IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty,..... Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

RESPONDENTS' FINAL BRIEF

Glenn E. Bowens, Esq.
P.O. Box 665
Blythewood, South Carolina 29016
(803) 714-7766
(803)714-0775
Attorney for Respondents

Glenn E. Bowens, Esquire
Post Office Box 665
Blythewood, SC 29016
803-714-7766
803-714-0775

Charles E. Carpenter, Jr., Esquire
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
803-758-2886

ATTORNEYS FOR RESPONDENTS

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty, ... Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

RESPONDENTS' FINAL BRIEF

Glenn E. Bowens, Esq.
P.O. Box 665
Blythewood, South Carolina 29016
(803) 714-7766
(803)714-0775
Attorney for Respondents

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal iii

Statement of the Case 1

Facts 1

Argument

I. THE JURY WAS PROPERLY CHARGED AND THE TRIAL COURT PROPERLY DENIED APPELLANT'S POST TRIAL MOTIONS FOR DIRECTED VERDICT AND JNOV 7

II. CORPORATE OFFICERS AND EMPLOYEEES DO NOT HAVE ABSOLUTE IMMUNITY FROM PERSONAL LIABLITY FOR TORTIOUS INTERFERENCE WITH A CORPORATE CONTRACT 25

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO REDUCE THE DAMAGES AWARDED FOR THE TORTIOUS INTERFERENCE CAUSE OF ACTION 39

IV. THE TRIAL COURT PROPERLY CHARGED THE JURY WITH REGARD TO DAMAGES FOR LOSS OF CUSTOMERS AND GOODWILL 44

Conclusion 47

TABLE OF AUTHORITIES

CASES

Baumann v. Long Cove Club Owners Association, Inc., 380 S.C. 131 (Ct. App. 2008) 29, 30

BPS, Inc. v. Worthy, 362 S.C. 319 (Ct. App. 2005). 10, 27

Bradburn v. Colonial Stores, Inc., 273 S.C. 186 (1979).....27, 34, 35, 36

Clark v Cantrell, 339 S.C. 369 (2000) 9

Collins Music Co., Inc. v. Smith, 332 S.C. 145 (Ct. App. 1998).....41, 43

Creech v. South Carolina Wildlife & Marine Resources Dep't., 328 S.C. 24 (1997) 11

Curcio v. Caterpillar, Inc., 355 S.C. 316 (2003) 22

Gilbert v. Mid-South Machinery Company, Inc., 267 S.C. 211 (1976) 25

Hunt v. Rabon, 275 S.C. 475 (1980) 26

Jackson v. Speed, 326 S.C. 289 (1997).....26

Jones v. Ridgely Communications, Inc., 304 S.C. 452 (1991) 9

Kuznik v Bees Ferry Associates, 342 S.C. 579 (Ct. App. 2000) 29

Lawlor v. Scheper, 232 S.C. 94 (1957) 25

Medical Mutual. Liability Soc. of Maryland v. B. Dixon Evander and Associates, Inc., 339 Md.41, 660 A.2d 433 (MD,1995) 28

Olin Mathieson Chemical Corporation v. Planters Corporation, 236 S.C. 318 (1960).....32, 33

Perlman v. Shurett, 567 So.2d 1296 (Ala.,1990.).....29

Peruvian Guano Corporation v. Thompson, 112 S.C. 377 (1919)..... 32, 33

Rowe v Hyatt, 321 S.C. 366 (1996) 30

Threlkeld v. Christoph, 280 S.C. 225 (Ct. App. 1984) 35, 36

Weinberg v. Wallace, 314 S.C. 183, 442 S.E.2d 211 (Ct. App. 1994).....44

Wright v Craft, 372 S.C. 1 (Ct. App. 2006) 12

OTHER AUTHORITIES

South Carolina Request to Charge – Civil (2002).....7

S.C. Code § 33-44-303(a) 27

S.C. Code § 33-6-220(b) 28

S.C. Code §33-8-420 28

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY ON THE SUBSTANTIVE LAW OF TORTIOUS INTERFERNECE WITH A CONTRACT BY A CORPORATE OFFICER?

2. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT?

3. WHETHER CORPORATE OFFICERS AND EMPLOYEES HAVE ABSOLUTE IMMUNITY FROM PERSONAL LIABLITY FOR TORTIOUS INTERFERENCE WITH A CORPORATE CONTRACT?

4. WHETHER THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE DAMAGES IN THE TORTIOUS INTERFERENCE CAUSE OF ACTION?

5. WHETHER THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY WITH REGARD TO DAMAGES FOR LOSS OF CUSTOMERS AND GOODWILL IN THE TORTIOUS INTERFERENCE WITH CONTRACT CAUSE OF ACTION?

STATEMENT OF THE CASE

This litigation was initiated on February 17, 2005 by Dutch Fork Development Group II, LLC ("DFDG") and Dutch Fork Realty, LLC ("DFR") against SEL Properties, LLC ("SEL") and Stephen E. Lipscomb ("Lipscomb"). The causes of action involved breach of contract accompanied by a fraudulent act and tortious interference with contract. SEL and Lipscomb answered denying liability for all causes of action.

The case was tried by jury on October 29, 2007 – November 7, 2007. The trial court denied Lipscomb's motion for directed verdict. The jury found for DFDG and DFR awarding $299,144.00 in actual damages and $1,000,000.00 punitive damages against SEL and $3,000,000.00 actual damages and $1,000,000.00 punitive damages against Lipscomb. The trial court denied the post trial motions filed by SEL and Lipscomb including the motion for judgment notwithstanding the verdict ("JNOV") on April 8, 2008. Notice of Appeal was filed on April 11, 2008. The appeal by SEL was voluntarily dismissed on June 9, 2008.

FACTS

The Respondent, DFDG is a development company engaged in the business of developing residential sub-divisions; DFR is a real estate sales/brokerage company. SEL is an investment holding company. Appellant Lipscomb is the managing member of SEL. K&L Contracting, LLC ("K&L") is a residential home construction company engaged in the business of purchasing lots and constructing houses in residential developments. Lipscomb is the managing member of K&L. (R.118, line 15 – R. 120, line 1) There were two contracts in this litigation involving the development of two neighboring but separate residential subdivisions; one known as the Courtyards at Rolling Creek ("Courtyards")

and the second known as Rolling Creek. The parties to the contracts were DFDG, DFR and SEL; Lipscomb conceded at trial that he was not a party to the contracts. (R 1767-1779; R. 519 lines 8-12; R. 795, line 21 – R. 796, line 5)

On November 14, 2000 the parties entered into a contract for the purpose of developing and marketing of the Courtyards. (R. 1767-1772) The Courtyards was to be developed in three phases over the five year term of the contract. The contract assigned DFDG responsibility and authority for the development of the Courtyards, DFR was responsible for marketing and sales; DFR was also granted the exclusive right to sell both lots and houses in all three phases of the development.

SEL's sole responsibility was to provide financing for the project to purchase the land and to pay of the costs of development. Lipscomb's authority to act for SEL with regard to the Courtyard's project was limited to providing financing. (R. 112, lines 8- 18; R.794, line 7 – R. 795, line 3; R. 937, lines 4-10; R. 1767-1772) The contract provided for DFDG to receive a $54,000.00 development fee for each phase of the development as well as twenty five percent of the profits from the sale of the lots. On October 17, 2002, the parties entered into a second contract, containing substantially identical terms, for the development and marketing of Phase 4 of the Rolling Creek subdivision. (R. 1773-1776)

The property, consisting of 122 acres comprising the land for all three phases, cost $800,000.00 and was purchased by SEL using its own funds (R. 1777-1782 Exhibits 3-4). Subsequently SEL obtained a development loan from the National Bank of South Carolina ("NBSC") (Exhibits 69-70, R.1876–1893). SEL reimbursed itself the $800,000.00 from the proceeds of the development loan. (R. 128, line 10- R.130, line 13) The purpose of the loan was to pay the expenses for the development of Phase 1 (e.g.

engineering costs, construction of roads and utilities) not to reimburse SEL for the purchase price of the land for all three phases. SEL was to be reimbursed for the cost of the land purchase as each lot was sold over the course of all three phases of the project not all at once in Phase 1. (R. 139, line 11- R.140, line 6; R. 269, lines 3-9; R. 307, lines 4-13)

The original budget for Phase 1 did not include paying for land acquisition as the land had already been acquired by SEL. (R. 307, lines 4-13) SEL's action left insufficient funds to complete the development. (R. 389, line 15 – R. 391, line 9) Lipscomb **personally** guaranteed the development loan would be repaid and personally guaranteed he would cover any expenses not covered by the development loan ("shortfalls") caused by taking the $800,000.00 out up front. (R.116, lines 11 -18; R.138, line 20 – R. 141, line 5; R. 569, lines 13-14; R. 816, lines 2-13; R. 988, line 2 – R. 989, line 1) Lipscomb did not comply with his personal guarantee as there was evidence that expenses for the development to various contractors were not timely made and the contractors placed liens on the property, refused to work or slowed down on their work. Lipscomb's unjustified withholding of funds prevented performance of the contract. (R.177, line 13 – R.178, line 24; R. 391, lines 10-23; R. 420, lines 2-21)

The development loan was to be repaid through a lot-release fee as each lot was sold. (R. 146, lines 2-6) However, lots in a subdivision may not be sold until either the infrastructure is completed or a bonded plat is obtained. (R. 363, line 17 – R. 364, line 2, R. 379, lines 19-25) The bonded plat ensures the infrastructure will be completed if lots are sold to the public before completion of the infrastructure. Lipscomb, without justification, refused to provide funds for a bonded plat, until the infrastructure was

substantially completed, which prevented DFR from beginning sales of lots for nearly a year. (R.203, line 21 – R.205, line 12) After the infrastructure was installed the roads began to experience isolated pavement failures. Lipscomb, without justification, refused to provide funds to pay for the repairs which resulted in significant deterioration of the roads. (R. 163, line 18 – R. 164, line 19; R. 169, lines 5 – 25)

The development plans for all three phases had been pre-approved by the appropriate governmental agencies. (R. 360, lines 11-19; R.379, lines 4-12; R.398, lines 2-7) Shortly after Phase 1 began Lipscomb secretly went to the project engineer, without the knowledge or consent of DFDG, abandoned the pre-approved development plans for Phase 2 and 3 and began re-designing those phases. (R. 175, line 3 – R.176, line 8; R.360, lines 11-13; R.379, lines 4-12) The engineering firm working on the re-design of Phase 2 and 3 was not paid. The re-design was not part of the development budget and Lipscomb did not provide funds to pay the engineering firm. Without being paid the engineering firm did not work on the re-design and completion and final approval of the re-designed plans was delayed until March 1, 2007. Without approved development plans construction of the infrastructure for Phase 2 and 3 could not begin nor could they be effectively marketed. (R.217, lines 1-22; R.361, line 13- R.362, line 8; R. 177, lines 6-12)

The design and preparation of the development plans for the Courtyards is a development function and solely the responsibility of DFDG. (R. 397, lines 21-25) Lipscomb had no authority to abandon the pre-approved plans and re-design the development plans for Phase 2 and 3. (R.218, lines 5-8; R.398, lines 2-5) Lipscomb's actions had a "catastrophic" impact on the project; he prevented DFDG and DFR from being able to perform the contract and derailed the project. (R. 175, line 3 – R.176 line 8)

There was no legitimate business justification for changing the development plans when doing so prevented the contract from being performed.

There was evidence Lipscomb engaged in secret negotiations with buyers for lots in Phase 2 and 3. (R. 224, line 21 – R.225, line 23; R. 277, lines 10-14) The negotiations were secret because Lipscomb did not intend to share the profits with DFDG or pay commissions to DFR. During the trial Lipscomb repeatedly denied having engaged in secret negotiations; however when presented with documentary evidence he admitted that he had secretly negotiated with buyers. (R. 1018, lines 14-22) DFR had the exclusive right to sell lots and houses in the Courtyards. Lipscomb had no authority to engage in secret negotiations with potential buyers. (R. 396, line 16 – R. 397, line 9) Lipscomb's secret negotiations ultimately led to a contract to purchase all of the lots in Phase 2 and 3 by Essex Homes for a purchase price of $7,663,000.00. (R. 2210 – 2214, Exhibit 123)

Lipscomb repeatedly misrepresented to DFDG that there were no profits in Phase 1 and that SEL had no funds to pay the development fee. (R. 137, lines 13-22; R. 142, line 12 – R. 143, line 4) However, accountants on both sides confirmed that there were profits that should have been split with DFDG and that SEL in fact had the ability to pay the Phase 1 development fee. (R. 446, lines 12-20; R.1048, line 12 – R. 1049, line 4) There was evidence at trial that the costs for the project had been misallocated on the books to make it appear as if there were no profits in Phase 1. (R. 439, line 20 – R. 445, line 2; R. 1050, lines 3-11)

Lipscomb engaged in improper self-dealing and charged illegitimate expenses. (R. 475, lines 9-11) Lipscomb used Courtyard funds to pay personal expenses and to pay K&L's construction expenses (R.181, line 2- R.201, line 11) There was evidence that

Lipscomb allowed K&L to receive lots without paying the fair market value price, which had been set at $40,000.00 per lot by agreement between SEL and DFDG, thereby depriving DFDG of its profit share. (R. 133, lines 8-14; R. 179, line 4 - R.181, line 14) Lipscomb allowed K&L to begin building on lots without closing and to delay closing on lots. (R. 239, lines 4-14; R.263, lines 2-8) The decrease in cash flow resulting from Lipscomb's self-dealing and improper use of Courtyard funds delayed completion of the project and prevented the parties from performing the contract.

Lipscomb terminated the development contract via letter on May 28, 2004. He claimed the reason for termination was the failure by DFR to meet the contract's lot sales requirement. However, during the trial Lipscomb admitted that the lot sales requirement in fact had been met and that he was wrong to have terminated the contract. (R. 851, lines 8-11) Lipscomb claimed he was mistaken about the lot sales requirement when he terminated the contract. Lipscomb claimed he thought the lot sales requirement was two lots per month; however, the letter terminating the contract accurately quoted the contract requirement of twenty percent of the available lots per year. (R.54, lines 9-10; R.114, line 20 – R. 115, line 4; R 853, lines 19-23) The termination letter made no reference to the claimed two lots per month requirement. (R. 1814, Exhibit 17)

There was evidence Lipscomb had no legitimate basis for terminating the contract and that his motive was to improperly deprive DFDG and DFR of the development fees, commissions and profit sharing from Phase 2 and 3 in order to prevent NBSC from calling in his personal guarantees. When the Respondents objected to being terminated rather than verify the sales requirement had been met, Lipscomb went back to his attorney to ask "well how you fire anybody?" (R. 908, lines 16-24)

ARGUMENT

I. The jury was properly charged and the trial court properly denied Appellant's post trial motions for directed verdict and JNOV.

The Appellant's argument is based on the erroneous assumption that he is absolutely immune from liability for tortious interference with a corporate contract solely because of his status as a corporate officer. The Appellant's argument also fails to distinguish between the contract liability of a corporation and the tort liability of an individual corporate officer. Under South Carolina law, corporate officers are not absolutely immune from personal liability for tortious interference with a corporate contract just as they are not immune from personal liability for other torts they commit. The jury was charged by the trial court:

> Generally, a corporate officer or employee is not liable for interfering with a corporate contract because he's considered a party to the contract, as long as he's acting to serve the corporate interest or -- or unless his activity involves individual, separate tortious acts. However, a corporate officer or employee may be liable for tortiously interfering with a corporate contract if he's acted outside the scope of his authority or he's acting with malice, that is evil intent, or acting to serve his own interest. (R. 1258, line 23 – R. 1259, line 7)

The trial court's charge to the jury was based on the model charge developed by Judge Ralph King Anderson, Jr. in South Carolina Request to Charge – Civil (2002) and is a correct statement of the law. A corporate officer's interference, inducement or procurement of a breach of contract is tortious and actionable when the corporate officer is either (1) not acting to serve the corporate interest; (2) commits a tortious act; (3) acts outside the scope of his authority; (4) acts with malice; or (5) acts to serve his own personal interest. The trial court found there was sufficient evidence presented on the tortious interference cause of action to warrant charging the jury.

The trial court also charged the jury:

> In determining whether the defendant Lipscomb's conduct in intentionally interfering with a contract is improper you should consider the following factors: The nature of the defendant's conduct; the defendant's motive; the interest of the other party...with which the defendant's conduct interferes; the interest sought to be advanced by the defendant...The plaintiff must prove the absence of justification. The absence of justification can be inferred. Interference with a contract is justified, however, when it is motivated by a legitimate business purpose. (R. 1257, lines 9-23)

There was evidence from which the jury could conclude that Lipscomb had no legitimate business justification for his actions and that his motive was to avoid having NBSC call in his personal guarantees by improperly depriving DFDG and DFR of the profits, fees and commission they would have earned in Phase 2 and 3. Their award of punitive damages indicates the jury also found Lipscomb was acting maliciously.

Lipscomb's appeal is not based on an error of law at trial, rather he disagrees with the jury's determination of the facts. During his motion for directed verdict, Lipscomb agreed with the rule of law charged to the jury. Lipscomb argued:

> And a tortuous interference with contract takes something where the person doing the act is acting outside the scope of his authority and doing something for improper personal means. There is no evidence in this case that the actions taken by Mr. Lipscomb in this matter were anything other than in his authority as a managing member of SEL. (R. 683, lines 11-18)

Lipscomb agreed that the law allowed for him to be found liable for tortious interference as a corporate officer if he was acting outside the scope of his authority or if he was doing something for improper personal means. Lipscomb did not argue at trial that he could not legally be found liable for tortious interference; instead he argued that the evidence did not show he was liable. Contrary to Lipscomb's argument there was substantial evidence

that he acted outside the scope of his authority and was acting to serve his personal interests rather than the corporate interest.

The question of the scope of Lipscomb's authority and whether he acted in his personal capacity to serve his own self-interest or in a corporate capacity to serve the corporate interest; whether he acted tortiously, with malice, or with a legitimate business purpose are all questions of fact for the jury. "A jury issue exists where the evidence is susceptible of more than one reasonable inference." Jones v. Ridgely Communications, Inc., 304 S.C. 452 (1991). The trial court found there was sufficient evidence that Lipscomb acted outside the scope of his authority, acted with malice, without justification, committed tortious acts and acted to serve his own personal interest to warrant submitting the issues to the jury.

Lipscomb did not object to the substantive law contained in the trial court's charge to the jury, thus any alleged error with the substantive charge on the law of tortious interference is not preserved for appellate review. The trial court's jury charge is not reversible error unless there has been an abuse of discretion based on an error of law or the charge is without evidentiary support. Clark v Cantrell, 339 S.C. 369 (2000) The jury charge was a correct statement of the law and there was substantial evidentiary support for the charge.

On appeal Lipscomb claims absolute immunity for his acts by arguing that because a corporation can only act through its individual officers and employees the corporation alone is responsible for its employees' tortious conduct. Lipscomb claims that he was always acting for SEL and so he cannot be liable for tortious interference.

Lipscomb is not correct. There is no absolute immunity for corporate employees. BPS, Inc. v. Worthy, 362 S.C. 319 (Ct. App. 2005).

It is axiomatic that a corporation can only act through its individual officers, agents and employees. However, not every act of a corporate officer is on behalf of the corporation, in furtherance of the corporate interest or within the scope of authority of the corporate officer. Sometimes, corporate officers act outside the scope of their authority, they act in their own self-interest, they act in bad faith, they engage in self-dealing, insider trading and corporate espionage; corporate officers can act maliciously, tortiously, negligently and sometimes even criminally. Corporate officers have always been held personally liable for this type of conduct.

Because a corporation can only act through its individual officers, agents and employees a corporation has liability under both tort law and contract law. The corporation's liability under the tort law doctrine of *respondeat superior* to pay damages to a third party injured by a corporate employee **does not relieve the individual tortfeasor employee from personal liability to the injured third party**. For example, a corporate employee is clearly acting for the corporation when he is driving a corporate vehicle on company business; however, there is no question that he is personally liable to third parties injured by his negligent / tortious driving. Likewise, a corporation's liability under contract law, to pay damages for the breach of contract caused by the tortious interference of a corporate employee, does not relieve the individual employee of personal liability under tort law for maliciously procuring / inducing the breach. In either case the injured party may bring an action against the corporation, the employee, or both.

Every tortious interference with contract case involves a tort and a breach of contract; they are essential elements of the cause of action. When the tortfeasor is a corporate officer the tortious and unjustified act procures or induces the breach. Because the tortfeasor is a corporate officer it may appear on the surface as if only a breach of contract were involved. The difference between a simple breach which is not actionable against the individual corporate officer and tortious interference, which is actionable against the individual corporate officer, is the absence of a legitimate business justification for the corporate offic er's act that resulted in the breach. There is no legitimate business justification for a corporate officer acting outside the scope of his authority. Acts that are not in furtherance of the corporate interest, acts taken out of malice or in furtherance of the corporate officer's personal interest do not have a legitimate business justification. If the act were "justified" the act would be legitimate and would not be tortious and not actionable. Lipscomb had no legitimate business justification for his actions. There is no legitimate business justification and no corporate interest served by preventing the parties from performing the contract and derailing the project.

The trial court found the jury could conclude from the evidence that Lipscomb was not acting within the scope of his authority but was acting in his personal capacity to further his own personal interest. Based on these findings the trial court properly denied the Appellant's motions for directed verdict and JNOV. The trial court's denial of directed verdict and JNOV motions can only be reversed when there is no evidence to support the trial court's decision. Creech v. South Carolina Wildlife & Marine Resources Dep't., 328 S.C. 24 (1997) When reviewing the denial of a motion for directed verdict or

JNOV the appellate court reviews the evidence and all reasonable inferences in the light most favorable to the non-moving party. Wright v Craft, 372 S.C. 1 (Ct. App. 2006) When there is any evidence from which the jury could reach its verdict the jury's verdict must be affirmed. Id.

Evidence Lipscomb acted outside the scope of his authority

The contract defined the scope of authority for each party involved in the Courtyards project. SEL, DFDG and DFR were each assigned a specific area of responsibility under the contract. The responsibility for development of the Courtyards was assigned to DFDG in paragraph 4; responsibility for marketing and the exclusive right to sell lots and houses was assigned to DFR in paragraph 6; and responsibility for financing the project was assigned to SEL in paragraph 2. Lipscomb's authority to act for SEL with regard to the Courtyards project was limited to providing financing. He had no authority to act in any other area related to the Courtyards.

There was no dispute at trial that the scope of Lipscomb's authority was limited to providing financing for the project. According to the testimony at trial, including testimony by Lipscomb, SEL is an investment holding company that finances real estate projects, it never acts as a developer; SEL's role and the role of its corporate officers is limited to financing the project. (R. 119, lines 5-14; R.126, lines 4-23; R.794, line 7 - R.795, line 3). Lipscomb acknowledged his limited scope of authority when he testified "I'm a finance person. I had to try to get finance for this thing. I was not a developer." (R. 952 lines 4-10) Lipscomb's counsel conceded in both his opening statement and closing argument that Lipscomb was only responsible for providing financing. (R. 109, lines 15-22, R. 112, lines 11-16; R. 1202, lines 19-25).

Lipscomb acted outside the scope of his authority by interfering with the development plans, a function for which DFDG alone was responsible. There was testimony that Lipscomb secretly went to the project engineer, abandoned the development plans for Phase 2 and 3 that had been pre-approved by the necessary government regulatory agencies, and began redesigning the plans for those phases. (R. 175, lines 3-13; R. 224, line 21– R. 225, line 23; R. 379, lines 13-18) There was testimony that Lipscomb went to the project engineer "behind our backs" and that Lipscomb had no right to make changes to the development plans. (R.217 lines 11- 218 line 8) Rick Maxheimer, the project engineer, testified that he was the one who ultimately told DFDG that Lipscomb had changed the plans for Phase 2 and 3. (R. 379, lines 13-15) Lipscomb claimed he did not act secretly and that DFDG went along with the changes; however, the jury believed the testimony from DFDG that Lipscomb acted "behind our backs." (R. 862, lines 4-8)

The engineering firm working on the re-design of Phase 2 and 3 was not paid and completion and final governmental approval of the re-designed plans was delayed until March 1, 2007. Lipscomb cannot change the development plans in a five year, three phase, real estate development project, not pay the engineering firm and then expect the developer to complete the project on time. There was no legitimate business justification for preventing performance of the contract and derailing the project. There was no legitimate reason for Lipscomb to misrepresent to the jury that DFDG knew about and consented to the re-design of Phase 2 and 3. There was no legitimate basis for Lipscomb to perform acts he was not authorized to perform. Based on the evidence the jury could conclude Lipscomb was acting outside the scope of his authority.

There was also evidence that Lipscomb acted outside his authority by engaging in secret negotiations with buyers, a function for which DFR was exclusively responsible. After repeated denials on the witness stand, Lipscomb finally admitted he engaged in secret negotiations with buyers to sell lots. Lipscomb testified:

> Q: The buyer –that's one of those buyers who you had negotiated with behind our backs, backed out on you. And that's why that contract fell through. Is that right?
>
> A: I guess it is, yes sir. (R.1018, lines 14-22)

When Lipscomb admitted that he had gone behind the back of DFR and tried to sell the property, after having denied doing so, the jury could reasonably conclude that he was acting outside the scope of his authority. Lipscomb had no reason or legitimate business justification for acting secretly and then lie in court about attempting to sell the property if he were authorized to take these actions.

Because SEL did not have the authority to revise the development plans and secretly negotiate with buyers, Lipscomb could not possibly have had the authority. Based on the evidence and Lipscomb's own concessions at trial the jury was able to conclude that Lipscomb acted outside the scope of his authority. The jury's conclusion is underscored by the evidence that Lipscomb acted secretly and then lied about his actions at trial. Lipscomb's repeated denials that he had negotiated with buyers and then ultimately admitting the negotiations when confronted with documentary evidence supports the jury's finding that he acted outside the scope of his authority. The jury could easily infer that Lipscomb lied and acted secretly because he was concerned about personal liability for having acted outside the scope of his authority.

Lipscomb admitted that he was not a developer and that his only job was to provide financing. Lipscomb admitted secretly negotiating with buyers and changing the development plans. There is no legitimate business justification for changing the plans when doing so prevents performance of the contract and derails the project. Lipscomb cannot legitimately perform acts that are illegitimate for him to perform. There is no legitimate business justification for a corporate officer performing acts that are outside the scope of his authority.

The **only evidence** that Lipscomb was acting within the scope of his authority came from his own testimony (R. 795, lines 1-20) The jury did not believe Lipscomb's claim in light of the contrary documentary evidence and testimony from other witnesses. Lipscomb cannot be acting within the scope of his authority when he is performing acts that neither he nor SEL were authorized to perform. Moreover, Lipscomb called no witnesses from SEL to testify and introduced no corporate resolutions or minutes of meetings to show that his acts were authorized or served the company's interests. The logical inference is that he had no such evidence or witnesses; the lack of any corroborating evidence that Lipscomb had authority to take these actions or that they served the corporate interest serves to reinforce the jury's verdict.

Evidence Lipscomb acted in his personal capacity to serve his personal interest

There was evidence Lipscomb acted in his personal capacity because he had personal financial interests at stake in the form of a personal guarantee to NBSC for the development loan obtained by SEL for Phase 1 of the Courtyards and a personal guarantee to cover any shortfalls. There was evidence Lipscomb acted to serve his own

personal financial interest (to avoid having his personal guarantees called in by NBSC) when he refused to provide funds to cover the shortfalls and terminated the contract.

There was evidence that Lipscomb failed to provide funds, as required by his personal guarantee, to cover the shortfalls including funds to repair the road problems. The failure to timely provide funds to make repairs caused the road problems to become increasingly more serious and more costly to repair. The cost of repair rose to $172,656.00 and with the roads in disrepair the lot sales slowed. (R. 1040, lines 5-14, R. 304, line 7- R.305, line 12; R. 997, line 25 – R. 998, line 4) Lipscomb also refused to provide funds to pay the construction company and the engineer. (R178, lines 1-24; R. 421, lines 10-22) When Lipscomb terminated the contract he was already personally obligated to provide the funds needed to repair the roads. Lipscomb's unjustified withholding of funds prevented performance of the contract.

There can be no dispute that Lipscomb was acting personally when he failed to provide the funds to cover the shortfall for the road repairs, to pay the construction company and the engineer; he could only be acting personally as it was his personal guarantee that he would provide his personal funds to cover the shortfalls. By terminating the contract Lipscomb sought to avoid paying DFDG and DFR the development fees, profit share and commissions they were due in Phase 2 and 3 and by doing so decrease the likelihood that NBSC would need to call in his personal guarantees. Lipscomb testified:

> We're the ones that are liable ultimately for SEL Properties, myself personally, ultimately liable to the bank if we don't pay it we're up the creek. I mean, they would come after us. (R.846, lines 21-25)

> When I say that SEL Property and I am personally guaranteed and I'm the only one stuck with it. When I say I, legally I should say SEL Properties and my personal guarantee. But I'm basically paying. (R. 862 lines 24 – R. 863 line3)

Because of Lipscomb's personal guarantees the jury was required to make a factual determination as to whether Lipscomb's actions were actually taken on behalf of SEL to "serve the corporate interest" and within the scope of his employment or if he was acting to further or protect his own personal (financial) self-interest.

There was also evidence that Lipscomb acted to serve his own personal interest and engaged in self-dealing by giving very preferential treatment to K&L which was not extended to other builders. (R. 181-201) Lipscomb claimed K&L was formed as a "seed company" in order to get the Courtyards project going. (R. 923, lines 8-12) However, there was evidence Lipscomb's claim was not true as K&L was engaged in building projects in other developments. (R. 640, lines 3-7) Lipscomb transferred Courtyard lots 14, 15 and 57 to K&L without requiring the full purchase price to be paid and without the knowledge of the Respondents. (R. 249, lines 8-18; Exhibit 147; R. 3716 Exhibit 148) K&L only paid the lot release fee required by NBSC in order to release their mortgage on the lot. (Exhibit 147) SEL had the right to approve the sale price, which SEL did when it agreed with DFDG and DFR to set the price at $40,000.00 per lot. (R.247, lines 2-8)

Lipscomb was not authorized to transfer lots for just the amount of the lot release fee. (R. 303, lines 11-22) DFDG was entitled to 25% of the profits from the sale of the lots; however, when Lipscomb allowed K&L to only pay the lot release fee there were no profits for those lots. Lipscomb also allowed K&L to begin building homes on lots without closing and allowed K&L to delay closing on lots. (R.263, lines 2-8) This prevented the development loan from being repaid timely and increased interest costs.

Lipscomb also improperly used Courtyard funds to pay the business expenses of K&L, make loans to K&L, to pay his personal expenses and normal overhead of SEL. (R.181, line 10 – R.200 line 12)

The preferential treatment given to K&L only benefitted Lipscomb personally and amounts to self-dealing, which has long been the source of personal liability for corporate officers. There was no benefit to the Courtyards or to SEL; in fact everyone but Lipscomb was harmed by the decreased income due to the preferential treatment given to K&L. Lipscomb's actions took needed cash out of the project and prevented both SEL and DFDG from performing under the contract. John Quinn, the certified public accountant for SEL, testified that if the lots had been sold for $40,000.00, the price established for the all the lots, then cash flow to the project would have been increased. (R. 617, line 18 – R. 618, line 1)

Because of the self-dealing and preferential treatment given to K&L the jury was required to make a factual determination of whether, under these circumstances, Lipscomb was acting on behalf of SEL to "serve the corporate interest" and within the scope of his authority or if he was acting in his personal capacity in furtherance of his own self-interest and on behalf of his personal interest in K&L. The jury concluded that Lipscomb was not acting to "serve the corporate interest" of SEL but rather was acting in his own self-interest.

Evidence Lipscomb acted with malice

There was evidence that Lipscomb acted with malice and outside the scope of his authority in wrongfully terminating the contract to improperly deprive Respondents of the development fees, profit sharing and commissions due to them in Phase 2 and 3 in

order to avoid NBSC calling in his personal guarantee on the development loan. First, Lipscomb claimed that he terminated the contract because he was under the mistaken belief that DFR had not met the lot sales requirement. Lipscomb claimed that he believed DFR was required to sell two lots per month rather than twenty percent of the lots per year as set forth in paragraph 8 of the contract. (R. 853, lines 19-25; R. 873, lines 11-12; R.904,, lines 3-9; R.925, lines 18-19; R. 1771, ¶8)

There was a glaring inconsistency in Lipscomb's excuse; his termination letter accurately quoted the twenty percent per year language from paragraph 8 of the contract; however, the termination letter made no reference to the requirement being two lots per month. (R.1814, Exhibit 17) Lipscomb has a business finance degree from the University of South Carolina and a two year degree from Notre Dame; it was very likely the jury did not believe that he was mistaken about the lot sales requirement. (R. 789 lines 1-8, R. 887, lines 8-9)

Second, the timing of the termination of the contract was very suspicious and led the jury to reject Lipscomb's excuse for termination. When the contract was terminated DFR was at the height of lot sales and only three (3) lots away from having sold sixty percent of the lots in Phase 1, which was the trigger-point to begin selling lots in Phase 2. (R. 238, lines 15-25; Exhibit 1 ¶¶ 3, 5; R. 1768- R. 1770) Once Phase 2 began DFDG was due another $54,000.00 development fee and profit sharing. Since the Phase 1 development fee had not yet been paid the total due was $108,000.00, plus profit sharing.

Third, it is not disputed that there was no legitimate basis or business justification for terminating the contract. The witness testimony and the documentary evidence from lot sales established that the sales requirement had been satisfied. Lipscomb admitted at

trial that DFR had met the contract sales requirement. (R. 851, lines 2-11) Fourth, Lipscomb admitted at trial that the contract was improperly terminated. (R. 851, lines 8-11; R. 853, lines 22-25; R. 872, lines 8-12) Lipscomb testified he knew he was "wrong" for terminating the contract (R. 905, lines 3-5)

Fifth, Respondents wrote to Lipscomb objecting to the termination letter and informed him that he was not correct and they had complied with the contract sales requirement. (R. 901, lines 8-21) After receiving the Respondent's letter, rather than make sure he was correct in his belief, Lipscomb went to his attorney to ask "Well, how do you fire anybody?" (R.908, line 1 – R. 909, line 10) The jury can reasonably infer from Lipscomb's question to his attorney that Lipscomb intended to cut the Respondents out of the project whether he had a legitimate reason or not. In the same time frame Lipscomb was in secret negotiations with potential buyers. Those secret negotiations continued after the wrongful termination of the contract and ultimately led to a contract to purchase all of the lots in Phase 2 and 3 by Essex Homes for a purchase price of $7,663,000.00. (R. 2210 – R. 2214) Sixth, there was evidence Lipscomb did not deposit the full proceeds from the sale of lots into the Courtyard account. (R.609, line 20 – R.610, line 2; R. 1053, lines 17-21)

Based on the evidence the jury can reasonably infer from the lack of any legitimate business reason for termination and the unconvincing excuse of being mistaken that the contract was terminated for illegitimate or malicious reasons. The award of punitive damages shows the jury believed Lipscomb was acting maliciously and intentionally – not mistakenly or accidentally. The trial court charged the jury that in order to impose punitive damages against Lipscomb personally for tortious interference

they must find "aggravated unjustified interference with contractual rights that's in reckless disregard of the rights of the contracting party" and that the purpose of punitive damages was to "punish the wrongdoer for conduct that's extraordinary or outrageous" and to "vindicate the rights of the plaintiff when the conduct is "willful, wanton, or reckless." The trial court also charged the jury that "conduct is willful, wanton, or reckless when it is committed with a deliberate intention under such circumstances that a person of ordinary reason and prudence would be conscious of it as an invasion of another's rights." (R. 1259, line 8 – R. 1260, line 16).

Lipscomb offered no legitimate business justification for his conduct while there was substantial evidence of self-dealing, corrupt motives and other unconscionable, unjustified and outrageous conduct. The jury could reasonably infer from the evidence that having a legitimate business justification for terminating the contract was not of concern for Lipscomb and he just wanted to get rid of the Respondents. The jury could readily infer from the evidence, including the timing of the termination of the contract, just before Phase 2 was to begin, that Lipscomb's motive in terminating the contract was to improperly deprive the Respondents of their development fees, commissions and profit sharing from Phase 2 and 3 in order to avoid having to honor his personal guarantees. Viewing the evidence in the light most favorable to DFDG and DFR as the non-moving parties there was sufficient evidence from which the jury could conclude that Lipscomb acted with malice, acted outside the scope of his authority and acted in his personal capacity to serve his own personal interests. The jury's verdict must be affirmed.

Lipscomb's Credibility

Lipscomb's credibility was seriously damaged because of his demeanor, evasiveness in answering questions and misrepresentations from the witness stand. He was repeatedly impeached by his deposition testimony and other documentary evidence. Lipscomb offered unconvincing excuses with regard to his reason for terminating the contract, the improper allocation of costs, and secret changing of the development plans. Lipscomb's lack of credibility gave the jury a basis to conclude he was not being truthful and that he acted with malice, outside the scope of his authority and in his own personal self-interest. The jury alone has the authority to decide the credibility of witnesses and resolve conflicts in evidence, neither the trial nor appellate courts have this authority. Curcio v. Caterpillar, Inc., 355 S.C. 316 (2003)

First, Lipscomb testified that he terminated the contract because he was mistaken about the lot sales requirement; however, the correct sales requirement was quoted in his termination letter. Second, Lipscomb repeatedly denied having engaged in secret negotiations with buyers; however, after being confronted with documentary evidence he admitted engaging in secret negotiations. Third, Lipscomb testified that no lots had been sold in Phase 2 or 3; however a contract was produced proving that all of the lots in Phase 2 and 3 had been sold to Essex Homes. (R.797, lines 1-6, 18-19; R. 2210 – R. 2214)

Fourth, Lipscomb testified there were no profits in Phase 1; however, accountants from both sides agreed the costs had been misallocated and confirmed there were profits in Phase 1 that should have been split with DFDG. (R. 439, line 20-25; R. 1034, line 24 – R.1035, line 6; R. 1037, lines 10-19; R. 1044, lines 7-9; R.1048, line 12 – R.1049, line 4) Lipscomb improperly allocated costs, including the costs of the land for all three phases,

$800,000.00, to Phase 1. The misallocation of costs made it appear there were no profits in Phase 1. Lyn Richards testified that had the costs remained misallocated the profits would have been "severely diminished to say the least, if not completely eliminated." (R. 442, lines 7-11) Fifth, in response to evidence that costs had been misallocated to make it appear on the books that there were no profits in Phase 1 the Appellant argued that the Respondents were responsible for allocating the costs. (R.1207, lines 3-10) However, Lipscomb's own accountant testified it was the responsibility of the CFO and CPA for SEL to make sure costs were properly allocated. (R.1080, line25–R.1081, line 3)

Sixth, Lipscomb testified SEL was not financially able to pay the development fee and shortfalls; however, there was evidence Lipscomb and SEL did have the ability to pay. John Quin testified there was "no reason" why SEL could not pay. (R.534, lines 9-13; R.548, line 19 – R.550 line 12) Seventh, Lipscomb testified at trial that he was not personally required to cover the shortfalls; however, in his deposition he testified that he was required to cover the shortfalls. (R.987, line 14– R989, line 8). Additionally, the loan documents established he was required to cover the shortfalls. (R. 1352, line 15 – R.1353, line 3; R. 1940)

Eighth, Lipscomb testified K&L was not profitable; however, there was evidence it was profitable and generated $5,764,775.63 from its work at the Courtyards. (R. 206, line 23 – R. 208, line 5; R. 1872) Ninth, Lipscomb testified that he did not secretly change the plans for Phase 2 and 3 and that Respondents knew about the changes and went along with them. However, the evidence proved the plans were changed secretly without Respondents' knowledge.

The jury was required to make a factual determination of whether, under all the circumstances, Lipscomb was acting in his corporate capacity within the scope of his authority or in his personal capacity. The jury concluded that Lipscomb was acting in his personal capacity. There was no reason for Lipscomb to make misrepresentations at trial regarding his actions if he were authorized to perform them. Why would Lipscomb lie to the jury about his actions if he were authorized to take the actions? Why would Lipscomb act secretly if his actions were authorized? Lipscomb's misrepresentations and excuses convinced the jury that Lipscomb did not tell the truth because he was concerned about personal liability for tortious interference. The jury can reasonably infer from the evidence that when Lipscomb abandoned the original plans, began re-designing the project and wrongfully terminated the contract he was acting outside the scope of his authority.

Viewing the evidence in the light most favorable to DFDG and DFR as the non-moving party there was more than enough evidence for the jury to conclude Lipscomb was acting outside the scope of his employment, acting to serve his own personal interest. The following supports the jury's verdict: (1) Lipscomb's personal financial guarantee; (2) the timing of the termination letter; (3) failure to make sure he was correct in terminating the contract after the Respondents objected; (4) going back to his attorney to find out how to fire the Respondents; (5) the unconvincing excuse of being mistaken about the lot sales requirement; (6) Lipscomb's repeated denials then ultimate admission of his secret sales negotiations; (7) Lipscomb's misrepresentation that there were no profits in Phase 1 and the inability to pay the Phase 1 development fee; (8) the absence of legitimate business justification for his actions; (8) the preferential treatment to K&L; (9)

the misallocation of costs which made it appear as if there were no profits in Phase 1; (10) the misuse of Courtyard funds; (11) Lipscomb's numerous misrepresentations at trial; and (12) abandoning the pre-approved development plans for Phase 2 and 3 and redesigning those phases. Clearly there is sufficient evidence to justify the jury's verdict that Lipscomb was not acting within the scope of his authority and was acting in his personal capacity to serve his personal interest. When there is evidence to support the jury's verdict the verdict must be affirmed.

II. Corporate officers and employees do not have absolute immunity from personal liability for tortious interference with a corporate contract.

Lipscomb attempted but failed to convince the jury that that his actions were within the scope of his authority, were not malicious and were undertaken to serve the corporate interest and not his own personal self-interest. The jury heard Lipscomb's evidence and rejected it. Having lost the argument at trial, Lipscomb now argues that he has absolute immunity and only SEL may be held liable for his actions:

> Manager Lipscomb's actions on behalf of his family company, Landowner, LLC, regardless of their business ramifications, cannot be the basis for a cause of action for tortious interference. If Manager Lipscomb performed an act on behalf of Landowner, LLC that caused a breach of contract, the Developer's and Broker's remedy is against Landowner, LLC for breach of contract. (Appellant's Brief p. 7)

Lipscomb is not correct if his actions are tortious. Whether Lipscomb's act was on behalf of the company is a question of fact for the jury. The Supreme Court has held the relation of the tortfeasor employee to the company does not provide a defense for the employee. Lawlor v. Scheper, 232 S.C. 94 (1957). The personal liability of a manager of a company for his own tortious acts "is unaffected by the fact that he acted in his representative capacity." Gilbert v. Mid-South Machinery Company, Inc., 267 S.C. 211 (1976)

(president of company held personally liable for fraudulent misrepresentation). An agent who deals "directly with a third party has a duty not to injure the party with his actions and may be held liable for violating that duty." Jackson v. Speed, 326 S.C. 289 (1997) (corporate employees liable for fraud). Lipscomb dealt directly with DFDG and DFR and they have a remedy against Lipscomb personally for tortiously depriving them of their property rights. (R. 119, lines 15-16) Anytime a corporate officer tortiously interferes with a corporate contract the act of the corporate officer either breaches or leads to a breach of the contract; the corporate officer procures or induces the breach without legitimate business justification. When a corporate officer or employee acts outside the scope of his authority, when he acts in his personal capacity or when his acts are tortious, the individual always bears personal responsibility.

Lipscomb argues that without absolute immunity "the limitation of liability which is one of the principal objects of corporations" would be undermined. (Appellant's Brief p. 8) Lipscomb's argument ignores the elements of the tort. Tortious interference always combines a tortious act with a breach of contract. The South Carolina Supreme Court has held that while generally the reason for the creation of a corporation is to limit liability there are instances where corporate officers may be personally liable; ordinarily when the corporate officer is shown to have participated in or directed the tortious act. Hunt v. Rabon, 275 S.C. 475 (1980). The corporate "limited liability shield" has never applied to torts committed by corporate officers and employees. One cannot create a corporation, commit tortious acts and then expect to escape personal liability for those tortious acts simply by arguing that he was acting on behalf of the corporation. Holding Lipscomb personally liable for his own tortious conduct does not circumvent the corporate shield.

Appellant's argument is contrary to the longstanding and well settled law of this state. Individual officers, employees and agents of corporations and limited liability companies are always personally liable for their own torts; whether the tort is negligent driving, fraudulent misrepresentation, or tortious interference with a corporate contract. The Supreme Court has held that a cause of action can be maintained against a corporate employee for maliciously inducing the breach of a corporate contract when the inducement is unjustified. Bradburn v. Colonial Stores, Inc., 273 S.C. 186 (1979). This Court has previously held that a corporate officer is not immune from personal liability for interference with a corporate contract simply by virtue of being a corporate officer. Worthy, at 328. BPS, Inc. filed a lawsuit against Worthy and his company, Carolina Benefit, alleging breach of contract accompanied by a fraudulent act and tortious interference with contract (the same two causes of action at issue in the case at bar). Worthy was sued in his individual capacity and moved to dismiss the action against him individually claiming that as a corporate officer he was immune from liability. Id., at 323, 327. The Court of Appeals, in reversing the trial court's grant of summary judgment in favor of Worthy, held:

> Nothing in the law shields Worthy from direct liability in tort for his own actions. Id. at 328-329.
>
> Similarly, the corporate veil does not protect Worthy from liability for his own actions. Section 33-6-220(b) (1999) of the South Carolina Code states: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation *except that he may become personally liable by reason of his own acts or conduct.*" (Emphasis in original). Id.

Lipscomb also argues S.C. Code § 33-44-303(a) shields him from personal tort liability for tortious interference with a corporate contract. Lipscomb's application of this statute

is erroneous. S.C. Code § 33-44-303(a) has the same legal effect and meaning as S.C. Code §33-6-220(b). The statute shields a member or manager from liability "solely by reason of being or acting as a member or manager" it does not shield a manager from liability for his own personal torts or for actions outside the manager's scope of authority. This Court has previously held:

> A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed. Id. at 328.

Corporate officers and directors have long been subject to personal liability for their conduct in shareholder derivative suits, when acting in bad faith, actions involving a conflict of interest and self-dealing. South Carolina Code §33-8-420 provides a specific statutory cause of action against corporate officers for misconduct.

A number of courts in sister states have held that corporate officers are not immune from liability for tortiously interfering with a corporate contract when the corporate officer is acting outside the scope of his authority, acting maliciously or acting to serve his own personal interest:

> The cases, however, make clear that, generally, if the corporate officer or employee is acting outside the scope of authority or to serve his or her own interests or with malice then the corporate officer or employee is no longer acting as the alter ego of the corporation and is personally liable. *See generally* THOMAS G. FISCHER, LIABILITY OF CORPORATE DIRECTOR, OFFICER OR EMPLOYEE FOR TORTIOUS INTERFERENCE WITH CORPORATION'S CONTRACT WITH ANOTHER, 72 A.L.R.4th 492 (1989 & 1994 Supp.). Medical Mutual. Liability Soc. of Maryland v. B. Dixon Evander and Associates, Inc., 339 Md.41, 660 A.2d 433 (MD,1995)
>
> [C]orporate officers or employees may individually commit the tort of intentional interference with business or contractual relations to which their corporation or employer is a party. See *Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E.2d 749 (1965) (corporate officers in their personal

> capacities held liable for procuring the termination of plaintiff's employment with their corporation). However, courts have held that this tort cannot be maintained against officers or employees of a corporation unless those persons were acting outside their scope of employment and were acting with actual malice. Swager v. Couri, 77 Ill.2d 173, 32 Ill.Dec. 540, 395 N.E.2d 921 (1979); *Martin v. Platt,* [179 Ind.App. 688, 386 N.E.2d 1026 (1979)]; Gram v. Liberty Mut. Ins. Co., [384 Mass. 659, 429 N.E.2d 21 (1981)]; *Nola v. Marollis Chevrolet Kansas City, Inc.,* 537 S.W.2d 627 (Mo.Ct.App.1976). As the Supreme Court of Illinois put it, '[T]o be tortious, a corporate officer's inducement of his corporation's breach of contract must be done "without justification or maliciously." ' Swager, 77 Ill.2d at 190, 32 Ill.Dec. at 546, 395 N.E.2d at 927. Perlman v. Shurett, 567 So.2d 1296 (Ala.,1990.)

Even the business judgment rule which protects officers and directors from liability for their decisions is not absolute. "The business judgment rule requires directors to act reasonably and in good faith. It does not expect perfection. However, the rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct." Kuznik v Bees Ferry Associates, 342 S.C. 579 (Ct. App. 2000); Baumann v. Long Cove Club Owners Association, Inc., 380 S.C. 131 (Ct. App. 2008) (business judgment rule not applicable upon showing of bad faith, dishonesty, incompetence, acts outside authority and acts with corrupt motives). Under the circumstances of this case the business judgment rule would not have afforded Lipscomb any protection.

The policy underlying the law in this area prevents abuses by corporate officers. Allowing absolute immunity for corporate officers who tortiously interfere with a corporate contract puts the public at extreme risk. Current events involving the behavior of corporate officers damaging their companies only reinforces the need and wisdom of the legal principles that do not grant corporate officers absolute immunity. The Supreme

Court has consistently held that corporate officers are personally liable for the torts they commit or cause to be committed:

> If a corporate officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort. Id. at 477.
>
> To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act. Rowe v Hyatt, 321 S.C. 366 (1996).

Corporate officers are always personally liable for their own torts. Tortious interference with a contract is a tort, it arises in tort law not contract law. If the tortious acts of the employee procure the breach of a corporate contract, without legitimate business justification, and thereby damage the property rights of a third party, the individual employee is liable under tort law for those damages.

Lipscomb argues that one act cannot be both a breach of contract and a tortious interference with the contract. Lipscomb is simply not correct. Lipscomb's argument does not take into account the facts of this case or the elements of tortious interference with contract; one of the elements of the tort is that a breach of contract must have occurred. Moreover, Lipscomb did not just commit one act; he committed a number of acts. The end result of his action was to prevent SEL, DFDG and DFR from performing the contract because Phase 2 and 3 were delayed because the plans were not completed due to Lipscomb's failure to provide funds, pursuant to his personal guarantee, to cover the engineering costs. The jury certainly did not find Lipscomb's acts to be innocent or have legitimate business justification. The jury found that Lipscomb had no legitimate business justification for his interference with the contract between SEL and the

Respondents and caused damage to the Respondents' property rights which the jury valued at $3,000,000.00.

There are situations where, for legitimate business reasons, a corporate employee may take non-tortious action within the scope of their authority that results in the breach of a corporate contract. When the non-tortious acts of a corporate employee result in the breach of a contract there is no tort and therefore no personal liability for tortious interference with the corporate contract. The corporation alone is liable for breach of contract. A corporation can breach a contract, for a legitimate business reason, without an individual employee committing a tort; however, whenever an employee commits the tort of "tortious interference" there will always be both a tortious act and a breach of contract. The corporation is liable to the injured party under contract law for the breach of contract and the corporate employee is liable to the injured party under tort law for tortiously damaging the party's property rights by inducing or procuring the breach without legitimate business justification. The standard Appellant seeks to apply would give a free pass to corporate officers and employees to injure third parties in a wide range of cases.

Clearly when a corporation sends an employee to deliver its product to a buyer the company is acting through its employee. However, when that corporate employee drives negligently on his way to deliver the product and causes injury both the individual employee and the company are liable to the injured third party. The employee cannot simply say "my act of driving was on behalf of my company, your remedy is against my company." Lipscomb would argue that since the company can only deliver its product through an individual employee the driver was acting for the company so only the

company is liable; a clearly erroneous conclusion. The Supreme Court has consistently rejected this argument in its decisions over the last ninety years by holding that corporate officers are personally liable for their tortious conduct which results in harm to third parties doing business with the corporation. Olin Mathieson Chemical Corporation v. Planters Corporation, 236 S.C. 318 (1960); Peruvian Guano Corporation v. Thompson, 112 S.C. 377 (1919).

The Olin Mathieson Chemical Corp. had a contract with Planters Corp. which required Planters hold in trust the proceeds from the sale of machinery and to pay those proceeds to Olin Mathieson; the proceeds were never paid. Planter's corporate treasurer was responsible for the receipt and disbursement of corporate funds. The treasurer, in violation of the company's contract, did not hold the funds in trust he intermingled the funds with Planters' general funds and spent them. The court found the funds were "disbursed by, and in behalf of, Planters Corporation" by the treasurer. The court, in addressing the personal liability of the treasurer held:

> the appellant was actively engaged in the management of the Planters Corporation and was personally responsible for the intermingling of the trust funds belonging to the respondent with the general funds of Planters Corporation, so as to **impose personal liability** upon the appellant. Olin Mathieson, at 327. (emphasis added)

The treasurer clearly interfered with the corporation's contract and caused a breach when he intermingled and then spent the sales proceeds. Even though the treasurer was the corporate officer responsible for the receipt and disbursement of funds he had no authority to intermingle the funds or spend them on other corporate expenses. The Supreme Court held him personally liable for his tortious conduct that procured a breach of the corporate contract.

In Peruvian, the Peruvian Guano Corporation entered into a contract with the J. S. Thompson Company whereby Thompson agreed to hold sales proceeds in trust and then pay the proceeds to Peruvian. The contract also required that all transactions be kept separate. Thompson did not comply with the contract and used the sales proceeds as if they belonged to the corporation. Thompson became insolvent and never paid Peruvian the money it was owed under the contract. The Supreme Court held the managing officers of the corporation could be held personally liable for their careless and negligent management of the corporation's affairs "particularly with reference to the alleged violation of the contract" with Peruvian. Peruvian, at 377.

The Olin Mathison and Peruvian cases are virtually identical to the present case before the Court; Lipscomb is no different than the corporate officers in these cases. Lipscomb admitted at trial that his conduct was tortious when he testified that he was "wrong" to terminate the contract. Counsel for Lipscomb conceded in his opening statement and closing argument that Lipscomb was wrong. (R. 115, line 1; R.321, lines 3-4, 23-25; R. 1222, lines 2-7) Moreover, the unconvincing excuse Lipscomb offered only served to reinforce the belief that he was acting intentionally and maliciously. Some of Lipscomb's acts are very similar to those in Olin Mathison and Peruvian: failing to deposit proceeds from sales of lots into the Courtyard's account; failure to do proper accounting for the funds, misallocation of costs and self-dealing.

The law with regard to tort liability of corporate officers and employees applies with equal force to all corporate organizations regardless of whether the corporate officer doing the interfering is the manager of a "family" limited liability company or the president of a large corporation. The standard Lipscomb seeks to apply would remove all

personal responsibility from corporate officers. The Supreme Court has consistently ruled against the position advanced by Lipscomb. Moreover, the cases cited in the Appellant's brief do not stand for the proposition that corporate officers have absolute immunity from personal liability for tortious interference with a corporate contract. Rather the cases cited by the Appellant actually support the trial court's charge.

Lipscomb relies heavily on Bradburn v. Colonial Stores, Inc., 273 S.C. 186 (1979). The Appellant's brief blatantly mis-states the Supreme Court's holding in Bradburn. The court did not hold that "an agent for a company cannot be liable for tortious interference with his company's contract." The Supreme Court actually held:

> Although **an action will lie** for **maliciously inducing** the breach of an employment contract, the inducement will not be actionable unless it is **unjustified**. It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation **acting on behalf of the corporation** and **within the scope of his employment**, the inducement is privileged and is not actionable.
> Id. at 188 (emphasis added).

Clearly a cause of action does exist for maliciously inducing a breach of a corporate contract by a corporate employee. The term "maliciously inducing" is simply another way of saying tortious interference. According to Bradburn, in order for Lipscomb's actions to be "privileged" and "not actionable" he must be (1) acting on behalf of the corporation; (2) within the scope of his employment and (3) justified in causing the breach; all of which are questions of fact for the jury.

In the cases cited in the Appellant's brief the court did not hold that the corporate officer could not legally be held liable for tortious interference. The court held that under the factual circumstances of the particular case the corporate officer had not tortiously interfered with the corporate contract. In other words, the court's ultimate holding was

based upon a lack of evidence meeting the elements of the tort. The court consistently recognized the applicability of the tort to corporate officers and employees. Corporate officers are only shielded from liability when their acts are not tortious, when their acts are justified, when they are in fact acting on behalf of the corporate interest and within the scope of their employment.

In Bradburn the corporation had an oral at-will employment contract with Bradburn. The court found:

> The complaint alleges that the individual defendants acted at all times in their capacities as agents, servants and employees of Colonial Stores, Inc. There is no allegation that any of the individual defendants acted outside his corporate capacity. Id. at 189.

Bradburn did not allege facts sufficient to constitute tortious interference with a corporate contract. Bradburn specifically alleged the corporate employees were acting within the course and scope of their employment. Bradburn produced no evidence showing that the corporate employees acted outside their corporate capacity. The court held:

> Thus, no evidence was introduced from which a jury could have determined that any of the individual defendants acted outside his corporate capacity in inducing Colonial Stores, Inc. to break its employment contract with Bradburn. Id.

Clearly if there had actually been evidence that the individual defendants acted outside their corporate capacity then the individual defendants would be liable for tortious interference.

The Appellant also relies on Threlkeld v. Christoph, 280 S.C. 225 (Ct. App. 1984). The Appellant again incorrectly states the court's holding. The court in Threlkeld did not hold that agents of a company "could not be held liable for tortious interference of a contract to which the company was a party." The court in Threlkeld held that the

corporate "employer" could not be liable for tortious interference with its own employment contract because it was an actual party to the contract; the court did not hold a cause of action could not be maintained against the individual employees who were not actual parties. Id. at 226-227. When the court in Threlkeld addressed the liability of the individual employees it held:

> we find that there is no genuine issue of fact presented on which a court could find that Christoph and Davis acted otherwise than as agents of Bigelow-Sanford; or that their conduct in any way induced Bigelow-Sanford to breach its contract with Threlkeld. Id. at 227

Clearly if there had actually been evidence that corporate employees Christoph and Davis were not acting as agents of Bigelow-Sanford, if there was evidence they were not acting on behalf of the corporate interest, if they acted outside the scope of their employment, if they acted tortiously, if their acts were unjustified, if they acted with malice or in their own personal self-interest, then they would certainly be individually liable for tortious interference with a corporate contract just like the corporate employee in Bradburn. Moreover, the court found there was no evidence that Christoph and Davis took any action that induced the company to breach its contract with Threlkeld and, even more importantly, the court actually held there was no breach of the contract, which is a necessary element of tortious interference with contract. Id. at 226. Again the court's holding was based upon a lack of evidence, not a per se bar on liability of individual corporate officers for tortious interference with a corporate contract.

In both Bradburn and Threlkeld the court refused to rule that a corporate employee could not be held liable for tortious interference with a corporate contract. Perhaps an actual corporate party to a contract cannot tortiously "interfere" with its own contract (and hence cannot be liable "in tort"); however, the law is clear that an agent,

servant, employee, officer or director of a contracting party is not an actual party to the contract and is individually liable "in tort" for tortious interference with the contract between the actual contracting parties when he (1) is not acting to serve the corporate interest; (2) commits a tortious act; (3) acts outside the scope of his authority; (4) acts with malice; or (5) acts to serve his own personal interest.

There is no dispute that Lipscomb is not an actual party to the contract. SEL is the actual contracting party. Lipscomb testified that SEL was the actual contracting party rather than himself "Because I didn't want to deal in real estate transactions. That's what we set it up for." (R. 796, lines 2-5) Moreover, Lipscomb's counsel conceded that Lipscomb was not the actual contracting party:

> Mr. Babcock: Your Honor, Mr. Lipscomb's net worth is not relevant at this point to those issues because he was not a party to the contract. SEL Properties, LLC, is the entity in that regard, and not Mr. Lipscomb, personally. (R. 519, lines 8-12).

In this case Lipscomb's interference prevented both SEL and the Respondents from performing the contract. For example, when Lipscomb abandoned the development plans for Phase 2 and 3 and began redesigning the plans for those phases it caused a breach the contract because it prevented SEL, DFDG and DFR from performing the contract by preventing Phase 2 and 3 from starting on time and preventing the marketing of lots in Phase 2 and 3. (R. 217, lines 1-22) Lipscomb's wrongful termination of the contract was also without any legitimate business justification and prevented DFDG and DFR from performing the contract. Lipscomb's actions constituted tortious interference because he acted outside the scope of his authority and without a legitimate business justification for his actions

There was substantial evidence that Lipscomb interfered and prevented the parties' performance of the contract and when doing so he was not acting to serve the corporate interest but acting in his personal capacity in his own self-interest, he was acting outside the scope of his authority, his actions were tortious and unjustified. Lipscomb is not acting to serve SEL's corporate interest when he prevents performance of a contract that is beneficial to the corporation without having any legitimate business justification for his actions.

A corporate officer is not liable for bad business decisions if he had a legitimate business justification for making the decision. There is a significant distinction between a decision that simply turns out to be a bad decision and an act that is not in the best interest of the corporation because it is taken out of corrupt motives, has no legitimate business justification, is tortious, performed out of malice and in the pursuit of personal financial self-interest without regard to the interests of the company. Contrary to Appellant's assertion the Respondents do not seek to hold Lipscomb liable for non-tortious "business decisions" made on behalf of SEL or for non-tortious acts performed in the ordinary course of his employment as manager.

For example, SEL had an obligation under the contract to pay a $54,000.00 development fee for Phase 1 to DFDG in $9,000.00 monthly installments beginning in November 2001 as well as a $54,000.00 development fee for Phase 2. It was undisputed at trial that SEL failed to make those payments and by its failure breached the contract. Counsel for SEL conceded in his opening statement that SEL owed money to the Respondent. (R. 108, lines 4-13, R. 135, ll. 14-25 – R.137, line 9). Appellant also concedes in his brief that SEL breached the contract:

> Manager Lipscomb admitted at trial that Landowner, LLC breached the November 14, 200 contract and that Landowner, LLC owed money to the Developer and Broker." (Appellant's Brief p. 6)

Moreover, the trial court directed a verdict against SEL on this issue without objection. (R.1106, lines 12-14; R.1107, lines 5-6; R.1110, line 23 – R.1111, line 5)

SEL was also required to pay twenty-five percent of the profits to DFDG in each phase in accordance with contracts (R. 1767 – R.1776). SEL claimed that there were no profits in Phase 1 or Phase 4. The evidence at trial established there were in fact profits. The failure of SEL to pay DFDG its share of the profits was a breach of the contract. The jury found that SEL's breach of the contract in these two instances did not result from Lipscomb's tortious interference. Lipscomb was the corporate officer responsible for Courtyard finances which included paying the bills on behalf of SEL in the ordinary course of business. (R. 932 lines 14 – 18; R. 952, lines 4-10). The jury assigned the liability and damages resulting from these breaches to SEL not to Lipscomb personally.

III. The trial court properly denied the Appellant's motion to reduce the damages awarded for the tortious interference cause of action.

The trial court properly denied the Lipscomb's motion to reduce the damages awarded by the jury for the tortious interference cause of action. Lipscomb's argument for a reduction is based on the erroneous assumption that there was one single breach of contract from which all damages flow. The evidence clearly proves there were multiple breaches of the contract, involving two different parties, occurring at different times, caused by different conduct. Some breaches resulted from Lipscomb's tortious interference, for which he bears personal liability; some breaches were not the result of tortious interference for which SEL alone is responsible.

Because Lipscomb cannot be held personally liable for damages that did not result from his tortious interference the jury was required to separate out those breaches that were not caused by Lipscomb's tortious interference so that he was only held liable for damages that flowed from breaches he tortiously procured. Damages flowing from breaches of contract that were not procured by Lipscomb's tortious interference may only be awarded against SEL. The result being the award of damages against SEL and Lipscomb cannot be the same amount or co-extensive.

Contrary to Appellant's argument the damages for tortious interference with contract and breach of contract cannot be co-extensive; particularly when there are multiple breaches involving two separate contracts, different parties, occurring at different times, where different provisions of the contracts were breached, based on different acts, involving multiple phases of two real estate development projects. For example, SEL's failure to pay the $54,000.00 development fee for Phase 1 did not result in $3,000,000.00 in damages. However, when Lipscomb abandoned the Phase 2 and 3 development plans and wrongfully terminated the contract DFDG and DFR were prevented from performing the remainder of the contract which did produce $3,000,000.00 in damages. Termination of the contract caused DFR to lose customers and prevented DFR from earning the commissions on lots and homes in Phase 2 and 3 of the project. DFDG was prevented from earning the development fees and profit sharing.

Lipscomb also argues that damages awarded in the tortious interference cause of action cannot exceed the damages awarded in the breach of contract cause of action against SEL. This argument is based on the erroneous assumption that the jury awarded all of the damages flowing from all of the breaches of contract in the cause of action

against SEL; which the jury clearly did not do. According to the jury's answer to the special interrogatory the only damages awarded by the jury against SEL, related to the subsequent phases, was $54,000.00 representing the development fee for Phase 2 which SEL conceded it owed. (R. 1276, lines 11-16; R. 1212, lines 10-13)

Damages resulting from tortious interference can exceed the damages resulting from the breach of contract. Lipscomb's argument on this basis is without merit for several reasons. First, in cases where there are multiple breaches, some caused by tortious interference and some that were not, the damages resulting from breaches caused by tortious interference can be greater. Second, damages for tortious interference encompass more elements of damage than breach of contract. The plaintiff in a tortious interference case can recover damages for loss of customers, loss of goodwill, damage to reputation, loss of goodwill, unforeseen expenses and loss of employees. (R. 1258, lines 3-8)

Lipscomb relies on Collins Music Co., Inc. v. Smith, 332 S.C. 145 (Ct. App. 1998). The facts of Collins are substantially different from those of the case at bar. This court explicitly addressed the legal issue and held:

> This does not mean, however, that the measure of actual damages on both causes of action are coextensive. Id. at 147

There was but one single breach of contract in Collins which produced the $10,000.00 in damages and the tortfeasor procured the only breach of contract. The plaintiff in Collins only produced evidence of damages in the amount of $10,000.00. The court held that the plaintiff could only recover the damages that were proved; the plaintiff could not recover the same damages from the same breach of contract under two different causes of action.

DFDG and DFR produced evidence in the form of documentary evidence and expert witness testimony proving the $299,144.00 in damages caused by SEL alone and the $3,000,000.00 in damages caused by Lipscomb's tortious interference. There is no double recovery for a single wrong in this case. The Respondents are not recovering the same identical damages twice. There was no "single wrong" there were multiple wrongs in this case, some committed by SEL and some committed personally by Lipscomb. In a case involving multiple breaches of contract the damages flowing from breaches procured by Lipscomb's tortious interference can properly be awarded in the tortious interference cause of action without also awarding them in the breach of contract cause of action. This would be the result if the Respondents had sued Lipscomb alone for tortious interference (without ever suing SEL); the jury could have properly awarded $3,000,000.00 against Lipscomb.

The trial court, without objection, granted a directed verdict with regard to the wrongful termination of the contract and the failure to pay the Phase 1 development fee. The court left it up to the jury to determine if there were any other breaches and the resulting damages. (R.1104, line 10 – R. 1111, line 2; R. 1243, lines 9-18) The jury found other breaches occurred and determined the damages for breaches that were not the result of Lipscomb's tortious interference to be $299,144.00 and held SEL solely liable for those damages. The jury determined the damages for breaches that resulted from Lipscomb's tortious interference to be $3,000,000.00. Elements of damage for tortious interference include loss of customers and loss of goodwill.

The jury essentially held SEL liable for the breaches of contract for which SEL admitted liability in open court. SEL admitted at trial that it owed $242,717.00 in

damages for breaches of contract in Phases 1, 2 and 4. (R. 1212, lines 5-20) These damages were caused by four different breaches, occurring at different times and in different phases of the project from two different contracts: (1) Phase 1 profit sharing (2) Phase 1 development fees, (3) Phase 2 Development fees, (4) Phase 4 profit sharing. If the jury had believed Lipscomb's tortious interference resulted in these damages then the award against Lipscomb would have been $3,299,144.00. Because the jury found Lipscomb's tortious interference did not cause the $299,144.00 in damages he cannot be held personally liable for or credited with those damages. The jury determined the failure to pay the development fees and the profit sharing in Phase 1, 2 and 4 were not due to tortious interference and held SEL liable for those damages.

SEL did not admit to liability for breaches of contract relating to lost profits and commissions in Phase 2 and 3. After hearing all the evidence the jury found that Lipscomb's tortious interference prevented performance of the contract in Phase 2 and 3 and procured breaches of the contract and awarded damages according to their view of the evidence. The jury determined the damages caused by Lipscomb's interference with the contract with regard to Phase 2 and 3 to be $3,000,000.00. The testimony from the witnesses, including accountants from both sides as well as the documentary evidence of lost profits and lost commissions on both lots and houses in Phase 2 and 3 supports the jury's verdict. If the jury had rejected Respondents' claim for lost profits and commissions in Phase 2 and 3 the jury would not have awarded $3,000,000.00 in damages for tortious interference.

Unlike Collins, the jury in the present case was presented with multiple breaches involving two different contracts and was required to distinguish between breaches that

were the result of tortious interference by Lipscomb and those breaches that were not the result of tortious interference. The damages against Lipscomb can only relate to breaches of contract which resulted from his tortious interference. Because of the multiple breaches involved, the breach(es) of contract the jury determined occurred when it decided Lipscomb had tortiously interfered does not have to be the same breach(es) of contract upon which the jury found SEL liable in the breach of contract cause of action. The jury obviously concluded the breaches of contract that were procured by Lipscomb's unjustified interference caused more damage than the breaches he did not tortiously procure. The jury awarded damages against Lipscomb in accordance with their view of the evidence under the tortious interference cause of action; the only cause of action in which Lipscomb was a defendant.

IV. The trial court properly charged the jury with regard to damages for loss of customers and goodwill.

It is abundantly clear from the evidence at trial that the Respondents lost customers and goodwill. This court has previously defined good will as:

> the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
>
> Other business assets to which good will may adhere include: (1) the business' trade name; (2) the business' location; and (3) the business' fixtures, inventory and other tangible assets
>
> Good will includes every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the old firm, or with any other matter carrying with it the benefit of the business of the old firm. Weinberg v. Wallace, 314 S.C. 183, 442 S.E.2d 211 (Ct. App. 1994)

The evidence at trial established DFDG and DFR had a loyal following of builders who purchased lots and built homes in their developments which DFR subsequently sold to individual home buyers. The evidence showed DFDG and DFR had developed an award winning real estate development and sales team with an excellent track record from the neighboring subdivision "Rolling Creek." Ronnie Colson of NBSC testified that his decision to extend the development loan for Phase 1 was based on the success of the DFDG and DFR at Rolling Creek which he described as a "premier development." (R. 1362, lines 15-21) Rolli ng Creek had a good reputation. (R.386, lines 23-25) Th e development was in an excellent location. There was testimony that it was a "great area" and "a well sought after area that's up and growing." (R. 211, lines 13-18) Mr. Colson described the area as a "booming market" (R.1362, line 11).

The loss of customers and goodwill was not too speculative to be recovered. The "credibility" of the Courtyards at Rolling Creek was established in Phase 1; in turn the subsequent phases could be marketed to larger builders who would purchase large sections of lots. (R. 221, line 16 – R.222, line 5) DFDG put a significant amount of work into Phase 1 of the Courtyards to make it a "model community" in order to help sell Phases 2 and 3. (R. 392, line 21- R. 393, line 9) SEL continued to use the Respondents' trade name, symbols and logos, reputation, popularity and credibility in connection with the Courtyards after terminating the contract. DFR had the "exclusive right to sell" the lots in Phase 2 and 3; Lipscomb's admitted secret negations with buyers that ultimately led to the $7,600,000.00 sale to Essex of all the lots in Phase 2 and 3. The purchase by Essex conclusively established the value of the Respondents' lost customers and goodwill. Lipscomb essentially sold Plaintiffs' project, concept, the "Rolling Creek"

brand name, reputation and goodwill to Essex for $7,600,000.00. There was substantial evidence from which the jury could determine damages for lost customers and lost goodwill.

The Respondents spent years building the Rolling Creek development into a "premier" "well known" and "successful" development. The Respondents spent "over a million dollars" to bring water and sewer to the Rolling Creek development which the Courtyards was able to utilize. The price of lots in Rolling Creek nearly doubled over time. The Courtyards at Rolling Creek was an effort to capitalize on the success of Rolling Creek by incorporating the name "Rolling Creek" and symbols of "Rolling Creek" into the name "Courtyards at Rolling Creek." In this manner the Respondents were able to associate or link the new "Courtyards at Rolling Creek" with the "Rolling Creek" name, location, including the new school located nearby and the "booming market" in the area, the affluence and reputation associated with the "Rolling Creek" name based on its position in the community as an upscale, secure, family oriented development. (R. 1362, lines 15-21, R. 123, line 4 – R.126, line 3; Exhibit 151 and 152)

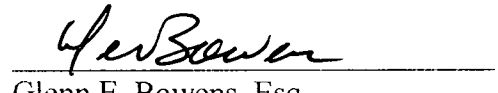
Lipscomb's abandoning the pre-approved plans for Phase 2 and 3 followed by his failure to pay the engineering firm to prepare new plans prevented construction on Phase 2 from beginning on time and stalled the project. (R. 216, line 20 – R. 217, line 22) There was testimony that failure to start construction of Phase 2 infrastructure on time, in order to prevent "lag time" between phases, would result in the loss of customers, builders and momentum. (R. 394, line 16 – R. 396, line 15) The danger is that builders who were on site purchasing lots and building houses in Phase 1 would demobilize and go elsewhere if the subsequent phases did not start on time. Builders cannot simply wait until March

2007 for Lipscomb to finish his re-design of Phase 2 and 3 and get governmental approval.

Conclusion

The trial court properly charged the jury based on the evidence presented during the course of the trial. The jury's verdict is supported by the evidence. There was substantial evidence that Lipscomb acted outside the scope of his authority and acted in his personal capacity to serve his own personal interests rather than SEL's corporate interest. The trial court properly denied the Appellant's post trial motions for directed verdict and JNOV. There is no legal basis to reverse the trial court. Respondents request the court affirm the verdict based upon any ground appearing in the record in accordance with Appellate Rule 220(c).

Respectfully submitted,

By: 

Glenn E. Bowens, Esq.
P.O. Box 665
Blythewood, South Carolina 29016
Phone: (803) 714-7766
Fax: (803) 714-0775
Attorney for Respondents

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty, ... Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Initial Brief was served upon:

Brady R. Thomas
LEWIS, BABCOCK & HAWKINS
PO Box 11208
1513 Hampton Street
Columbia, SC 29202

By depositing the same in the United States Mail, postage prepaid, this the _____Day of May, 2009.

Glenn Bowens

RECEIVED
JUN 29 2009
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty, ... Respondents,

v.

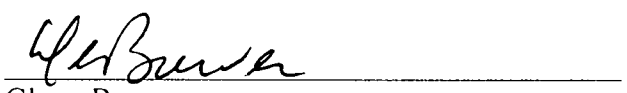
SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Rule 211(b) Certificate of Counsel

Brady R. Thomas
LEWIS, BABCOCK & HAWKINS
PO Box 11208
1513 Hampton Street
Columbia, SC 29202

By depositing the same in the United States Mail, postage prepaid, this the 29th Day of June, 2009.



Glenn Bowens

RECEIVED
MAY 29 2009
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty, ... Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Initial Brief was served upon:

Brady R. Thomas
LEWIS, BABCOCK & HAWKINS
PO Box 11208
1513 Hampton Street
Columbia, SC 29202

By depositing the same in the United States Mail, postage prepaid, this the 29 Day of May, 2009.

Glenn Bowens

IN THE STATE OF SOUTH CAROLINA

RECEIVED
JUN 29 2009
SC Court of Appeals

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 05-CP-40-0749

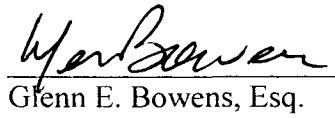
Dutch Fork Development Group II, LLC and
Dutch Fork Realty, ... Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb
of whom Stephen E. Lipscomb is the ..... Appellant.

CERTIFICATE

I certify the Appellant's Final Brief complies with South Carolina Appellate Court Rule 211(b).



Glenn E. Bowens, Esq.
P.O. Box 665
Blythewood, South Carolina 29016
Phone: (803) 714-7766
Attorney for Respondents