukases one-half the value of those assets, \$719.00. Table B corrects this error. The other error made by the Master is that he failed to first balance the accounts before awarding the \$1,000 and \$3,150.93 to the Passaloukases. The capital accounts are balanced by making an adjustment in the sum of \$1,715.47, balancing both accounts at \$62,529.63. That means that Passaloukases owe the Bensches the sum of \$1,715.47. When the next step is taken by factoring in the separate award against the Bensches in the sum of \$4,150.93, that now leaves the Passaloukases with a net award in the sum of \$2,435.47.

¹³ This looks more like punitive damages which the Master otherwise denied. It is not compensatory and therefore identified as a "penalty".

Items	Bensch Account Contribute	Bensch Account Withdraw	Balance of Bensch Account	Passaloukas Account Contribute	Passaloukas Account Withdraw	Balance of Passaloukas Account
Beginning Capital Account	\$62,995.09		\$62,995.09	\$59,375.16		\$59,375.16
Accountant's Final Bill	\$300.00		63295.09			59375.16
Pay to Eleftheriou	\$950.00		64245.09			59375.16
Non-Fixture Assets				\$1,439.00		
Totals:	\$64,245.09	\$0.00	\$64,245.09	\$60,814.16	\$0.00	\$60,814.16
Resulting Imbalance	\$3,430.93					
Adjustment to Balance:		\$1,715.47	\$62,529.63	\$1,715.47		\$62,529.63
Awards to Passaloukas		\$4,150.93		Net Owed by Passaloukas:		\$2,435.47
Penalty Adjustment to Passaloukas	\$3,150.93					
Conversion of Personal Property:	\$1,000.00					

Table C: To Add Debit to Bensch Account for \$6,288.32 Reimbursement to Bensch

The Master compounded the error described in Table B by failing to account for the reimbursement which the Bensch took in the sum of \$6,288.32. This does not depend upon the credibility of any witness. It is a written accounting which was admitted by the Bensch. R.p. 295 (Plts' Ex #12); R.p. 97, l. 9 - 13.

The imbalance is \$2,857.39. It is balanced by the Bensch being debited \$1,428.70. The same credits are factored in resulting in a net award to the Passaloukas the sum of \$5,579.63.

Items	Bensch Account Contribute	Bensch Account Withdraw	Balance of Bensch Account	Passaloukas Account Contribute	Passaloukas Account Withdraw	Balance of Passaloukas Account
Beginning Capital Account	\$62,995.09		\$62,995.09	\$59,375.16		\$59,375.16
Accountant's Final Bill	\$300.00		63295.09			59375.16
Pay to Eleftheriou	\$950.00		64245.09			59375.16
Non-Fixture Assets			64245.09	\$1,439.00		60814.16
Reimbursement to Bensch:		\$6,288.32	57956.77			60814.16
Totals:			\$57,956.77			\$60,814.16
Resulting Imbalance	\$2,857.39					

Adjustment to Balance:	\$1,428.70		\$59,385.47	\$1,428.70	\$59,385.47
Awards to Passaloukas		\$4,150.93		Net Owed to Passaloukas:	\$5,579.63
Penalty Adjustment to Passaloukas	\$3,150.93				
Conversion of Personal Property:	\$1,000.00				

Table D: To Add Debit to Bensch Account for the Forfeiture of the Leasehold Improvements to Bensch

A very critical element of this lawsuit is the fact that the Master, having allowed all assets of Zorba's to be forfeited to the Bensch (except \$719 credited as one-half of the non-fixtured items), failed to acknowledge and account for the fact that the Bensch recovered the forfeited assets in spite of having determined that the Bensch had received a "windfall". Table D makes this correction. When this error is corrected the Passaloukas are owed the sum of \$35,703.91 by the Bensch.

Items	Bensch Account Contribute	Bensch Account Withdraw	Balance of Bensch Account	Passaloukas Account Contribute	Passaloukas Account Withdraw	Balance of Passaloukas Account
Beginning Capital Account	\$62,995.09		\$62,995.09	\$59,375.16		\$59,375.16
Accountant's Final Bill	\$300.00		63295.09			59375.16
Pay to Eleftheriou	\$950.00		64245.09			59375.16
Non-Fixture Items			64245.09	\$1,439.00		60814.16
Reimbursement to Bensch:		\$6,288.32	57956.77			60814.16
Forfeiture of Leasehold Improvements to Bensch:		\$60,248.57	-2291.8			60814.16
			-2291.8			60814.16
Totals:			\$(2,291.80)			\$60,814.16
Resulting Imbalance	\$63,105.96					
Adjustment to Balance:	\$31,552.98		\$29,261.18		\$31,552.98	\$29,261.18
Awards to Passaloukas		\$4,150.93		Net Owed to Passaloukas:		\$35,703.91
Penalty Adjustment to Passaloukas	\$3,150.93					

Conversion of Personal Property: \$1,000.00

Table E: To Add Debit to Bensch Account \$75,000 for the Sale of Restaurant by Bensch

Table E accounts for the \$75,000 proceeds received from the sale of the restaurant. This results in a net award to the Passaloukases in the sum of \$73,203.91.

Items	Bensch Account Contribute	Bensch Account Withdraw	Balance of Bensch Account	Passaloukas Account Contribute	Passaloukas Account Withdraw	Balance of Passaloukas Account
Beginning Capital Account	\$62,995.09		\$62,995.09	\$59,375.16		\$59,375.16
Accountant's Final Bill	\$300.00		63295.09			59375.16
Pay to Eleftheriou	\$950.00		64245.09			59375.16
Non-Fixture Items			64245.09	\$1,439.00		60814.16
Reimbursement to Bensch:		\$6,288.32	57956.77			60814.16
Forfeiture of Leasehold Improvements to Bensch:		\$60,248.57	-2291.8			60814.16
Value of Restaurant		\$75,000.00	-77291.8			60814.16
Totals:			\$(77,291.80)			\$60,814.16
Resulting Imbalance	\$138,105.96					
Adjustment to Balance:	\$69,052.98		\$(8,238.82)		\$69,052.98	\$(8,238.82)
Awards to Passaloukas		\$4,150.93		Net Owed to Passaloukas:		\$73,203.91
Penalty Adjustment to Passaloukas	\$3,150.93					
Conversion of Personal Property:	\$1,000.00					

Final Tables: Accounting for Other Important Elements Overlooked by the Master and Court of Appeals

With all respect to the Court these Tables are intended to ease the Court's evaluation, not to make it more difficult. One final set of tables, based upon the accounting method which the Passaloukases' accountant presented is now offered here. Applying sound legal principles, the Passaloukases believe that the substantial, reliable evidence in this case shows that Zorba's

value, including interest at the legal rate through June 1, 2010 (an arbitrary, but convenient, date which is subject to revision with the passage of time) on assets wrongfully misappropriated by the Bensches, and excluding consideration of punitive damages and attorneys fees which are sought, is approximately \$243,539.12 based upon the following summary of the account of the assets and liabilities which have been documented *supra*:

ASSETS: \$379,578.67

Proceeds of Sale to Mi Tierra	\$75,000.00
Interest on Sale to Mi Tierra's 5/2/00 to 6/1/10 ¹⁴	\$66,150.01
Leasehold Improvements (value as of 1/9/00)	\$60,248.57
Net Rents from 5/2/00 to 5/1/05	\$91,898.50
Interest on Rents from 5/1/05 to 6/1/10	\$40,848.89
Interest on Lease Improvements from 5/1/05 to 6/1/10	\$26,780.49
Refund of Insurance Premium	\$481.00
Interest on Refund 1/9/00 to 6/1/10	\$437.32
Stock in Trade on Hand on 1/9/2000	\$6,000.00
Interest on Stock in Trade from 1/9/00 to 6/1/10	\$5,454.75
Cash Converted by Bensches on 1/8/2000	\$404.00
Interest on Cash from 1/9/00 to 6/1/10	\$367.28
Security Deposit owed by Bensches	\$1,000.00
Interest on Security deposit from 1/9/00 to 6/1/10	\$909.13
Last Month's Rent owed by Bensches	\$1,885.00
Interest on Last Month's Rent from 1/9/00 to 6/1/10	\$1,713.73
Punitives: Wrongful Ejectment and Conversion	undetermined

LIABILITIES: \$224,604.56

Salary to Bill Passaloukas 8/15/99 - 1/8/2000	\$14,400.00
Interest on Salary to Passaloukas from 1/9/00 to 6/1/10	\$13,091.40
Attorneys Fees, Costs for Prosecution of Suit	\$88,565.01
Loan Repayment to Bensch	\$26,706.77
Interest on Loan to Bensch from 1/9/00 to 6/1/10	\$24,260.60
Loan Repayment to Passaloukas	\$29,375.16
Interest on Loan to Passaloukas from 1/9/00 to 6/1/10	\$26,705.62
Attorneys Fees to Passaloukas to Defend Claim	\$1,500.00

¹⁴ All interest calculations herein were made to June 1, 2012, the date being just prior to the filing of Petitioners' Initial Brief with the Court of Appeals. Interest must finally be adjusted to the date of any judgment which might award interest at the legal rate.

Rents Owed to Bensch from 12/15/99 to 1/14/00	\$1,905.36
Interest on Rents to Bensch from 12/15/99 to 6/1/10	\$1,575.50

NET VALUE OF ASSETS: \$154,974.11

The Passaloukases' Capital and Loan Account:

The Passaloukases contributed \$68,875.16, not \$59,375.16 as the Master found. R.p. 234 (Plts Ex # 2). Of that sum \$30,000 is allocated to capital. R.p. 289 (Exhibit "A", p. 4 of the "Written Consent" (Plts' Ex # 11)). The balance, \$38,875.16, must therefore be allocated to their loan account.

The Passaloukases were reimbursed the sum of \$9,500.00. R.p. 235 (Plts' Ex # 2).

The Passaloukases' capital and loan account has a positive balance of \$59,375.16 allocated as follows:

Equity Capital Account:		+	\$30,000.00
Loan Account:	\$38,875.16		
Less Loans Repaid:	<u>- 9,500.00</u>	+	<u>\$29,375.16</u>
		Balance:	<u>\$59,375.16'</u>

The Bensch's Capital and Loan Account:

The Bensch's contributed \$62,995.09. R.p. 237 (Plts Ex # 4). Of that sum \$30,000 is allocated to capital. R.p. 289 (Exhibit "A", p. 4 of the "Written Consent" (Plts' Ex # 11)). The balance, \$32,995.09, must therefore be allocated to their loan account.

The Bensch's were reimbursed the sum of \$6,288.32. R.p. 295 (Plts' Ex # 12). Additionally, on January 9, 2000, the date of the ejectment the Bensch's recovered the value of the leasehold improvements which they took back when they ejected Zorba's on January 9, 2000. The value of the leasehold improvements at that time was \$60,248.57. R.p. 237-239 (Plts' Ex # 4). These are calculated as total contributions, \$62,695.09, less 2,151.00 paid for insurance

(which they were subsequently reimbursed) and \$95.54 for champagne glasses.¹⁵

The Bensches capital and loan account has a negative balance of -\$3,541.80, allocated as follows:

Equity Capital Account:		+ \$30,000.00
Loan Account:	\$ 32,995.09	
Less Loans Repaid:	- 6,288.32	+ \$26,706.77
Less Leasehold improvements recovered:		- \$60,248.57
	Balance:	-\$3,541.80

Judgment Award Sought By Passaloukases Based Upon Accounting

Common Law Accounting

Based upon the above itemized accounting statements, the Bensches are indebted to Zorba's in the sum of \$379,578.67. Zorba's is indebted to the Passaloukases in the sum of \$146,145.79 for the following items of damage which are set forth above: litigation expenses including attorneys fees in the sum of \$88,565.01; loan repayment to the Passaloukas in the sum of \$29,375.16; interest on the Passaloukas loan to 6/1/10 in the sum of \$26,705.62; and attorneys fees incurred by the Passaloukas to defend employee claim in the sum of \$1,500.00. The Passaloukases are further entitled to one-half of the net value, \$154,974.11, as set forth in the final accounting above as their share of the Zorba's equity, being the sum of the sum of \$77,487.06.

Close Corporation Direct Action Alternative

Alternatively, because Zorba's is a statutory close corporation, if the Court finds that any of the grounds for relief described in S.C. Code Ann., 1976 § 33-18-400 exist, then the Court may "award damages to any aggrieved party". S.C. Code Ann., 1976 §33-18-410 (a)(9).

¹⁵ The Bensches took possession of all of the contents of Unit 101. They sold the restaurant for \$75,000 and otherwise made no accounting for the champagne glasses.

Jurisdiction of the Court is “plenary and exclusive”. S.C. Code Ann., 1976 §33-18-400 (b). The Passaloukases believe that the Court may award damages directly to the Passaloukases against the Bensches for each element of their loss because they are “aggrieved” parties and because the Court’s power is “plenary and exclusive”. The direct damages would be the items previously described, \$88,565.01 (attorneys fees), \$29,375.16 (loan repayment), \$26,705.62 (interest on loan), \$1,500.00 (attorneys fees incurred in defending employee lawsuit).

Finally, Bill Passaloukas is entitled to his salary in the sum of \$14,400.00 together with interest thereon in the sum of \$13,091.40.

XIX. The Master erred by failing to determine that the Bensches converted or misappropriated assets of Zorba’s and the Passaloukases.

The Master made no factual findings on this issue ruling only that the “claim of conversion are unproven.” R.p. 10 (Order). That is error. The Bensches are liable for conversion of the corporate assets identified hereafter as a result of the ejectment of Zorba’s on January 9, 2000. Conversion is the illegal use, misuse, or detention of another’s chattel to the exclusion of the owner’s rights. *Owens v Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).

XX. The Master erred in dismissing the statutory and common law actions for dissolution.

The Master dismissed the Passaloukases’ common law shareholder derivative action and the direct shareholder actions arising under S.C. Code Ann., 1976 § 33-14-300 and § 33-18-400. R.p. 10 (Order). These actions ask for an accounting, set forth claims for wrongful misappropriation and conversion of corporate assets and ask for dissolution and liquidation. The Master made no specific findings but stated: “I find no persuasive evidence of oppressive behavior, unfairly prejudicial behavior on the part of the Defendants”. He found that “The corporation has been administratively dissolved, has no value, and that there are no creditors. Therefore, a judicial dissolution is unnecessary.” R.p. 10 (Order). The Master concluded that “no deadlock, illegal, fraudulent, unfair, or oppressive conduct contributed to the failure of the

corporation.” R.p. 8 (Order). The findings supporting his conclusion are not sufficient enough for an appellate court to ensure the law has been faithfully executed and the view of the law, based upon the facts cited hereafter, which would support the conclusion is erroneous.

Direct Shareholder action under S.C. Code Ann., 1976 § 33-14-300 and § 33-18-400

The Court may dissolve Zorba’s under either S.C. Code Ann., 1976 §§ 33-14-300 or 33-18-400 if it is established that there is deadlock or if the directors or those in control have acted in a manner that is oppressive or unfairly prejudicial to Zorba’s or to the Passaloukases, or if the assets have been misapplied or wasted. S.C. Code Ann., 1976 § 33-14-300 (2)(I), (ii), (iv). The remedies are not limited. S.C. Code Ann., 1976 §33-14-310 (d).

The remedies under S.C. Code Ann., 1976 §§ 33-18-400 and 33-18-410 are in addition to any other right or remedy which the Passaloukases may have. S.C. Code Ann., 1976 § 33-18-400 (e). S.C. Code Ann., 1976 § 33-18-400 provides a broad range of remedies to “aggrieved” shareholders of statutory closed corporations such as Zorba’s. It especially allows the Passaloukases to bring a direct action against the Bensches under S.C. Code Ann., 1976 §§ 33-18-410, 33-18-420, or 33-18-430. If any grounds for relief exist the Court may award damages directly to the Passaloukases if they prove that they have been “aggrieved” by the Bensches’ conduct. S.C. Code Ann., 1976 §33-18-410 (a)(9)(The Court may “award damages to any aggrieved party”.) Jurisdiction is “plenary and exclusive”. S.C. Code Ann., 1976 §33-18-400 (b).

The Master determined that he had no authority due to the fact that Zorba’s had been administratively dissolved. That is not correct under S.C. Code Ann., 1976 § 33-14-210 (d) which provides that the corporation continues its existence:

A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Sections 33-14-106 and 33-14-107.

Because Zorba’s corporate existence continues under authority of S.C. Code Ann., 1976 § 33-14-210 (d), the Court is bound to make the determinations required by the statutes. The

Court's duty is to first "...enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of court shall deliver a certified copy of the decree to the Secretary of State, who shall file it without charging any fee." S.C. Code Ann., 1976 § 33-14-330. "After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs..." S.C. Code Ann., 1976 § 33-14-330 (b).

The Passaloukases claim deadlock, wrongful ejection of Zorba's from Unit 101 Towne Center, breach of fiduciary obligations and misappropriation of corporate assets. The facts cited herein establish deadlock, oppressive and unfair acts.

CONCLUSION

Disposition of this case does not depend upon the credibility of any witness which the Court may have misapprehended or overlooked in its consideration of the merits of this appeal. The Passaloukases are entitled to a strict accounting and full de novo review of all legal and equitable issues and a decision which addresses each issues raised in the case with reasons given.

The burden of proof is on the Benschés to present a strict accounting of their management and disposition of specifically identified assets. Theirs is the duty to prove that they managed and disposed of the specifically identified assets for the benefit of Zorba's. The Passaloukases presented a prima facie case establishing the identity and value of Zorba's assets. When that prima facie case was made out, the burden shifted to the Benschés to present written documents, not unsupported and undocumented claims. The Passaloukases presented an accounting. The Benschés did not.

The ejectment was improper. The Lease was not in default. The notices did not comply with default provisions of the Lease and the law. Forfeitures of leases are not favored. *Kiriakides vs United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994).

Even if the Lease was properly terminated the assets were not forfeited. The leasehold improvements were irrevocably conveyed to Zorba's. No rule of the law of fixtures prevents it. No provision of the Lease, the Shareholders' Agreement, Written Consent or rule of law allows

forfeiture. Zorba's is entitled to the increased rents as a result of the enhanced value of Unit 101 due to the addition of the leasehold improvements owned by Zorba's. The termination of the Lease also terminated Zorba's obligation for rents while Zorba's continued to own the leasehold improvements.

The restaurant owned by Zorba's was worth \$75,000. It was sold for \$75,000. It was not liquidated. The \$75,000 is revenue generated from the sale of Zorba's assets. There is no evidence that the Bensches enhanced the value of Zorba's assets in any way, only unsupported and speculative claims which are not enforceable as a matter of law.

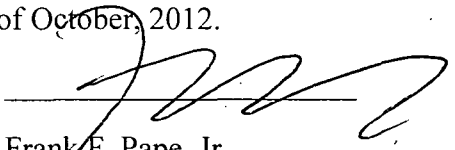
Mr. Passaloukas is entitled to his salary, \$14,400.00. No evidence show that he was ever paid. The Passaloukases only received a return of a portion of their capital contributions.

The remaining assets are the stock in trad, refund of the insurance premium, cash in hand, security deposit and first months rent.

Once it is ensured that the law has been properly applied to the compelling facts of this case, the Passaloukases ask that the Court consider the imposition of interest, attorneys fees and punitive damages.

The Passaloukases respectfully request that this Court accept and grant this Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted this 31st day of October, 2012.



Frank F. Pape, Jr.
2952 Crosswycke Forest Circle
P.O. Box 190009
Atlanta, Georgia 31119
1-404-846-0228
Petitioners' Attorney

Other Pro se Parties of Record:

Cynthia M. Bensch
Gary M. Bensch
29Martingale West
Bluffton, S.C. 29910
1-843-681-3112
Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY

NOV 01 2012

Court of Common Pleas

S.C. Supreme Court

Marvin Dukes, III, Master in Equity

Opinion No. 2012-UP-274 (S.C. Ct. App. filed May 2, 2012)

Appellate Case Tracking No. 2012-212-958

Bill P. Passaloukas and Susie H. Passaloukas,
Individually and as Shareholders Derivatively
On Behalf of Zorba's, Inc.,.....Petitioners,

v.

Cynthia Bensch, Gary Bensch, Towne Center, LLC
and Zorba's, Inc.

Of whom Cynthia Bensch and
Gary Bensch areRespondents.

CERTIFICATE OF MAILING

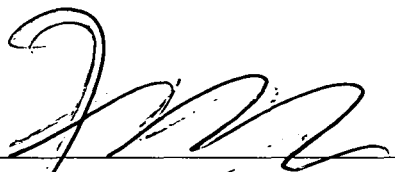
The undersigned hereby certifies that on October 31, 2012, he served a copy of the
Petition for Writ of Certiorari upon Respondents Cynthia M. Bensch and Gary M. Bensch by
depositing a true and accurate copy thereof in the United States mails, sufficient postage prepaid,
and by private over night courier to the Clerk of the South Carolina Court of Appeals and
addressed as follows:

Cynthia M. Bensch
29 Martingale West
Bluffton, SC 29910

Gary M. Bensch
29 Martingale West
Bluffton, SC 29910

October 31, 2012

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



Frank F. Pape, Jr.
2952 Crosswycke Forest Circle
P.O. Box 190009
Atlanta, Georgia 31119
1-404-846-0228
Petitioners' Attorney

RECEIVED

FRANK F. PAPE, JR.

ATTORNEY AT LAW
POST OFFICE BOX 190009
ATLANTA, GEORGIA 31119 (MAILING)

NOV 01 2012

2952 CROSSWYCKE FOREST CIRCLE NE, ATLANTA, GA 30319 (STREET)
S.C. Supreme Court

TELEPHONE (404) 846-0228 FACSIMILE (404) 846-0281

Licensed in Georgia and South Carolina

October 31, 2012

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Bill P. Passaloukas and Susie H. Passaloukas, Individually and as Shareholders
Derivatively On Behalf of Zorba's, Inc., Appellants, v. Cynthia Bensch, Gary Bensch, and
Zorba's, Inc., Respondents.

Appellate Case Tracking No. 2012-212-958

Dear Mr. Shearouse:

I am enclosing the following documents for filing:

1. Original and six copies of Petition for Writ of Certiorari;
2. Two copies of the Appendix;
3. One unbound copy of the Appendix
4. Two copies of the Record on Appeal;
5. One unbound copy of the Record on Appeal;
6. Two copies of the Supplemental Record on Appeal, Volume I;
7. One unbound copy of the Supplemental Record on Appeal, Volume I;
8. Two copies of the Supplemental record on Appeal, Volume II;
9. One unbound copy of the Supplemental Record on Appeal, Volume II;
10. Two copies of Brief of Appellants;
11. One unbound copy of Brief of Appellants;
12. Two copies of Final Brief of Respondents;
13. One unbound copy of Final Brief of Respondents;
14. Two copies of Reply Brief of Appellants;

15. One unbound copy of Reply Brief of Appellants;

16. Two Proofs of Service; and

17. Check in the sum of \$100.00 for filing fee.

By copy of this letter to Mr. and Mrs. Bensch, I am serving copies of the Appendix and Petition upon them.

With kind regards, I am

Yours very truly

Frank F. Pape, Jr.

Enclosures

cc: Mr. Gary Bensch
Mrs. Cynthia Bensch
Mr. and Mrs. Bill Passaloukas

FedEx *NEW Package*
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Form ID No. **0200** *DO NOT DESTROY* Recipient Copy

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Company
Address **PO Box 190009**
Atlanta State **GA** ZIP **31119**

2 Your Internal Billing Reference

3 To
Recipient's Name **Honorable Daniel Shegouse** Phone

Company **South Carolina Supreme Court**
Address **1231 Gervais Street**
Dept./Floor/Suite/Room

Address
Use this line for the HOLD location address or for continuation of your shipping address.
City **Columbia** State **SC** ZIP **29201**



8017 9261 5020

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Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
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- 2 or 3 Business Days**
- FedEx 2Day A.M.
Second business morning.* Saturday Delivery NOT available.
 - FedEx 2Day
Second business afternoon.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
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- 5 Packaging** *Declared value limit \$500.
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Someone at recipient's address may sign for delivery. *Fee applies.*
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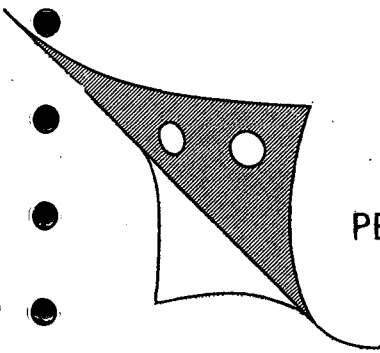
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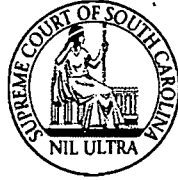
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The Supreme Court of South Carolina

Frank Pape

11/01/2012

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Reference No:	6689
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