THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Ellis B. Drew, Jr., Master-In-Equity
Steven C. Kirven, Master-In-Equity

Case No.: 2013-CP-04-02228
Court of Appeals Number: 2016-001689

Robin Johnson and CQI Pharmacy Services, LLC — Respondents,

v.

Robert Little and CQI Oncology/Infusion Services, LLC, — Appellants.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Respondents, Robin Johnson and CQI Pharmacy Services, LLC ("Respondent Company") commenced a breach of contract case against Appellants Robert Little and CQI Oncology/ Infusion Services, LLC ("Appellant Company") on October 2, 2013 in Anderson County. In their complaint, Respondents allege causes of action against Appellants for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraud, and violation of the Unfair Trade Practices Act. Respondent alleged that Appellants' misrepresentations and concealment of the truth caused the Respondent damages to include, actual, punitive and treble damages. (Complaint).

Appellants filed a Motion to Dismiss, which was denied. The Appellants filed an Answer and Counterclaim and later dismissed their Counterclaim, by Court Order dated April 12, 2016. (Answer and Counterclaim and Form Order dated April 12, 2016).

By Order filed May 31, 2016, the Trial Court found that Respondents had proven their case and damages were awarded against Appellants, jointly and severally, in the amount of $50,000.00. (Order filed May 31, 2016). Appellants' Motion for Reconsideration was denied by Order filed July 12, 2016. (Order filed July 12, 2016).

STANDARD OF REVIEW

Respondents agree with Appellants that the appropriate standard of review is the "any evidence" standard.

In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2004). The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law. Gordon v. Colonial Ins. Co., 342 S.C. 152, 536 S.E.2d 376 (Ct. App. 2000).

"In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine." Hanna v. Palmetto Homes, Inc., 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990); see Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact). See also Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976) ("When the testimony of an expert witness is not relied

upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture....").

STATEMENT OF FACTS

On May 9, 2013 Robert Little and CQI Oncology/ Infusion Services, LLC, as seller, and CQI Pharmacy Services, LLC, as purchaser, entered into a Purchase and Sale Agreement whereby Robert Little and CQI Oncology/ Infusion Services, LLC agreed to sell assets of CQI Oncology/ Infusion Services, LLC to CQI Pharmacy Services, LLC. (Purchase and Sale Agreement). All contracts, files, clients lists, contacts, vendor lists of CQI Oncology/ Infusion Services, LLC were specifically enumerated as included in the sale. (Purchase and Sale Agreement). The purchase price was $30,000.00 "in the form of a Cashier's Check payable to Robert Little." (Purchase and Sale Agreement). The terms of the Purchase and Sale Agreement are straightforward and provided that "[s]eller represents and warrants that the Property is free and clear of any liens or encumbrances and that the Seller has rightful title to the Property. Seller hereby agrees to forever defend the title to the Property unto Purchaser, its successors and assigns, from and against all persons whomsoever." (Purchase and Sale Agreement). The Purchase and Sale Agreement further provides an indemnification clause which reads in part "[s]eller agrees that he will defend, indemnify and hold purchaser harmless from any and all actions, causes of action, claims and or demands which arise or are asserted as arising from the Seller's conduct prior to closing." (Purchase and Sale Agreement). There is no question that this is a binding contract.

At the time the Purchase and Sale Agreement was negotiated, Robin Johnson was an employee of CQI Oncology/ Infusion Services, LLC and had been an employee for many years. (Transcript p.5, lines 14-25; p.6, lines 1-3). Appellant Little and Respondent Johnson had a long-

lasting relationship: both were employees for the other, both were signatories on each other's business accounts, and they ran both businesses from the same location. Appellant Little even helped Respondent Johnson start up her business and he chose the name "CQI Pharmacy Services." (Transcript p. 11, lines 11-25; p.12, lines 1-2).

In the course of her employment with Appellant Company, Respondent Johnson performed day-to-day operations of the CQI Oncology/ Infusion Services, LLC including accounts receivable and accounts payable. (Transcript p.7, lines 17-18; p.43, lines 4-9). Prior to executing the Purchase and Sale Agreement, Respondent Johnson made multiple deposits of over $68,000.00 to pay several invoices dated March 28, 2013 through April 28, 2013 in anticipation of paying $24,000.00 to vendors. (Transcript p.15, lines 6-14; p.24, lines 20-25). The deposits were made into the account of CQI Oncology/ Infusion Services, LLC; and the checks were written out of the same account and were signed by Respondent Johnson as she was a signatory on that account. (Transcript p.15, lines 1-24; p.25, lines 7-10). After extensive negotiations and after the payments were made on invoices in excess of $24,000.00, the Respondent Company entered into the Purchase and Sale Agreement with the Appellants and in consideration of the mutual promises between Respondent Company and Appellants, payment was tendered of consideration in the amount $30,000.00 payable to Robert Little on May 9, 2013 (Purchase and Sale Agreement; Transcript p.15, lines 1-25; p.16, lines 1-25; p. 18, lines 17-25).

Respondent Company entered into the contract in reliance upon the invoices having been paid, without any knowledge or notice that Appellant Little removed Respondent Johnson as signatory on the checking account that was used to make the deposits and payments, and without the knowledge that Appellant Little caused the checks issued to vendors to be retracted. (Transcript p.7, lines 16-25; p.8, lines 1-8). Although Appellant Little assumed that Mrs. Johnson

knew that she was removed from the accounts, he did not notify her that he removed her name as signatory from the account (Transcript p.7, lines 23-25; p.8, lines 1-4; p.18, lines 17-25). Mrs. Johnson was unaware that the checks were returned until notified by the vendors, all of whom refused to send Respondent Company any product until all accounts were current (Transcript p.8, lines 15-22). Andrea Fisher, a former employee of Appellant Company, testified that Appellant Little did not tell her either and she learned about it from another source although she was also still employed by Appellant Company at the time Appellant Little removed Respondent Johnson from the account (Transcript p.51, lines 5-13).

Respondent Johnson testified that had she known that the payments she made during her employment with Appellant Company would be returned, Respondent Company would not have entered into the contract with the Appellants (Transcript p.19, lines 1-10).

LEGAL ARGUMENT

I. Did the Trial Court err as a matter of law in finding that Appellant breached the contract with Respondent Company?

The Trial Court properly held that the Appellants breached the contract with Respondent Company. To recover for breach of contract, the Plaintiffs must prove three elements (1) a binding contract existed between the parties, (2) Defendants breached or failed to perform the contract, and (3) Plaintiffs suffered damages as a result of the breach. S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. citing Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

Here, there is no dispute that the parties entered into a binding contract. The terms of the Purchase and Sale Agreement are clear and unambiguous. The Purchase and Sale Agreement provided for a purchase of assets of the Appellant Company, among other things, binding both the Individual Appellant and Appellant Company as "Seller". The contract provided that all the property is free and clear of any liens or encumbrance and further provided that "Seller agrees that he will defend, indemnify and hold purchaser harmless from any and all actions, causes of action, claims and or demands which arise or are asserted as arising from Seller's conduct prior to closing." The Appellants claim that the invoices belong to the Respondent Company is unfounded. There was testimony which clearly defined the products ordered on the invoices were medical supplies, which were the responsibility of the Appellant Company. The Trial Court correctly held the invoices were the responsibility of the Appellant Company. The Trial Court's findings were further supported by testimony.

The testimony of Respondent Johnson provides that she had worked for the Appellant Company for 20 years and that her name was on all of the orders placed by that company. (Transcript p.5, lines 16-17; p.46 lines 15-24). Respondent Johnson testified as to the content of the invoices and as to the products ordered. She explained what medical surgical supplies were and explained that if an order was for medical supplies, then it was ordered for Appellant Company. (Transcript p.12, line 25; p.14, lines 6-16). She testified that the invoices in question, although they may have been addressed to Respondent Company, had Appellant Company's Federal Id Number and Pharmacy number and were in fact Appellant Company's responsibility. (Transcript p.11, lines 20-23; p.13, lines 1-7). In addition to the testimony of Respondent Johnson, there was testimony from Andrea Fisher, a former employee of Appellant Company, that provides the invoices were for the Appellant Company because they were medical supplies and that was

how to distinguish between the two companies. (Transcript p.49, lines 18-25 and p.50, lines 1-5, p.45, lines 23-25; p.46, line 1; p.46, lines 2-5).

Respondent Johnson testified to each invoice that was paid from the deposits made into the Appellant Company's account. She testified that the Fed Ex bill was to Appellant Company. (Transcript p.10, lines 17-18). Respondent Johnson testified that Cardinal Health was a longtime vendor of Appellant Company and that the bills were for products ordered by Appellant Company. (Transcript p.10, lines 18-24; p.11, lines 11-23; p.16, lines 20-25; p.17, lines 1-5). She testified that BRACCO invoice contained products sold to the Appellant Company. (Transcript p.12, lines 3-18). Respondent Johnson testified that the Owens and Minor invoice was also for supplies bought for the Appellant Company. (Transcript p. 12, lines 19-25; p. 13, lines 1-7). She also testified that the MSD invoice was for Appellant Company. (Transcript p.13, lines 8-25). Respondent Johnson testified that all of the invoices were for medical/ surgical supplies and were ordered for the Appellant Company and that all invoices were paid after depositing funds, collected from customers that received the products, into Appellant Company's account. (Transcript p.14, lines 6-25; p.15, lines 1-24). Respondent Johnson testified that she was just doing her job when she deposited and wrote checks to pay these invoices and further that if they were invoices for Respondent Company, she would not have paid them out of Appellant Company's account. (Transcript p.46, line 25; p.47, lines 1-19). It was clear from the evidence presented to the Trial Court that the invoices were for medical supplies and thus were the responsibility of the Appellant Company.

The Appellants claim that the Respondents are not credible because Respondent Johnson ordered the products herself; however Appellants neglected to state that Respondent Johnson has worked for the Appellant Company for 20 years. (Transcript p.24, lines 7-12). Respondent

Johnson's placing of the order was in her capacity as an employee of Appellant Company. (Transcript p.58, lines 3-5). The Appellants argument is without merit. Respondent Johnson's testimony provides that Appellant Little in fact helped her open her business and he helped choose the name for Respondent Company; it was named "CQI Pharmacy Services" because that was a name that the Appellant Company used in the past. (Transcript p.11, lines 11-25; p.12, lines 1-2). Testimony further provides that Respondent Johnson's duties as an employee of Appellant Company included placing orders, accounts payable, accounts receivable, and other daily activities. (Transcript p.7, lines 17-18, p.43, lines 4-9). Respondent Johnson testified that as an employee of Appellant Company, she received approximately $68,000.00 in accounts receivables for the invoiced items, and she deposited it into Appellant Company's bank account to cover the checks she wrote to pay for those invoices. (Transcript p.7, lines 19-22; p.8, lines 5-7, p. 15, lines 6-14; p.42, lines 18-23; p.46, lines 6-14). She further testified that Respondent Company would not have entered into the Purchase and Sale Agreement if she knew that those invoices were unpaid. (Transcript p.19, lines 1-10).

The Purchase and Sale Agreement acknowledges that there is confusion as to the business names (see Purchase and Sale Agreement p. 2), but the evidence and testimony provided at trial made it very clear that the invoices were the responsibility of the Appellant. The Trial Court was correct in its ruling, and its Order should be upheld.

II. *Did the Trial Court err as a matter of law in requiring Appellants to indemnify Respondents against claims arising from the sale of Business Assets from Appellants to Respondent Company?*

It was evident to the Trial Court that the Appellants breached the contract and accordingly Appellants would be liable for whatever damages follow as a natural consequence and a proximate result of such breach. South Carolina courts have consistently defined indemnity as "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 454, 438 S.E.2d 271, 272 (Ct.App.1993).

Here, the indemnification clause in the contract clearly states "[s]eller agrees that he will defend, indemnify and hold purchaser harmless from any and all actions, causes of action, claims and or demands which arise or are asserted as arising from the Seller's conduct prior to closing." (Purchase and Sale Agreement). Therefore, the Appellants contractually agreed to indemnify and hold Respondents harmless against Appellants' actions prior to the closing of the Purchase and Sale Agreement.

The testimony of the Respondent Johnson provided that Appellant Little caused a "Breach of Warranty" to be placed on the checks that she wrote as an employee of Appellant Company; and that Appellant Little caused the retraction of those checks without notice to Respondent Johnson. (Transcript p.7, lines 23-25; p.8, lines1-9; p. 18, lines 24-25; p.66, lines 14-15; p.67, lines 4-6). Appellant Little testified that he did not stop payment on the checks and then testified that he immediately stopped payment on the checks. (Transcript p.66, line 18; p.67, line 14). Appellant Little's testimony is clearly contradictory; however it is clear that he did not tell Respondent Johnson that she no longer had the authority to sign checks as she had done for many years. (Transcript p. 65, lines 9-11; p.67, lines 4-6). It is also certain that Appellant Little spent that money after having the checks retracted, as he testified that the money in the Appellant Company's

account was spent and that the checkbook was not tendered to the Respondent as part of the assets which he sold to Respondent Company. (Transcript p.66, lines 9-11; p.66, lines 21-23).

Respondent Johnson and witness Andrea Fisher both testified that Respondent Company could no longer do business with its vendors because of the actions of Appellants. (Transcript p.8, lines 15-22; p.19, line 18-21; p.50, lines 10-11; p. 50, lines 22-25; p.51, line 1). This was a clear breach of the Purchase and Sale Agreement which specifically stated that all property is free and clear of any liens or encumbrances. (Purchase and Sale Agreement page 2). Respondent Johnson testified that she entered into the Purchase and Sale Agreement after she knew that all vendor accounts were current and that she was misled by the actions of Appellant Little. (Transcript p.18, lines 2-16; p.19 1-24). The Trial Court correctly held that Appellants (first party) are liable to pay Respondents (second party) for the loss Respondent Company incurred to its vendors (third party).

Appellants' claim that Appellants committed no wrongful act to trigger the indemnity clause is unfounded. Appellant Little purposely caused the retraction of the checks causing vendors to be unpaid while knowing that would impact the Respondents' business due to confusion in the names of the two companies. Appellants breached the contract, and it was Appellant Little's specific acts which caused the damages to the Respondents. Accordingly, the Trial Court was correct in its ruling and its Order should be upheld.

III. Did the Trial Court err as a matter of law in ordering judgment against Appellants in the amount of $50,000.00?

The Trial Court found that the Appellants breached the contract and therefore were liable for the damages resulting therefrom. The Appellants have misconstrued the Trial Courts ruling and believe that the Trial Court ruled that Appellants are responsible for the payment of debt to

third parties. Although Appellant Little's retraction of the checks contributed to the breach of contract and liability thereof; the Trial Court held that Appellants breached the contract and that the Appellants are responsible for indemnifying the Respondents against loss and damages. The Trial Court was proper in awarding a judgment against Appellants in the amount of $50,000.00.

If the fact of damage is established, the law does not require the amount of damage to be proved with absolute mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made. Charles v. Texas Company, 199 S.C. at 180, 18 S.E.2d at 729; South Carolina Finance Corporation of Anderson v. West Side Finance Company, 236 S.C. 109, 113 S.E.2d 329 (1960). The findings of fact are to be given deference. Daisy Outdoor Advertising Co., Inc. v. Dean Abbott, 317 S.C. 14, 16, 451 S.E.2d. 394, 395 (Ct. App. 1994); Palmettonet, Inc. v. S.C. Tax Comm., 318 S.C. 102, 456 S.E. 2d 385, 387 (1995); Mayes v. Paxton, 313 S.C. 109, 114, 437 S.E.2d 66, 69 (1993).

There was no abuse of discretion by the lower court. Given the proof and circumstances, the findings of actual damages must be affirmed. Respondent Johnson testified that she deposited $68,000.00 in accounts receivables into Appellant Company's account to pay invoices that were for medical supplies purchased by Appellant Company. (Transcript p.15, lines 1-24; p.25, lines 7-10). Respondent Johnson, as an employee of Appellant Company, paid these invoices as they were due and the product had been shipped out to customers who in turn tendered payment. (Transcript p.7, lines 19-22; p.8, lines 5-7, p. 15, lines 6-14; p.42, lines 18-23; p.46, lines 6-14). Respondent Johnson's employment with Appellant Company included accounts payable and accounts receivable; she was simply doing her job. (Transcript p.46, line 25; p.47, lines 1-19). Respondent Johnson was unaware that Appellant Little intentionally retracted checks, leaving vendor accounts unpaid, and spent all of the money in the checking

account rather than transferring the account pursuant to the Purchase and Sale Agreement, which makes it clear that the purchase is for assets of Appellant Company. (Transcript p.66, lines 21-23).

Respondent Johnson testified that Appellant Little benefited from her damages in an approximate amount of $50,000.00. (Transcript p.18, lines 19-20). The Court held that Respondents were in breach of contract and properly awarded $30,000.00 for breach of contract and $20,000.00 for indemnification for a total judgment of $50,000.00. (Transcript p.73, lines 8-9). The Trial Court gave due weight to the evidence, and it would be inapposite to now second guess the Trial Court. Appellants were given an eminently fair hearing. Evidence supporting the claims of Respondents and their damages exist in the record. Proof of damages far exceeding $50,000.00 was presented. Accordingly, the Trial Court was correct in its ruling, and its Order should be upheld.

IV. Did the Trial Court err as a matter of law by entering judgment against Appellants upon a theory of successor liability?

The Appellants claim is unfounded; the Trial Court did not enter judgment against Appellants upon a theory of successor liability. In fact the Trial Court entered judgment against Appellants on grounds of breach of contract and indemnification.

This is a breach of contract case with indemnification, not a successor liability case. The evidence before the Trial Court provided that the Appellant Little intentionally retracted payments made to vendors who provided inventory to the Appellant Company. (Transcript p.22, lines 5-10). Said inventory was to be sold to Respondent Company free and clear of any liens and encumbrances. (Purchase and Sale Agreement). The Purchase and Sale Agreement provides

"Seller represents and warrants that the Property is free and clear of any liens or encumbrances and that the Seller has rightful title to the Property. Seller hereby agrees to forever defend the title to the Property unto the Purchase, its successors and assigns, from and against all persons whomsoever." (Purchase and Sale Agreement). The Purchase and Sale Agreement also clearly states that "Seller shall not interfere with any existing or future relationships that CQI Pharmacy Services, LLC has or may have with any and all companies, clients and/ or vendors."

These are among some of the contract provisions that have been breached. Testimony of Respondent Johnson and Andrea Fisher provides that the inventory was not free and clear of any liens and encumbrances. (Transcript p.22, lines 22-24; p. 50, lines 10-21). Respondent Johnson's testimony provides that the vendors would not do business with Respondent Company until accounts were paid. (Transcript p.22, lines 22-24). Andrea Fisher further testified that the Respondent Company's business relied on these vendors and vendor relationships were an integral part of Respondents' business (Transcript p.50, lines 22-25; p.51, lines 1-4). It was clear to the Trial Court that there was a breach of contract.

The question before the Trial Court was not whether Appellants' were responsible for any debt, rather did the Appellants breach the contract with the Respondent Company. The Trial Court was correct in its ruling and its Order should be upheld.

V. Did the Trial Court err as a matter of law by entering judgment against Appellant Robert Little individually?

The essence of Appellants' argument is that Appellant Little should be protected under the shield of an insolvent Appellant Company for his individual bad acts. Appellant Little was an individual party to the Purchase and Sale Agreement; he was a Seller. It is clear that Appellant

Little executed the Purchase and Sale Agreement both individually and as agent for Appellant Company (See Purchase and Sale Agreement). The Appellants' argument that judgment should not be entered against Appellant Little individually is unfounded.

Appellants cite section 33–44–303(a) of the South Carolina Code, alleging that Appellant Little is statutorily protected against this type of individual liability, but neglects to state that Appellant Little signed the Purchase and Sale Agreement, thereby binding himself individually.

Within the Limited Liability Company Act, section 33–44–303(a) of the South Carolina Code (2006) provides, "A member ... is not personally liable for a ... liability of [an LLC] solely by reason of ... acting as a member...." S.C. Code Ann. § 33–44–303(a) (2006). The commentary of that section clarifies, "A member ... is responsible for acts ... to the extent those acts ... would be actionable in ... tort against the member ... if that person were acting in an individual capacity." S.C. Code Ann. § 33–44–303 cmt. (2006). Furthermore, the Act provides, "[T]he principles of law and equity supplement" the Act unless displaced by the Act, and "[s]upplementary principles include, but are not limited to, the law of agency...." S.C.Code Ann. §§ 33–44–104(a) & cmt. (2006). Perjen, Inc. v. Onyx Co., LLC., 2011 WL 11730338 (Ct. App. 2011).

Echoing the legislative commentary of South Carolina Code sections 303 and 104, South Carolina courts have consistently held, "'[a]n agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.'" Gilbert v. Mid–South Mach. Co., 267 S.C. 211, 221–22, 227 S.E.2d 189, 193 (1976) (quoting *Lawlor v. Scheper*, 232 S.C. 94, 98–99, 101 S.E.2d 269, 271 (1957)). Thus, an LLC's liability shield does not protect a member who commits a tort while acting for the LLC from liability; the LLC member is personally liable

as a tortfeasor for torts the member actually commits. Perjen, Inc. v. Onyx Co., LLC., 2011 WL 11730338 (Ct. App. 2011).

The South Carolina Supreme Court has held that as a matter of law, a manager of a limited liability company can be held individually liable for his acts. Dutch Fork Development Group II, LLC v. SEL Properties, LLC., 406 S.C. 596, 606, 753 S.E.2d 840 (2012). The Court has also held that a member is not shielded from personal liability under the Uniform Limited Liability Company Act. 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 728 S.E.2d 448 (2012).

Moreover, a manager, member or officer is personally liable for any tortious acts they participated in or directed. BPS, Inc. v. Worthy, 362 S.C. 319, 328, 608 S.E.2d 155 (2005). Nothing in the law blindly shields an individual from direct liability in tort for his own actions. *See* Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649 (1996) ("An officer, director, or controlling person in a corporation may incur liability by participating in or directing the tortious act.").

The South Carolina Court of Appeals has recognized that if, "a director or 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...." BPS, Inc. v. Worthy, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct.App.2005) (quoting 19 Am. Jur.2d Corporations, § 1382 (2004)). A member or manager of an LLC is not automatically provided immunity from personal liability, and can be held personally liable in tort for his own actions and is personally liable for any tortuous acts he participated in or directed. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 208 (Ct. App. 2009).

"The right to sue one's tortfeasor is a long-standing right in our legal system, and we will only find it abrogated by statute through "clear legislative intent."" 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 347, 728 S.E.2d 448 (2012) quoting Doe v. Marion, 361 S.C. 463, 473, 605 S.E.2d 556 (Ct. App. 2004). In 16 Jade Street the Court held that the General Assembly did not intend the LLC act to shield a member from liability for his own torts. Id. at 340. The Court concluded that section 33–44–303(a) only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions even if those actions are taken to further the interests of the business. Id. at 349; *See also* NVR, Inc. v. West Georgia Road Venture, LLC., 2012 WL 1902267 (D.S.C. Greenville May 25, 2012).

The first paragraph of the Purchase and Sale Agreement clearly refers to the sellers as Robert Little individually and CQI Oncology/Infusion Services, LLC. (Purchase and Sale Agreement). Moreover, page 2 paragraph 4 of the Purchase Agreement, in the Indemnification Section, it is clearly stated that "seller agrees that **he** will defend..." (emphasis added). (Purchase and Sale Agreement). Appellant signed the Purchase Agreement as Robert Little, individually and Appellant Little also signed on behalf of CQI Oncology Services, LLC., as a member of the LLC. (see Purchase and Sale Agreement). Furthermore, the purchase price was paid to Appellants in the form of a cashier's check payable to Robert Little individually and not the LLC (Purchase and Sale Agreement). Even if Appellant Little had not signed the contract, he would not be able to hide his bad acts behind the corporate veil.

The Appellants' Motion to Reconsider was unsuccessful on the argument of whether Appellant Little should remain liable for the damages, and the Trial Court denied the motion. The Trial Court ruled that the language in S.C. Code Ann. §33-44-303 does not void the contract signed

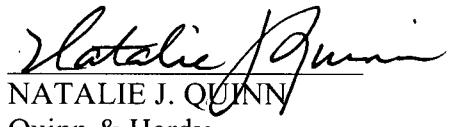
by Appellant Company and Appellant Little. (June 21, 2016 Transcript p.13, lines 7-14). It was clear to the Trial Court that the Appellant Company, Appellant Little and Respondent Company had a binding contract, which was breached by Appellants, thereby subjecting the Appellants to liability arising from the breach and indemnification therefrom. In this matter the record is clear, Appellant Little acted as an individual when he executed the contract with Respondent Company and he acted as an individual when he retracted payments to vendors. (Purchase and Sale Agreement and Transcript p.18, lines 2-16; p.19 1-24). Appellant Little testified that he stopped payment on the checks (Transcript p.66, line 18). Appellant Little further testified that the Appellant Company is no longer doing business. (Transcript p.63, line 6). There was no testimony provided by Appellant that he retracted the payments on those checks as a business decision or in his capacity as a member or manager. That would be a peculiar business practice to stop payment on checks issued to vendors that Appellant Company has done business with for over twenty years.

It seems apparent that Appellant Little is simply trying to hide behind the corporate veil of an insolvent company. Appellant Little should not be protected from his bad acts, nor should he be free from liability when Appellant Little personally executed the Purchase and Sale Agreement, he accepted a check payable to only himself and his bad acts constituted breach of contract. For the foregoing reasons, the Trial Court's decision should be upheld.

CONCLUSION

The Trial Court correctly held that the Appellants breached a contract. No legal or factual error was made by the Trial Court in awarding its judgment against Appellants for $50,000.00 upon breach of contract and indemnification. Further the Trial Court correctly determined that the judgment is against both Appellant Little and Appellant Company. For the reasons set forth herein, Respondents urge this Court to affirm the decision of the Trial Court.

RESPECTFULLY SUBMITTED,



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PROOF OF SERVICE

I certify that I have served **Respondents' Initial Brief** and **Designation of Matter** on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on January 25, 2017, addressed to his attorney of record, James M. Robinson, Esquire, Robinson Law Firm, P.A., Post Office Box 738, Easley, SC 29641.

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