THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Judge

Appellate Case No. 2016-001170

William B. Haskin, Jr.,.....Appellant,

vs.

Samuel W. Rhodes, Jr., Rhodes Investments, Inc.,
Rhodes Consulting, LLC, and Tracey M. Bozzelli.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Whether the Circuit Court erred by disregarding critical, competent, compelling, and contemporaneous evidence in the form of the prenuptial agreement of Rhodes and his wife, Tracey Bozzelli, which showed conclusively that Rhodes was a partner and responsible for his share of losses; by ignoring the relevant, uncontroverted partnership tax returns; by ignoring the parties' course of conduct over fifteen years; in misapplying or failing to apply applicable Florida and South Carolina law in failing to find that Rhodes was liable for one-half of the losses suffered by the Haskin-Rhodes partnership or, alternatively; and in concluding that Rhodes was not liable as an LLC member for one-half of the losses of 2624 Myrtle, LLC, and 2802 Middle Street, LLC, and one-third of the losses of Station 22 of Charleston, LLC?

STATEMENT OF THE CASE

In this civil lawsuit filed October 5, 2012, and tried by the Circuit Court without a jury, Appellant, William B. Haskin, Jr. ("Haskin"), seeks damages from Respondent, Samuel Rhodes, Jr., as well as accounting, contribution, *quantum meruit*, piercing the corporate veil, and other equitable remedies as a result of losses sustained in their joint venture building business. Haskin filed his Amended Complaint on May 1, 2013, adding Tracey Bozzelli as a party and adding a cause of action for fraudulent conveyance.[1] (*See* R. pp. 45-87)

Rhodes contends that he is not responsible for capital contributions relying on a limited liability company agreement for an LLC created for a project not involved in this litigation, as well as an alleged verbal agreement with Haskin relieving Rhodes of liability for any losses sustained by the longstanding Haskin-Rhodes partnership. The contemporaneous documentation, however, including Rhodes's prenuptial agreement with his wife and co-respondent, Tracey Bozzelli, and the parties' uncontroverted tax returns, belie those claims. (*See* R. pp. 703-718; pp. 719-784; pp. 785-871; pp. 872-938; pp. 939-967.) In the prenuptial agreement entered into between Rhodes and Tracey Bozzelli on March 3, 2008, Rhodes disclosed that he personally owned fifty percent of the properties located at 2802 Middle Street, 2624 Myrtle Avenue, and 1723 Middle Street in Sullivan's Island, South Carolina, and was obligated for fifty percent of the debt on those properties. (R. p. 714 at (h).) The agreement went on to list the fair market value of each property with an asterisk above each amount as well as the amount of debt on the

[1] Haskin asserted claims for piercing the corporate veil of Rhodes Investments, Inc., seeking imposition of personal liability upon Rhodes, and for fraudulent conveyance of Rhodes's one-half interest in 1723 Middle Street, Sullivan's Island, South Carolina, to his wife for inadequate consideration. Rhodes and his wife owned this home together prior to Rhodes's transferring his interest to his wife contemporaneously with the issuance of two large judgments against him personally in order to shield it from creditors, including Haskin. Haskin hereby incorporates by reference and preserves his arguments for appellate review as circumstances warrant for piercing the corporate veil and fraudulent conveyance made in his Motion to Alter and/or Amend Order filed February 19, 2016.

property. (R. p. 714 at (h).) There was a special notation that Rhodes was responsible for fifty percent of the debt on these properties which totaled $3,390,000. (R. p. 714 at (h).) The agreement further reveals that Rhodes was also responsible for over $2,000,000 in debt on two other projects in which Haskin was not involved. (R. p. 714 at (h).) Rhodes entered into the prenuptial agreement freely and voluntarily after having received advice from his attorney. (R. p. 703.) Rhodes admits, with advice of counsel, that he is liable for half of the debt on these properties. (R. p. 703.) The partnership tax returns provide uncontroverted evidence that Rhodes was a partner and, thus, responsible for his share of any losses sustained by the partnership. Moreover, Haskin's payment of joint obligations of the business and Rhodes entitles Haskin, in law and in equity, to repayment of funds expended by him which benefitted Rhodes. (R. pp. 719-784; pp. 785-871; pp. 872-938; pp. 939-967.) Rhodes's payments of joint obligations of the business over a period of years also supports the fact that Rhodes understood, and was in fact, obligated to contribute to losses of the business. (R. pp. 719-784; pp. 785-871; pp. 872-938; pp. 939-967.)

This matter was tried without a jury before the Court of Common Pleas for Charleston County, Judge Roger M. Young, Sr., presiding, during the week of November 16, 2015. (R. pp. 223-453.)[2] Following closing arguments, Judge Young requested that each party submit a proposed order within thirty days. (Supp. R. p. 3, ln. 9–p. 4, ln. 5.) The parties submitted proposed findings of fact and conclusions of law on December 21, 2015. The Circuit Court issued its Order of Judgment on February 5, 2016 (R. pp. 3-14), rendering judgment in favor of Rhodes and Co-Defendants Samuel Rhodes Investments, Inc., Rhodes Consulting, LLC, and Tracey M. Bozzelli, of which Haskin received written notice on February 10, 2016. Haskin timely filed a Motion to Alter or Amend Order on February 19, 2016, which was subsequently

[2] The official record of these proceedings consists of six transcripts, as cited herein.

denied by the Circuit Court by Order on April 28, 2016, filed on April 29, 2016 (R. pp. 15-21). Haskin received a copy of the Circuit Court's Supplemental Order on May 2, 2016. Haskin thereafter timely filed his Notice of Appeal appealing the Circuit Court's Supplemental Order. (R. pp. 169-191).

STATEMENT OF FACTS

Haskin and Rhodes were best friends. In the early 1990s, Haskin and Rhodes, together, owned a restaurant on Sullivan's Island called "Sully's," which Rhodes operated and for which Haskin secured the financing and funded its operations. Haskin and Rhodes split the profits and losses from this venture equally until they sold it in the mid-1990s. Soon thereafter, Haskin and Rhodes began development activities on Sullivan's Island and Isle of Palms, South Carolina, where, over a period of time, they acquired and developed properties at the following locations:

1. Ensign Court, Isle of Palms;
2. 2914 Marshall Boulevard, Sullivan's Island;
3. 29 I'on Avenue, Sullivan's Island;
4. 18 I'on Avenue, Sullivan's Island;
5. 1723 Middle Street, Sullivan's Island;
6. 2802 Middle Street, Sullivan's Island;
7. 2624 Myrtle Avenue, Sullivan's Island;
8. 2624 Bayonne Street, Sullivan's Island;
9. 1908 Middle Street, Sullivan's Island;
10. 1914 Middle Street, Sullivan's Island;
11. 22 Lafar Avenue, Daniel Island;
12. 2851 I'on Avenue, Sullivan's Island; and

13. 46th/49th Avenue, Isle of Palms.

The structure of each of these joint ventures was virtually the same: Haskin would secure the necessary financing to purchase the desired parcel, obtain a construction loan, and fund any shortfall during construction and after all loan draws were exhausted, out of his own pocket, until the house was sold. (R. p. 6 ln. 21-25; p. 274 ln. 22–p. 275 ln. 21; p. 278 ln. 2-4; p. 281 ln. 23–p. 282 ln. 5.) Rhodes's duties included, but were not limited to, constructing and managing the project on a day-to-day basis and hiring and paying all subcontractors. (R. p. 267, ln. 1-4; p. 321, ln. 4-11; p. 250, ln. 1-6.) Rhodes always handled the checkbook. (R. p. 269, ln. 20-24.) Rhodes would also send monthly cancelled checks to the company bookkeeper. (R. p. 298, ln. 10-14.) Once the project was completed and sold to a third party, the parties' *modus operandi* and course of dealing was that Haskin would first be reimbursed for the costs he advanced and then the parties split the profits equally. (R. p. 265, ln. 5, ln. 14-19; p. 266, ln. 5-6, ln. 21-25; p. 267, ln. 8-12; p. 271, ln. 21-23; p. 272, ln. 14-15; p. 273, ln. 17-19; p. 274, ln. 3-5; p. 275, ln. 2-3, ln. 20-21; p. 276, ln. 15-16; p. 280, ln. 8-10; p. 281, ln. 4-5, ln. 14-17; p. 284, ln. 15-16; p. 290, ln. 1-3, ln. 14-16; p. 291, ln. 13-16.) Rhodes and Haskin agree they had an oral agreement for each project they undertook. (R. p. 265, ln. 20-21; p. 267, ln. 5-16; p. 270, ln. 3-5; p. 320, ln. 18–p. 320, ln. 3.)

From 1994 until November 4, 2011, Haskin and Rhodes repeated this process many times over, with Haskin securing the financing for millions of dollars in various pieces of raw land, building houses on those parcels, reimbursing Haskin for his investment of money, and then earning, and splitting equally, a substantial profit on the sale of the home to a third party. (R. p. 265, ln. 20-21; p. 267, ln. 15-16; p. 270, ln. 3-5, Nov. 18, 2015; p. 320, ln. 18–p. 321, ln. 3.) Rhodes did not invest any significant funds.

Examples of Haskin and Rhodes's successful projects are 2624 Bayonne, LLC, 1908 Middle Street, LLC, and 1914 Middle Street, LLC. (R. p. 337, ln. 14–p. 338, ln. 7; p. 271, ln. 9-23; p. 273, ln. 10–p. 274, ln. 16.) The tax returns for these entities reflect a pattern of acquiring property, building on that property, and selling it for a profit. (R. p. 192, ¶ 12.) In every case, the proceeds from the sales of the above referenced properties were used to repay the outstanding indebtedness of the particular LLC, repay the members for their contributed capital, and the remaining profits were disbursed to Haskin and Rhodes Investments. (R. p. 338, ln. 22–p. 340, ln. 21; p. 265, ln. 1-5; p. 266, ln. 21-25; p. 267, ln. 8-12.) Rhodes received approximately $771,000 in distributions on these three successful projects in 2007. (R. p. 340, ln. 13–p. 341, ln. 7.)

This lawsuit arises out of the parties' disagreement about the sharing of the partnership losses sustained on 2802 Middle, 2624 Myrtle, and 22 Lafar. Haskin funded the $1,600,000 in capital needs as a result of losses on these three projects. Rhodes contends he is not liable to Haskin for his share of the funding because, he says, there was a verbal agreement that he would not have to contribute. Rhodes contends a conversation took place at Poe's Tavern with Haskin in the presence of Bozzelli and Reese that supports his position. There is no evidence supporting his contention, and the witnesses he identified – his wife, Tracey Bozzelli, and Tim Reese – do not support Rhodes's version of events. In fact, Rhodes entered into a prenuptial agreement with Tracey Bozzelli after the alleged conversation with Haskin (with Tim Reese and Tracey Bozzelli present) took place in which Rhodes listed all of these debts as fifty percent his responsibility. Rhodes testified at trial that the prenuptial agreement really meant that his corporation owned the LLC interests even though there is no credible evidence supporting this contention. (R. p. 323, ln. 13–p. 324, ln. 15; p. 325, ln. 8–p. 326, ln. 1.)

Contrary to testimony offered by Rhodes at trial, the financial records of the companies, including the tax returns, demonstrate that, consistent with his agreement with Haskin, Rhodes contributed to capital of these companies on many occasions. In his deposition, Rhodes testified that he contributed capital because Haskin was out of town and that "we had to do something before we lost the house." (R. p. 226, ln. 21–p. 227, ln. 6.) Later in his deposition, Rhodes testified that he did not know why he contributed capital to these projects and surmised that Haskin may have been out of town but that that he was not sure. (R. p. 251, ln. 22–p. 252, ln. 1.) Rhodes testified at trial that he had a conversation with Haskin about putting money in to pay the bills. (R. p. 313, ln. 5-9.) Haskin testified that Rhodes contributed capital arbitrarily. (R. p. 283, ln. 1-4.) Haskin was only out of town three or four days at a time during the relevant period. (R. p. 295, ln. 8-14.) There is no credible evidence of Rhodes's contention in the record and neither he nor the other Co-Defendants have offered support for his claim.

Rhodes admits in his deposition that an oral agreement existed whereby Haskin would secure the necessary financing to purchase the desired parcel, obtain a construction loan, and fund any shortfall during construction. (R. p. 321, ln. 4-11; p. 248, ln. 11–p. 249, ln. 25.) Rhodes also agrees that there was a verbal agreement between him and Haskin as to their joint venture. (R. p. 231, ln. 20-24; p. 233, ln. 24–p. 234, ln. 4; p. 238, ln. 1-11; p. 243, ln. 18-24.) The various projects were customarily titled in the name of an LLC at the suggestion of Michael Gratz, the parties' business tax preparer, located in Florida. Haskin received his fifty percent ownership interest for acquiring the financing and handling the financial aspects of the projects. (R. p. 309, ln. 13 – p. 310, ln. 4.) Rhodes received a fifty percent ownership in the business for agreeing to build the house and oversee construction until it was completed. (R. p. 310, ln. 5-8.) Rhodes was never due any money for constructing the homes in question. (R. p. 310, ln. 9-13.)

Rhodes would share in the profits if there were profits and losses if there were losses. (R. p. 310, ln. 14-19.) The fifty percent interest was in exchange for his sweat equity. (R. p. 369, ln. 19–p. 370, ln. 18) The value of that interest is the fair market value of the house minus half the debt as reflected in the Rhodes and Tracey Bozzelli's prenuptial agreement. (R. p. 387, ln. 7–p. 388, ln. 5.)

Market recession in the United States began at the end of 2007 and early 2008. Construction of the home at 2802 Middle Street was completed in late 2007. Construction of the homes at 2624 Myrtle Avenue and 22 Lafar Avenue were completed in 2008. Haskin and Rhodes were unable to sell 2802 Middle Street or 2624 Myrtle Avenue until 2011. Haskin, Rhodes, and another partner, James Covington, were never able to sell 22 Lafar Avenue, which resulted in a deed in lieu of foreclosure being accepted by the bank in 2013.

Before the beginning of each of these projects, Haskin and Rhodes had a meeting in which Haskin agreed to fund the carrying costs of these projects – debt service, maintenance, taxes, insurance, utilities, and related costs, including Rhodes's portion, until the properties sold, and in which Rhodes agreed to repay Haskin his one-half share of the losses to Haskin upon the sale or disposition of the respective properties. (R. p. 275, ln. 4-21; p. 277, ln. 11-23; p. 279, ln. 16-23; p. 282, ln. 3-17; p. 283, ln. 7-12.) Haskin contributed the capital to preserve the property, to service the debt, to keep the asset viable, and to attempt to avoid foreclosure. (R. p. 280, ln. 2–p. 282, ln. 5; p. 283, ln. 7–p. 284, ln. 25; p. 287, ln. 2-15.) Rhodes did not have the money to contribute. (R. p. 287, ln. 10–p. 288, ln. 8.) This benefited Rhodes by paying down the debt and preserving the asset. (R. p. 390, ln. 9-14.)

Rhodes now denies the parties' agreement was that they would share all losses and profits equally or that the meetings described by Haskin took place. (R. p. 331, 10-25.) Rhodes

contends there was a verbal agreement which provided he was never responsible for losses. (R. p. 232, ln. 12-22; p. 240, ln. 12-24.) Rhodes admitted that this alleged arrangement is nowhere in writing. (R. p. 232, ln. 20-22.) Rhodes explained his version of the agreement with Haskin was based on "common knowledge, common sense." (R. p. 232, ln. 23-25.)

Rhodes contends that he and Haskin had a conversation at Poe's Tavern in which he alleges that Haskin told him that he would not be responsible for any losses. (R. p. 240, ln. 12-21.) In her deposition, Rhodes's wife, Tracey Bozzelli, testified that she was not aware of the parties' arrangement regarding Sully's Restaurant. (R. p. 260, ln. 16–p. 261, ln. 4.) However, at trial she testified that she had thirty to forty conversations with Haskin about the parties' arrangement, which was Haskin provided the financing and Rhodes built the houses. (R. p. 119.) Tracey Bozzelli admitted that she did not pay much attention to the details of their arrangement beyond that. (R. p. 281, ln. 22–p. 283, ln. 3; pp. 120) At trial, she added to her testimony to include an allegation that she knew that Haskin was responsible for getting the loans, paying back the money and that it was her "impression" that Haskin was responsible for paying back all of the fees. (R. p. 118.) Rhodes contends that Haskin told him that "he had nothing to lose but time." (R. p. 242, ln. 3-7.) Other than Rhodes's own testimony, there is no evidence in the record to support this contention.

Rhodes contends that Tim Reese, a real estate agent, and his wife, Tracey Bozzelli, were present for this alleged conversation. (R. p. 241, ln. 6–p. 242, ln. 20.) Neither Tracey Bozzelli nor Tim Reese support this story. Rhodes elicited testimony at trial from Mr. Reese that the lots Haskin and Rhodes were considering purchasing at 2802 Middle and 2624 Myrtle were overpriced. (R. p. 416, ln. 17–p. 418, ln. 8.) Nevertheless, Rhodes proceeded to build houses on these lots, which everyone agrees was his responsibility under the parties' oral agreement.

Neither Tim Reese nor Tracey Bozzelli ever testified at trial that Haskin made the statement to the effect that "all Rhodes had to lose was time" or that Rhodes would not have to share in losses as well as profits. Mr. Reese did not testify at all about this alleged conversation and admitted that he did not know anything about Rhodes and Haskin's business relationship. (R. p. 418, ln. 11-14; p. 419, ln. 22–p. 420, ln. 2.) Neither Mr. Reese nor Tracey Bozzelli testified that they had any understanding of how Rhodes and Haskin would split profits and losses. (R. p. 418, ln. 11-14; p. 419, ln. 22–p. 420, ln. 2; pp. 118-120.) Rhodes's claim that Haskin said to him, "all you have to lose is time" is unsubstantiated by the record; however, the prenuptial agreement, which was authenticated by both Rhodes and Tracey Bozzelli, does show that Rhodes personally owned fifty percent of 2802 Middle Street, 2624 Myrtle Avenue, and 1723 Middle Street, in Sullivan's Island, South Carolina, and was obligated for fifty percent of the debt on those properties. (R. p. 714 at (h).)

From 2008 through 2011, Haskin funded approximately $1,500,000 in debt service, maintenance, taxes, insurance, utilities, and related costs for 2802 Middle, 2624 Myrtle, and 22 Lafar. (R. p. 342, ln. 7–p. 343, ln. 2; p. 344, ln. 15-17.) Haskin, from 2006 to 2011, contributed $837,000 to the carrying costs of 2820 Middle, and Rhodes showed a contributed capital $15,000. (R. p. 342, ln. 7-16; R. p. 454.) The tax returns show that for 2624 Myrtle, Haskin contributed approximately $505,000 in his capital account, and that Rhodes contributed $35,000 through his capital account. (R. p. 342, ln. 7-20.)

Station 22 of Charleston, LLC, actually had three members, Haskin, Rhodes, and Mr. Covington, and their contributions through their capital accounts were $161,384, $3,500, and $122,107, respectively. (R. p. 380, ln. 19 – p. 31, ln. 10.) Haskin funded $161,384 of those carrying costs. (R. p. 380, ln. 19 – p. 31, ln. 10.)

Before this lawsuit was initiated, Rhodes never disputed the fact that he owed Haskin over $1,300,000. (R. p. 292, ln. 23-25; p. 293, ln. 11-13.) Rhodes testified that the reason he never objected during the course of this discussion via email was that he was "taken aback" and "caught off guard" by Haskin's demand for repayment of over $1,300,000 for Rhodes's share of the losses on these projects. (R. p. 319, ln. 4-18.) Haskin's Complaint was filed a year later on October 5, 2012. When asked at trial whether the first time he denied liability for the losses claimed by Haskin was in his Answer to the Complaint in this case, Rhodes responded: "That may be right, I'm not sure." (R. p. 322, ln. 13-15; p. 293, ln. 14-16.) Rhodes did not deny he owed Haskin his share of the carrying costs until he hired an attorney.

On November 3, 2011, Haskin emailed Rhodes and informed him that they had successfully closed on the sale of 2624 Myrtle and had paid off First Citizens Bank for the first mortgage. (R. p. 456.) Rhodes had signed a personal guarantee, guaranteeing over $900,000 in debt on this property. (R. p. 253, ln. 12–p. 254, ln. 25.) Rhodes's primary residence at the time of the November 3, 2011, email was 1723 Middle Street. Rhodes responded by email of November 8, 2011, in which he states, "[c]an meet you tomorrow at 12 at Sullivans. Thanks, Sammy." (R. p. 457.) Haskin responds within minutes stating "[s]ee you then." (R. p. 457) Haskin and Rhodes held the meeting on November 9, 2011, at Sullivan's Restaurant, Rhodes's establishment. The meeting was cordial and Rhodes said that he wanted to consult with his attorney. (R. p. 292, ln. 3-15.)

At the November 9, 2011, meeting, Haskin went on to detail the carrying costs associated with each property, the amount of money he funded to pay for those costs (as well as Mr. Covington), and what Rhodes's share of those costs would be. (R. p. 292, ln. 3-15; R. pp. 458-460.) Haskin detailed the losses incurred on these projects. On November 15, 2011, Haskin

followed up with Rhodes via email to see what he and his attorney needed to confirm the information he provided to Rhodes detailing the losses on the subject properties. In that email, Haskin asked Rhodes if he "had a chance to meet with Rob and come up with a game plan?" (R. p. 461.) Rhodes responded to Haskin ten minutes later, stating "[n]ot yet, will call you when we meet." (R. p. 461.) On December 5, 2011, almost three weeks later, Haskin again inquired via email about the status of the review with Rob Kerr, asking "Sammy, where are we on this?" (R. p. 464.) Rhodes responds an hour later and stated that "Rob is making a list of questions for you. I should get it today and forward to you." (R. p. 464.) The next day, Rhodes informed Haskin that Rob Kerr wanted to see the operating agreements for the LLCs because Mr. Kerr was not familiar with Florida law and what the forgiveness on debt was with the bank. (R. p. 465.) Haskin confirmed receipt of the email on December 8, 2011. (R. p. 466.)

During the entire discussion, Rhodes never denied that he owed Haskin the funds Haskin advanced the companies on behalf of Rhodes – that is until several weeks later after he hired an attorney.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). In an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). On the other hand, when reviewing an action at law, on

appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT BY FINDING THAT SAMUEL RHODES, JR. (RHODES), IS LIABLE FOR ONE-HALF OF THE LOSSES SUFFERED BY THE HASKIN-RHODES PARTNERSHIP ON THE 2624 MYRTLE, LLC, AND 2802 MIDDLE STREET, LLC, PROJECTS AND ONE-THIRD OF THE LOSSES ON STATION 22 OF CHARLESTON, LLC, OR ALTERNATIVELY, REMAND FOR A NEW TRIAL.

The Circuit Court committed reversible error in granting judgment to Respondents based on its conclusion that Rhodes never agreed to contribute to the losses sustained by the various limited liability companies despite overwhelming contemporaneous and competent evidence in the record to the contrary. The Circuit Court disregarded critical, competent, and contemporaneous evidence in making incorrect and unsupported findings that are contradicted by the evidence in the record and the Circuit Court's own findings. Based on the relevant facts of this case and a proper application of the law, it is clear that Rhodes agreed to, and considered himself to be, not only entitled to the profits of 2624 Myrtle, LLC, 2802 Middle Street, LLC, and Station 22 of Charleston, LLC, but personally liable for one half of the losses.

A. This Court should conduct a *de novo* review of the facts in this case for Appellant's equitable cause of action for accounting because the Circuit Court erred by failing to apply applicable South Carolina law.

The Circuit Court erred in holding that Haskin failed to show he is entitled to recovery under an accounting cause of action. (R. pp. 13-14.) The Circuit Court's Order does not fully address Haskin's expert's testimony, the uncontroverted partnership tax returns, Rhodes and Tracey Bozzelli's prenuptial agreement, or the remedy requested except to say that "[t]he evidence presented shows, however, that an accounting has been done for each of these entities and that none of the entities currently owns any assets." (R. p. 13.) The Supplemental Order of April 28, 2016, simply denies any relief and refers back to its scant treatment of the accounting cause of action in its prior February 5, 2016, Order of Judgment. The Circuit Court's orders do

not address the substance of the relief sought. The essence of this case is that Rhodes owes Haskin his share of the losses that Haskin funded on the partnership's behalf in order to balance their respective capital accounts. The Circuit Court ignored the unrefuted expert testimony from Haskin's expert witness, Richard Livingston, CPA/CFF, CFE, CVA, that 50/50 ownership is consistent with what Rhodes told his future wife in their prenuptial agreement dated March 3, 2008, namely, that Rhodes was a 50/50 partner owning one-half of the value of the assets and liable for one-half of the debt. (R. p. 350, ln. 19–p. 351, ln. 13; p. 353, ln. 4–p. 354, ln. 4; p. 714 at (h).) He also testified that if Rhodes only held a profits interest in the projects at issue in this case – 2802 Middle, 2624 Myrtle, and 22 Lafar – that the K-1s for each project from inception of those projects would reflect a capital interest for Rhodes and/or Rhodes Investments, Inc., of zero percent. (R. p. 350, ln. 1-18.) Mr. Livingston testified that the K-1s reflected the fact that Rhodes held a capital interest, a profits interest, and a loss interest in these projects. (R. p. 353, ln. 4–p. 354, ln. 4; *see also* pp. 968-970.)

Haskin is entitled to the equitable remedy of accounting, which requires "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." *Hist. Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (citing 1 Am. Jur. 2d *Accounts and Accounting* § 52 (2005); *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (2010)). In an action in equity tried by a judge, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs.*, 226 S.C. 81, 221 S.E.2d 773. An accounting action between partners is an equitable action. Accordingly, the court reviews the facts and makes findings based upon its view of the preponderance of the evidence. *Lawson v. Rogers*,

312 S.C. 492, 495, 435 S.E.2d 853, 855 (1993) (citing *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).

This Court should conduct a *de novo* review and find facts in accordance with its own view of the preponderance of the evidence because the Circuit Court failed to consider the reliable, substantive evidence of Richard Livingston's testimony, the partnership tax returns, and Rhodes and Tracey Bozzelli's prenuptial agreement. Based on that review, of all of the evidence adduced at trial, this Court should conclude that Haskin advanced Rhodes's share of the carrying costs of the projects at issue, and that Rhodes is liable for the necessary adjustment of their respective capital accounts. The case of *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (2010) is instructive.

In *Consignment*, a gasoline supply contract assignor brought action against assignee for breach of contract, accounting, and declaratory judgment after assignee indicated it would stop paying on existing supply contracts. The *Consignment* Court found a valid and enforceable contract existed and that assignee breached its obligations, ordered an accounting, and declared assignee was obligated to pay assignor fifty percent of net profits on supply contracts previously assigned or procured. *Id.* The Court of Appeals rejected the assignee's argument that assignor's sole remedy was at law under the alleged contract because it had relied on the existence of a binding contract, holding that "[a]n accounting implies the defendant is responsible to the plaintiff for money or property as the result of a contract **or some other fiduciary relationship**. *Id.* (emphasis added) (citing 1A C.J.S. *Accounting* § 6 (2010)). Both contract and fiduciary duties between partners are present in this case. Here, Rhodes is responsible for payment of his share of the losses to properly adjust his capital accounts.

Mr. Livingston calculated the amount of the disparity in capital accounts to be $777,062 for Rhodes's share of the cost incurred in carrying the properties at issue at a loss. Mr. Livingston further calculated $384,503 in prejudgment interest at the legal rate, as required by S.C. Code Ann. § 34-31-20(A), for a total $1,161,565.

B. The Circuit Court erred by disregarding the prenuptial agreement of Rhodes and his wife, Tracey Bozzelli, which proves that Rhodes considered himself personally liable for one-half of the debt on the projects at issue.

Neither the Circuit Court's Order of Judgment of February 5, 2016, nor its Supplemental Order of April 28, 2016, denying Plaintiff's Motion to Alter/Amend make any findings of fact or conclusions of law regarding the Rhodes and Tracey Bozzelli's prenuptial agreement. (*See* R. pp. 3-12; *see also* pp. 15-21.)

In the prenuptial agreement entered into between Rhodes and Tracey Bozzelli on March 3, 2008, Rhodes disclosed that he (1) personally owned fifty percent of properties located at 2802 Middle Street, 2624 Myrtle Avenue, and 1723 Middle Street in Sullivan's Island, South Carolina, and (2) was obligated for fifty percent of the debt on those properties. (R. p. 714 at (h).) The agreement went on to list the fair market value of each property with an asterisk above each amount, as well as the amount of debt on the property. (R. p. 714 at (h).) There was a special notation that Rhodes was responsible for fifty percent of the debt on these properties, which totaled $3,390,000. (R. p. 714 at (h).) Rhodes's disclosure in the prenuptial agreement reveals that he was also responsible for over $2,000,000 in debt on two other projects in which Haskin was not involved. (R. p. 714 at (h).) Rhodes entered into the prenuptial agreement freely and voluntarily under oath after having received advice from his attorney. (R. p. 703.) Rhodes admits, with advice of counsel, that he is liable for half of the debt on 2624 Myrtle Avenue and 2802 Middle Street. (R. p. 714 at (h).)

Haskin's expert, Mr. Livingston, testified that the uncontroverted tax returns and K-1s for these entities demonstrate that Rhodes held an ownership or "capital" interest of fifty percent in each company, which is consistent with what Rhodes told his future wife in their prenuptial agreement, namely, that Rhodes was a 50/50 partner owning one-half the value of the assets and liable for one-half of the debt. (R. p. 350, ln. 19–p. 351, ln. 13; p. 353, ln. 4–p. 354, ln. 354; *see also* pp. 703-718.) None of Rhodes's capital percentages in any of these entities was ever diluted and his ownership remained the same for the entities throughout their existence. (R. p. 351, ln. 11–p. 352, ln. 25.) In fact, "Mr. Rhodes and Mr. Haskin each had a 50 percent ownership in the net asset value of these entities throughout the time they existed." (R. p. 352, ln. 23-25.) If the parties had not agreed to share profits and losses equally, Rhodes would have been diluted, and Rhodes was never diluted. (R. p. 351, ln. 21 – p. 352, ln. 25.) The Circuit Court erred in concluding at trial that Rhodes had been diluted, which was inaccurate and constitutes reversible error. (*See* R. p. 100)

Mr. Livingston also testified that "that's the whole point of a partnership: We're sharing the risk." (R. p. 388, ln. 17–p. 389, ln. 3.) Mr. Livingston elaborated and made it clear that Rhodes's claim of no responsibility for losses is illogical and not credible given the facts because the tax returns show that Rhodes was a full partner with a capital interest, a profits interest, and a loss interest. (R. p. 388, ln. 17 – p. 389, ln. 3.) Mr. Livingston further testified:

> That's what's important about this. He [Rhodes] did not dilute—he took on — they each got their interest for what they were going to do and the risk they were taking at the outset of this. **They got their 50/50 capital in the entity. They have 50 percent of the net value of the assets and the liabilities. That is shown on the financial statement for the [prenuptial agreement], that concept and how that plays out.**

(R. p. 389, ln. 22 – p. 390, ln. 4.)

Rhodes contends that he never agreed to a 50/50 arrangement in which he was responsible for losses as well as gains; however, the prenuptial agreement, which Rhodes signed, contradicts and discredits that claim. Only after he was brought before the Circuit Court did Rhodes attempt to discredit his own prenuptial agreement by claiming that he is not personally responsible for the assets, and the liabilities associated with those assets, when he told his future wife exactly the opposite.

C. The Circuit Court ignored uncontroverted evidence of the partnership tax returns and contradicted its own findings in concluding that Rhodes did not agree to share in and/or was not liable for losses as well as profits.

The Circuit Court's Order of Judgment disregards uncontroverted evidence of the Form 1065 partnership tax returns and schedule K-1s for 2624 Myrtle, LLC, 2802 Middle Street, LLC, and Station 22 of Charleston, LLC, which reflect that Haskin and Rhodes both contributed to losses, and had agreed that they would share profits and losses equally. (R. pp. 8-9.) Each entity had its own form 1065 partnership tax return for all relevant years. Haskin and Rhodes operated between themselves as joint venturers based on their oral agreement to share profits and losses equally. The tax returns of these entities clearly demonstrate that Rhodes was a full partner or member responsible for capital losses and entitled to profits when they existed. Rhodes now claims to having only held a profits interest in these entities, but such claims have no support in the evidence in this case. (R. p. 388, ln. 17–p. 389, ln. 3.)

i. The Circuit Court erred in making incorrect and contradictory findings as to whether Rhodes was either obligated and/or agreed to contribute toward losses.

The Circuit Court's Order found that both Haskin and Rhodes made capital contributions, which both parties claimed as losses on their *individual* tax returns. (R. p. 6.) The Circuit Court also found that Rhodes Investments, Inc., contributed to the capital of 2802 Middle Street

between 2007 and 2011 in the amount $14,277. (R. p. 6.) Despite these findings, the Circuit Court went on to make a contradictory finding that "[n]either Rhodes Investments or Rhodes ever agreed with Haskin[] to contribute towards losses." (R. p. 8.) Although ignored by the Circuit Court, the evidence in the record makes clear that Rhodes did, in fact, make contributions to losses in the form of carrying costs on the projects. (R. p. 395, ln. 2-21.) As the tax returns make clear, Rhodes contributed approximately $54,000 to the projects at issue over a period of a few years for carrying costs such as utilities, insurance, repairs, and other costs. (R. p. 379, ln. 24–p. 383, ln. 18.) These carrying costs were the losses that the Haskin-Rhodes partnership was forced to fund and which Haskin personally advanced.

The Circuit Court's Order of Judgment erroneously finds that "the first time that Haskins [sic] took the position that Rhodes Investments or Rhodes owed him for half of his losses on 2802 Middle, 2624 Myrtle and Station 22 was on November 3, 2011, as shown by an email from Haskin to Rhodes." (R. p. 8.) The Circuit Court's Order ignores the fact that Rhodes contributed to the losses of the companies for years prior to the demand email of November 3, 2011. The Circuit Court also disregards Haskin's testimony about meetings he had with Rhodes about their agreement with regard to these carrying costs and funding them until the properties sold. Haskin testified that, before the beginning of each of these projects, he and Rhodes had a meeting at Haskin's office located at 2913 Middle Street at which Haskin agreed to fund the carrying costs of these projects – debt service, maintenance, taxes, insurance, utilities and related costs – including Rhodes' portion, until the properties sold and that Rhodes agreed to repay Haskin his one-half share of the losses to Haskin upon the sale or disposition of the respective properties. (R. p. 275, ln. 4-21; p. 277, ln. 11-23; p. 279, ln. 16-23; p. 282, ln. 3-17; p. 283, ln. 7-

12.) The parties' *modus operandi* was to settle up on projects as they were sold. (R. p. 275, ln. 4-21; p. 277, ln. 11-23; p. 279, ln. 16-23; p. 282, ln. 3-17; p. 283, ln. 7-12.)

The Circuit Court's Order of Judgment erroneously set forth that "[c]apital contributions made by Rhodes Investments to 2624 Myrtle and 2802 Middle were made at times when Haskins [sic] was out of town and not available to make contributions." (R. pp. 6-7). Rhodes testified that he was not sure whether Haskin was out of town or not when he made these contributions. In his deposition, Rhodes testified that he contributed capital because Haskin was out of town and that "we had to do something before we lost the house". (R. p. 226, ln. 21–p. 227, ln. 19.) *Later in his deposition, Rhodes testified that he did not know why he contributed capital to these projects and surmised that Haskin may have been out of town, but that that he was not sure.* (R. p. 251, ln. 22–p. 252, ln. 2.) (emphasis added).) Rhodes testified at trial that he had a conversation with Haskin about putting money in to pay the bills. (R. p. 313, ln. 5-9.) Haskin testified that Rhodes contributed capital arbitrarily. (R. p. 283, ln. 1-4.) The Circuit Court also made no finding as to the amount Rhodes contributed to 2624 Myrtle or 2802 Middle during this time period. The only evidence in the record supporting this position is Rhodes's own testimony. Haskin disputes Rhodes's claim and craves any corroborating evidence to support Rhodes's version of the events. Rhodes never objected to any of the funding of these losses or advancement of such funding on his behalf. (R. p. 277, ln. 24–p. 278, ln. 4; p. 286, ln. 14–p. 287, ln. 4.)

ii. The Circuit Court erred when it failed to distinguish between the parties' responsibility for funding the carrying costs of the projects as compared to the ultimate liability for those costs.

The Circuit Court failed to differentiate between the initial capital contributions of the parties, responsibility for subsequent capital contributions to fund the carrying costs of these

projects, as well as who was ultimately liable for what percentage of those carrying costs. The Circuit Court made a very important, but incorrect, finding about the crux of the case that:

> Rhodes Investments contribution of capital was in the form of services performed through the efforts of Rhodes in constructing various homes for limited liability companies. Rhodes Investments and Rhodes were not paid any money to construct the home. The evidence shows that a contractor typically charged twenty (20%) percent of the costs of construction of homes at the time the subject residences were constructed. Twenty percent of the cost of construction for projects done at 2624 Myrtle, 2802 Middle and Station 22 totals approximately $692,000.00. **Haskin lost the money he invested in these projects and Rhodes Investments and Rhodes lost their time and effort in constructing the residences over a period of twelve (12) to eighteen (18) months. Haskin was the investor and Rhodes Investments performed the work through the efforts of Rhodes.**

(R. pp. 8-9) (emphasis added).)

The record does not support this finding. The contemporaneous evidence – the prenuptial agreement and the partnership tax returns – make clear that Rhodes was responsible for fifty percent of the losses on 2624 Myrtle and 2802 Middle, as well as one-third of the 22 Lafar project. The various projects were customarily titled in the name of an LLC at the suggestion of the parties' business tax preparer located in Florida. Haskin received his fifty percent ownership interest for acquiring the financing and handling the financial aspects of the projects. (R. p. 309, ln. 13–p. 310, ln. 4.) Rhodes received a fifty percent ownership in the business for agreeing to build the house and oversee construction until it was completed. (R. p. 310, ln. 5-8.) Rhodes was never due any money for constructing the homes in question and there is no evidence supporting that conclusion. (R. p. 310, ln. 9-13.) Rhodes never asked or was entitled to be paid any contractor fee. The time and effort and associated costs not funded by the parties' LLC to build the homes were his contribution in the form of sweat equity Rhodes put in to obtain his fifty

percent ownership interest. Rhodes would share in the profits if there were profits and losses if there were losses. (R. p. 310, ln. 14-19.)

The Circuit Court's findings are contradicted by the uncontroverted evidence in the form of the prenuptial agreement and the partnership tax returns. Haskin contributed money for his initial contribution and Rhodes agreed to handle all of the construction in order to each receive a fifty percent capital ownership in each company. (R. p. 309, ln. 13–p. 310, ln. 8.) The Circuit Court's finding ignores the issue of the funding of subsequent capital contributions for the carrying costs or losses of the partnership, which would be both parties' responsibility. The fact that Rhodes agreed to construct the home and absorb the time and effort of doing so only entitled him to receive the fifty percent interest in the project. Haskin's out-of-pocket funding of the company's losses was in addition to the initial capital he contributed. (R. p. 384, ln. 6–p. 386, ln. 23.) Mr. Livingston testified that "[t]hey each get 50/50. It was a 50/50 partnership. The servicing of the debt after the fact is what is at issue." (R. p. 386, ln. 21-23.) As discussed previously, the record supports a finding that there was an agreement between Haskin and Rhodes that Haskin would fund the carrying costs until the property sold, at which time the parties would reconcile their accounts and Rhodes would contribute his fifty percent share (or one-third share as to Station 22). (R. p. 275, ln. 4-21; p. 277, ln. 11-23; p. 279, ln. 16-23; p. 282, ln. 3-17; p. 283, ln. 7-12.)

Haskin's expert, Mr. Livingston, testified that there is nothing in writing that would indicate that Haskin agreed to pay for all of the losses. (R. p. 288, ln. 19-23.) Mr. Livingston also testified that 50/50 ownership is consistent with what Rhodes told his future wife, Tracey Bozzelli, in their prenuptial agreement of March 3, 2008, namely that Rhodes was a 50/50 partner owning one-half the value of the assets and liable for one-half of the debt. (R. p. 350, ln.

19 – p. 351, ln. 13; p. 353, ln. 4 – p. 354, ln. 4; p. 714 at (h).) Mr. Livingston also testified that if Rhodes only held a profits interest in the projects at issue in this case – 2802 Middle Street, 2624 Myrtle, and 22 Lafar Avenue – that the K-1s for each project from inception of those projects would reflect a capital interest for Rhodes and/or Rhodes Investments, Inc., of zero percent. (R. p. 350, ln. 1-18.) Mr. Livingston further testified:

> Q. So during that period, someone had to fund these carrying costs you just talked about; is that right?
>
> A. Yeah, and **I think it's important to note it goes back to the capital percentage. As Mr. Haskin is funding the debt, paying the expenses of the asset, decreasing the debt, the capital percentage of Mr. Rhodes does not change during that time.** So say he's paying down the debt. The value of that capital percentage is going up. It never changed over time, so **Mr. Rhodes is getting the benefit of Mr. Haskin supporting and maintaining the assets and servicing the debt but still maintains his 50 percent capital percentage in the LLCs.**
>
> **If this was truly, I just get profits, the K-1s would show profits 100 percent, losses zero percent, capital zero percent. That's all the risk I have in this, is I'm going to put some time in and get some money out of it.**
>
> **That's not what the K-1s showed during this time period. The losses are allocated based on who funded them. Mr. Rhodes helped to contribute to those losses during that time period, to fund those losses, and he got to take them on his tax return, and he also continued to have 50 percent of the capital allocated to him and reported that also on his prenuptial, that 50 percent of the fair market value minus the asset.**

(R. p. 353, ln. 4 – p. 354, ln. 4; *see also* pp. 968-970.)

It is clear from the record in this case that Rhodes and Haskin each had a fifty percent ownership in the net asset value of these projects. (R. p. 352, ln. 21-25.) The partnership tax returns for 2802 Middle, LLC, and 2624 Myrtle, LLC, for 2006-2011 reflect that Rhodes Investments, Inc., always held a fifty percent capital interest in 2802 Middle Street and 2624

Myrtle Avenue. Haskin always held the other fifty percent capital interest in those entities. The tax returns for Station 22 of Charleston, LLC (22 Lafar Avenue), for 2006-2011, reflect that Rhodes always held a thirty-three and one-third percent capital interest in 22 Lafar Avenue while Haskin and Covington Properties each held a thirty-three and one-third percent capital interest.

Rhodes's capital percentage interest never changed in 2624 Myrtle and 2802 Middle from fifty percent and thirty-three and one-third percent in Station 22. (R. p. 350, ln. 9-18; p. 353, ln. 4–p. 354, ln. 4.) Rhodes testified that he only held a profits interest, having never agreed to share equally in profits and losses in the projects. (R. p. 312, ln. 13-20.) Mr. Livingston testified that Rhodes held a capital interest and a profits interest. (R. p. 353, ln. 4–p. 354, ln. 4.) A capital interest is an interest that would give the holder a share of the proceeds if the partnership's assets were sold at fair market value and then the proceeds were distributed in a complete liquidation of the partnership. (R. p. 968-970.) A profits interest is a partnership interest other than a capital interest. (R. p. 968-970.) Mr. Livingston testified in his explanation of a K-1 that the capital percentage represents a partner's percentage in the undivided value of the assets of the entity. (R. p. 349, ln. 17-19.)

Haskin and Rhodes each held a fifty percent interest in the fair market value of the assets minus the liabilities that the partner has an interest in. (R. p. 349, ln. 20–p. 350, ln. 5.) "Exactly what the capital percentage shows on each K-1 is how much of the undivided interest in the assets and liabilities that that partner owns." (R. p. 351, ln. 11-13.) Mr. Livingston testified:

> So, for instance, it's a real estate holding company. **It's 50 percent. What that signifies is the fair market value of the assets minus the liabilities that that partner has an interest in 50 percent of that value. So for someone that does – that's what you look at for how much of the capital do they own in that entity. That's what that capital percentage shows each time and what it represents.**

(R. p. 349, ln. 20–p. 350, ln. 5; *see also* pp. 968-970.)

In all of the projects Mr. Livingston reviewed, the tax returns reflect the losses were allocated for tax purposes. (R. p. 349, ln. 2-6.) Losses are nothing that a partner or investor wants. (R. p. 349, ln. 7-10.) Rhodes admitted at trial and in his deposition that the allocation of losses for tax purposes for all of these projects was done based upon which member funded the loss for each year. (R. p. 333, ln. 22–p. 334, ln. 1; p. 255, ln. 13-16.) Defendants' expert, Ellie Thomas, never proffered any opinions in this case except that he agreed with Mr. Livingston's calculations and that the losses were, in fact, allocated to the partner that funded the loss. He also never opined about the prenuptial agreement and what it showed.

D. The Circuit Court erred when it disregarded the evidence of the parties' course of conduct in concluding Haskin and Rhodes were not partners under South Carolina law and that Rhodes was not liable for his share of the partnership losses.

The Circuit Court erred in ruling that Haskin-Rhodes partnership did not exist or that an oral agreement did not exist by which Haskin and Rhodes agreed to share partnership profits and losses equally. The Circuit Court did not address the issue at all in its Order of Judgment of February 5, 2016, and erroneously concluded in its Supplemental Order of April 28, 2016, that "[t]here was no overall 'partnership'. Rather, there were a series of joint ventures that were undertaken in the form of LLCs." (R. p. 17.)

It is not unusual to have a partnership which develops multiple projects each in its own LLC. "[W]hen the parties to a joint venture agreement, in forming a corporation to carry out one or more of its objectives, intend to reserve certain rights *inter sese* under their agreement, which do not interfere with or restrict the management of the affairs of the corporation, its exercise of corporate powers, or the rights of third parties doing business with it, these rights being extrinsic to the corporate entity and its operations, such joint venture agreement may be enforced.

Sagamore Corp. v. Diamond W. Energy Corp., 806 F.2d 373, 378 (2d Cir. 1986). The Second Circuit reasoned that:

> **"[t]here is little logical reason why individuals cannot be 'partners *inter sese* and a corporation as to the rest of the world,' so long as the rights of third parties such as creditors are not involved."** *Arditi v. Dubitzsky, supra,* 354 F.2d at 486. When third parties may be adversely affected by exercise of rights under the partnership agreement, however, those rights will not be enforced. *Fromkin v. Merrall Realty, Inc.,* 15 A.D.2d 919, 225 N.Y.S.2d 632 (1962). **Thus a complete merger of a joint venture into corporate form, which legally supplants the venture, does not occur when the parties retain rights under the venture agreement that are not in conflict with the corporation's functioning, such as when the corporation is a mere "adjunct of a joint venture,"** *Fromkin v. Merrall Realty, Inc., supra,* 15 A.D.2d at 920, 225 N.Y.S.2d at 635, or the retained rights are "independent of and extrinsic to the corporate entity," *Shapolsky v. Shapolsky, supra,* 53 Misc.2d at 833–34, 279 N.Y.S.2d at 751. As was recognized even before *Weisman,* such an agreement "runs along side of the path of the corporation" without being merged into it. *Manacher v. Central Coal Co.,* 284 A.D. 380, 385, 131 N.Y.S.2d 671, 676 (1954), *aff'd,* 308 N.Y. 784, 125 N.E.2d 431 (1955).

Id. at 379 (emphasis added).

In *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 299-300, 765 N.Y.S.2d 575, 585 (2003), the court reasoned that the parties need not reserve any rights in order to maintain their underlying relationship when operating in a corporate form:

> While case law exists standing for the proposition that a joint venture ceases to exist when the parties form a corporation to carry out one or more of its objectives (*see Sagamore Corp. v. Diamond West Energy Corp.,* 806 F.2d 373), the language in *Sagamore* that the parties must have "reserved" certain rights, inter se, in order for the joint venture to continue to exist, appears unnecessarily restrictive, serving no prophylactic or remedial purpose. We view as a better approach that of the Third Department in *Blank v. Blank,* 222 A.D.2d 851, 852–853, 634 N.Y.S.2d 886, which noted the lack of "a compelling reason to preclude individuals from acting as partners between themselves and as a corporation to the rest of the world" where the rights of third parties, such as

> creditors, are not involved, and the parties' rights under the partnership agreement (here, the joint venture) are "not in conflict" with the corporation's functioning. **We conclude that the reasonable rule is to make the governing concern whether the parties' rights as joint venturers are in conflict with the corporation's functioning, rather than whether they expressly provided for a reservation of rights in the corporate governance documents.**

Id. (emphasis added).

The Circuit Court's Supplemental Order erroneously found that no overarching partnership between Haskin and Rhodes existed despite overwhelming evidence to the contrary. (R. p. 16-17.) For example, Haskin purchased a lot on Sullivan's Island located at 2851 I'on Avenue individually and sold it for a substantial profit less than a week later. (R. p. 319, ln. 12– p. 320, ln. 16.) Haskin paid Rhodes his fifty percent share of the profits because he was obligated to Rhodes to split all profits and losses of their partnership equally. (R. p. 319, ln. 12– p. 320, ln. 16.) Haskin testified:

> Q. And 2851 I'on was different from the other deals in the fact that it was a lot; is that correct?
>
> A. May have that address wrong, but I purchased a lot on Sullivan's Island that Sammy found for me, and it was such a crazy time. I closed on the lot on Friday, and a realtor had come to me with a price that was above what I paid for the lot, and I sold it the following Monday.
>
> Q. And was the lot in your name?
>
> A. Yes, sir.
>
> Q. And what did you do with profits from that lot sale?
>
> A. **Even though it was in my name, I gave Sammy half the profits.**
>
> Q. **Why would you give him half the profits?**

A. **Sammy was my partner. He was my best friend. We were doing projects together. We were supposed to split all profits and losses equally.**

Q. What did Mr. Rhodes do to assist you in closing that transaction, if anything?

A. Sammy found the lot and notified me of it, but as far as any financial help in closing, there was none.

Q. And the lot was in your name only?

A. Yes, sir.

Q. And you voluntarily gave him half the profits on the sale?

A. That's correct.

Q. And why would you do that?

A. Again, Sammy was my partner. He found the lot and I agreed with Sammy in deals that we did to split all profits and losses equally.

(R. p. 319, ln. 12–p. 320, ln. 16. (emphasis added).)

Richard Livingston testified that there was nothing in writing that indicated that Haskin agreed to pay for all of the losses on any project. (R. p. 347, ln. 19-23.) Haskin testified that he and Rhodes would share profits and losses equally. (R. p. 265, ln. 14-21.)

South Carolina law has long recognized that "[a] partnership agreement may rest in parol." *Beck v. Clarkson*, 300 S.C. 293, 301, 387 S.E.2d 681, 685 (Ct. App. 1989). "The agreement may even be implied and without express intention." *Id.* (citing *Wyman v. Davis*, 223 S.C. 172, 74 S.E.2d 694 (1953) and *Buffkin v. Strickland*, 280 S.C. 343, 312 S.E.2d 579 (Ct. App. 1984)); *Halbersberg v. Berry*, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990); *Moore v. Moore*, 360 S.C. 241, 260-61, 599 S.E.2d 467, 477 (Ct. App. 2004). "A partnership may be

found to exist by implication from the parties' conduct." *Corley v. Ott*, 326 S.C. 89, 485 S.E.2d 97, 99 (1997) (citing *Stephens v. Stephens*, 213 S.C. 525, 50 S.E.2d 577 (1948)).

To establish a partnership there must be an association of two or more persons to carry on as co-owners a business for profit. *Buffkin*, 312 S.E.2d at 579; *see also* S.C. Code Ann. § 33–41–210 ("A 'partnership' is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this State, a registered limited liability partnership. . . . ."). "[W]here the parties to a contract, by their acts, conduct, or agreement show that they intended to combine their property, labor, skill and experience, or some of these elements on one side, and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, such parties are partners." *Stephens*, 50 S.E.2d at 580. The sharing of profits is *prima facie* evidence of the existence of a partnership. S.C. Code Ann. § 33–41–22.

The Circuit Court erred in concluding that "[t]he course of dealings between the parties does not support Haskin's contention that either Rhodes Investments or Rhodes agreed to contribute to Haskin's losses." (R. p. 8.) There are no findings of fact in the Circuit Court's Order of Judgment or Supplemental Order that any agreement exists whereby Haskin would absorb all of the losses. (R. p. 350, ln. 19–p. 351, p. 13; p. 353, ln. 4–p. 354, ln. 4.) The parties conducted themselves as partners and agreed to share in profits and losses equally. Rhodes breached that agreement.

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771, 773 (Ct. App. 1997). Also, conduct manifesting assent constitutes acceptance and acceptance may be

inferred from conduct. *Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1409 (D.S.C. 1996). The elements of a breach of contract claim are: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate cause of the breach. *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

The same rules of law apply to joint adventure and partnership. *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961). In fact, relations among joint venturers are governed by partnership law. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 238, 391 S.E.2d 538, 543 (1989). Haskin and Rhodes operated their joint venture in South Carolina as South Carolina residents on South Carolina real estate projects. Rhodes's conduct manifested the intent to share profits and losses equally. Rhodes never objected to Haskin funding, out of his own pocket, all of the carrying costs in this case until he filed his Answer to the Complaint a year after he was emailed by Haskin to discuss repayment of his share of the carrying costs. (R. p. 277, ln. 13–p. 278, ln. 4; p. Trial Tr. Haskin Test., 17:13-18:4, p. 281, ln. 15-17; p. 281, ln. 23–p. 282, ln. 17.)

A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992) (citing *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)). Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto. *Id.* (citing *Spradley v. Houser*, 247 S.C. 208, 146 S.E.2d 621 (1966)).

A court must first look to the joint venture agreement between the parties. *Id.* A partnership agreement can rest in parol and a partnership can be found to exist by implication from the parties' conduct. *Beck v. Clarkson*, 300 S.C. 293, 387 S.E.2d 681 (Ct. App. 1989); *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997). Likewise, as long as all the elements of a joint venture are present, an oral agreement may be valid and effective as a writing is not indispensable to the creation of a joint venture. 28 S.C. Jur. *Partnerships and Joint Ventures* § 100; 46 Am. Jur. 2d *Joint Ventures* § 11.

In the present case, Haskin and Rhodes operated as joint venture partners in a series of projects over a long period of time. Haskin and Rhodes agree that they have an oral agreement whereby Haskin would arrange the financing, handle all out of pocket cost until the first construction loan draw, Rhodes would construct the home on the property and handle the day to day management of the project; that in every case, the proceeds from the sales of the above referenced properties would be and were used to repay the outstanding indebtedness of the particular LLC, repay the members for their contributed capital, and the remaining profits were disbursed equally to Haskin and Rhodes Investments, Inc. (R. p. 265, ln. 1-5; p. 266, ln. 21-25; p. 267, ln. 8-12; p. 332, ln. 18–p. 333, ln. 16; R. p. 367, ln. 22–p. 368, ln. 21.)

The fact that the parties registered limited liability companies does not change the underlying relationship between Haskin and Rhodes, nor does it make the limited liability acts of Florida or South Carolina applicable to the crux of this case. They agreed that, as between them, they would operate as partners. (R. p. 265, ln. 1-5; p. 266, ln. 21-25; p. 267, ln. 8-12; p. 332, ln. 18–p. 333, ln. 16; R. p. 367, ln. 22–p. 368, ln. 21.) These two friends formed a partnership on Sullivan's Island to develop properties in and around Isle of Palms and Sullivan's Island, South Carolina.

The evidence supports the conclusion that, as a result of their oral partnership agreement, Rhodes owes Haskin $777,062 for his share of the cost incurred in carrying the properties at issue at a loss, and $384,503 in prejudgment interest at the legal rate as required by S.C. Code Ann. § 34-31-20(A), for a total of $1,161,565. (R. p. 371, ln. 6–p. 373, ln. 20.; *see also* p. 455.)

S.C. Code Ann. § 33-41-510 (1976), as amended, requires:

> (1) each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied. Except as provided in Section 33-41-370(B), **each partner shall contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits...**

Rhodes's capital percentage of fifty percent in 2802 Middle Street and 2624 Myrtle Avenue reflects the fact that he is an equal partner in those projects, thereby being responsible for one-half the losses in addition to enjoying any profits that might have been generated. (R. p. 353, ln. 4–p. 354, ln. 4; s*ee also* pp. 968-970.) Likewise, Rhodes's thirty-three and one-third percentage capital interest in Station 22 of Charleston, LLC, reflects his share of the profit and losses at thirty-three and one-third percent. Accordingly, Rhodes is required by South Carolina law to make Haskin whole for the money he advanced on Rhodes's behalf to cover the carrying costs of the above described projects.

i. The Circuit Court erred in making unsupported findings that led it to erroneously conclude that no enforceable oral agreement exists whereby Haskin and Rhodes agreed to share partnership profits and losses equally.

The Circuit Court held that "[n]either Rhodes Investments or Rhodes ever agreed with Haskins [sic] to contribute towards losses" and ignores evidence to the contrary. (R. p. 8; pp. 17-18.) The Circuit Court also erred in not making any findings of fact as to what the agreement

between the parties actually was. Instead, in its Supplemental Order the Circuit Court made a finding that:

> Based on the findings of fact explained in this Court's Order of Judgment, this Court found that the agreement between the parties regarding business operations of 2624 Myrtle, LLC and 2802 Middle, LLC did not include one in which Rhodes or Rhodes Investments would contribute to losses sustained by Haskin.

(R. p. 18.)

The Circuit Court's Order also incorrectly holds that "Jim Covington, owner of Covington Investments, Inc. also confirmed that there was no oral agreement concerning losses relative to Station 22 *and that Rhodes refused to sign for the construction loan project.*" (R. p. 11 (emphasis added).) To the contrary, Mr. Covington, a real estate agent, testified at trial that Rhodes did not sign the note and did not know why. (R. p. 412, ln. 24–p. 413, ln. 3.) The Circuit Court's Order incorrectly attributes testimony to Mr. Covington that Rhodes "refused" to sign to the note when in fact Covington did not know what the reason was, only that Rhodes did not sign it. (R. p. 11.) The Circuit Court's Order also erroneously finds as to Station 22 that "Rhodes Investments would not sign the Operating Agreement as it contained a provision for mandatory capital contributions. Rhodes Investments, Inc., and Rhodes would also not sign on the construction loan that was obtained by Station 22 for the construction of the home at 22 Lafar Street." (R. p. 7.) Other than Rhodes's self-serving testimony, there is no support for this finding in the record.

The testimony of Mr. Covington and Rhodes are not consistent as to whether or not an agreement was discussed as to how they would share profits and losses for 22 Lafar. Rhodes testified in his deposition that he never had discussions with Mr. Covington about any arrangement as to how the business for 22 Lafar Avenue would be handled. (R. p. 246, ln. 18-

20; p. 247, ln. 14-16.) However, Rhodes testified that their arrangement was "understood" even though it was never discussed and Rhodes had never done a project with Mr. Covington before 22 Lafar. (R. p. 246, ln. 5-20; p. 247, ln. 14-16.) Mr. Covington has never sought repayment from Rhodes for the funding he provided for carrying costs for the project at 22 Lafar on behalf of Rhodes. (R. p. 412, ln. 20-25.)

Mr. Covington did not even know how much of a percentage ownership he or Covington Properties, Inc., had in Station 22 of Charleston, LLC. (R. p. 412, ln. 11-14.) Mr. Covington's entity, Covington Properties, Inc., is a one-third member of Station 22 of Charleston, LLC, the entity in which title was held for 22 Lafar Avenue, Daniel Island. (R. p. 107) When asked why he had not sought repayment from Rhodes, Mr. Covington testified he did not "have a number." (R. p. 413, ln. 20-25.) Mr. Covington also did not know how much he had contributed to the carrying costs of the project, stating that he would "have to talk to [his] accountant". (R. p. 413, ln. 12-19.) Mr. Covington and Haskin secured the financing for 22 Lafar. (R. p. 413, ln. 15-25.)

Rhodes tried to create an inference based on the fact that Mr. Covington has not sought repayment of the funds he advanced on Rhodes's behalf for Station 22. Rhodes admitted in his deposition that Mr. Covington was the listing agent for 22 Lafar Avenue and made a commission on its sale to Station 22 of Charleston, LLC. (R. p. 244, ln. 10–p. 245, ln. 8.) In his deposition, when asked how many times 3029 Middle Street (Rhodes and Tracey Bozzelli's home) had been listed for sale, Rhodes admitted that it had been on and off of the market several times. (R. p. 257, ln. 19-25; p. 258, ln. 1-9.) Moreover, **Rhodes admitted that Mr. Covington was the listing agent for the sale of 3029 Middle Street for the times that it was on the market.** (R. p. 256, ln. 3-15 (emphasis added).)

Rhodes also testified that Mr. Covington and Haskin approached him to build another project in which they did not want to bring him in on as a partner, but instead just as a builder and to pay him a fee. (R. p. 315, ln. 25–p. 316, ln. 5.) Rhodes was paid a fee of approximately $100,000 to build that project. (R. p. 316, ln. 8-10.) Unlike the many deals in which Rhodes was a partner, Rhodes was not liable on this project for losses since he was only the builder and not an equity partner.

E. The Circuit Court erred in finding that the operating agreement for 2624 Bayonne, LLC, a company not at issue in this case, was binding on the parties as to 2624 Myrtle, LLC, and 2802 Middle Street, LLC.

The Circuit Court committed reversible error in making unclear and contradictory findings of fact that appear to find that the 2624 Bayonne, LLC, operating agreement was binding on the parties even though the operating agreements for 2624 Myrtle, LLC, and 2802 Middle Street, LLC, are unsigned and the parties never followed the provisions of the 2624 Bayonne, LLC, operating agreement. The Bayonne project was never at issue in this case, but its operating agreement is the same as the unsigned agreements pertaining to 2624 Myrtle, LLC, and 2802 Middle Street, LLC. The Circuit Court made a finding that cites the provisions in the 2624 Bayonne, LLC, operating agreement that "no member shall be required to contribute additional capital to the Company" and that "[e]ach Member shall look solely to the assets of the Company for return of the Member's capital contribution... ." (R. p. 7.)

Despite these findings, the Circuit Court's Order does not make any conclusions of law as to whether or not the foregoing operating agreements were followed by the parties or to what extent, if any. The Circuit Court's Order makes findings of fact as to the *existence* of the operating agreements, but not as to whether they were valid, binding, or enforceable. (R. p. 7) The Circuit Court's Order *does*, however, acknowledge that there are no signed operating

agreements for any of the projects at issue in this case. (R. p. 7.) In its Order, the Circuit Court does not address the fact that the operating agreements for 2624 Myrtle, LLC, and 2802 Middle Street, LLC, are drafts of Florida operating agreements while the operating agreement for Station 22 of Charleston, LLC, *is* a South Carolina form. Further, the Circuit Court does not address the origin of these draft operating agreements at all in its Order of Judgment or Supplemental Order. The Circuit Court's Order erroneously finds that "[a]n unsigned Operating Agreement also exists for Station 22. Rhodes Investments would not sign the Operating Agreement as it contained a provision for mandatory capital contributions." (R. p. 7.) The evidence does not support this finding. The reason why the Station 22 of Charleston, LLC, operating agreement is unsigned is because the parties had an oral agreement to share profits and losses equally. (R. p. 284, ln. 1-16.)

The Circuit Court erroneously found as to 2624 Myrtle, LLC, and 2802 Middle Street, LLC, that the "*evidence shows these operating agreements were not signed because the bank financing which required signed agreements before closing was not used.*" (R. p. 7.) The only support in the record for this finding is the uncorroborated, speculative testimony of Rhodes who testified:

> Q. **The other two operating agreements for 2802 Middle and 2624 Myrtle are not signed; is that correct?**
>
> A. **That's correct.**
>
> Q. Do you know why they were not signed?
>
> A. **I think it has to do with Bill switching the financing to some kind of equity line out of his house. It was under my understanding was when you get a loan, you have to have an operating agreement,** which 2624 represents, but I think Bill switched the financing with putting in personal money out of his house, and that's why these never got

> signed. But they were provided to us, and Bill acknowledged that in his pretrial statement.

(R. p. 329, ln. 14–p. 330, ln. 1 (emphasis added).)

The Circuit Court's Order of Judgment does not address the fact that the 2624 Bayonne, LLC, operating agreement was not followed by the parties in any way. The Circuit Court's Supplemental Order likewise fails to deal with this issue. Under the 2624 Bayonne, LLC, operating agreement, Haskin would be entitled to a preferred return of six percent once the property sold. However, Haskin never sought nor received a preferred return in the Bayonne project or any of the projects at issue in this case. (R. p. 358, ln. 2-24; R. p. 3-19.) In fact, when the 2624 Bayonne property was sold in 2007, a larger percentage of gain was allocated to Rhodes, thereby allowing Rhodes to take a larger distribution than Haskin and to provide for equal ending capital accounts between the two members. (R. p. 358, ln. 2-24; R. p. 3-19.)

Mr. Livingston testified that he interviewed the accountant who provided the form operating agreements and had several conversations with him as part of his investigation in this case. (R. p. 356, ln. 20 – p. 357, ln. 22.) Michael Gratz prepared the operating agreement for 2624 Bayonne, LLC, a project that was very profitable for Haskin and Rhodes. The 2624 Bayonne, LLC, project was a project not at issue in this case. Mr. Livingston testified about the origin of the signed operating agreement for 2624 Bayonne, LLC, and the unsigned operating agreements for 2802 Middle Street, LLC, and 2624 Myrtle, LLC:

> A. Your Honor, in speaking with Mr. Gratz, I asked how did these operating agreements come into existence? Where did they come from? And he stated that in preparing – in setting up the LLCs in Florida that he had gone to his file and found LLC agreements that that were used – that he had that were used in Florida, put the names on here, and forwarded them on to Mr. Haskin. **He says he was not asked to do it. He was doing it as part of trying to help them set up the LLC, and that was his explanation as to why these agreements were even – why they even exist at this point**

in time. He was the author of these agreements, the CPA in Florida, and he just pulled these as templates for the parties as ones he dealt with.

Q. So based on your review of these documents, these operating agreements, and your testimony, do you believe that the parties followed those agreements, those operating agreements?
A. Well, from an accounting standpoint, **the only one that is signed is 2624 Bayonne, and it doesn't appear to have been followed.** The other two are unsigned, and it doesn't appear those two were signed.

Q. **Could you give us an example in the Bayonne instance which tells you why it wasn't followed?**

A. **Well, probably the most significant example is the calling of a preferential return for the members for the capital investment in the company of 6 percent of the average daily balance of that net capital investment, and for the monies that were put in by Mr. Haskin and Mr. Rhodes, there was no calculation of preferred return on those investments.**

Q. **So Mr. Haskin did not take a preferred return in 2624 Bayonne; is that right?**

A. **No, he did not.**

Q. And did these other unsigned operating agreements provide for a preferred return?

A. Well, they're all mirror images of each other. They're exact copies. Just the names are changed.

Q. **On 2624 Myrtle and 2802 Middle Street, did Mr. Haskin take a preferred return?**

A. **I didn't see any evidence of it, no.**

Q. So he shared profits and losses 50/50 with Mr. Rhodes, correct?

A. After the – **I testified the reimbursement of the initial contribution until the financing could be obtained and then to even out the capital accounts. So yes, it's 50/50, but it's not 300,000 and 150,000 goes to each partner. It's to first reimburse the initial capital contribution and the division of it.**

(R. p. 357, ln. 8–p. 359, ln. 7 (emphasis added).)

Of the fourteen projects that the parties completed, only one, 2624 Bayonne, which is not at issue here, has a signed operating agreement, and that agreement was not followed. (R. p. 357, ln. 8 – p. 359, ln. 12; R. p. 272, ln. 3-19; p. 289, ln. 7-11.) Mr. Livingston further testified, in referencing the signed 2624 Bayonne, LLC, operating agreement and the unsigned 2624 Myrtle, LLC, and 2802 Middle Street, LLC, operating agreements:

> As I understand it, Mr. Rhodes's oral agreement was that he only had an interest in the profit of it. **This does not contemplate the individual having – Mr. Rhodes just having through his entity Rhodes Investments just an interest in the profits. This contemplates capital interest, contributions, distributions against that capital interest and preferred returns. I don't see anything in this where it says Rhodes Investments, Inc., is just involved in this for whatever profit is generated.**

(R. p. 405, ln. 9-22 (emphasis added).)

Rhodes did not even have a copy of the signed 2624 Bayonne, LLC, operating agreement until counsel for Haskin sent it to him in discovery in this case. (R. p. 225, ln. 14-15.) Neither Haskin nor Rhodes remember why they signed that one operating agreement. (R. p. 233, ln. 20 – p. 239, ln. 9; p. 272, ln. 16-19; p. 290, ln. 17-24.) Rhodes changed his testimony at trial by claiming he had an attorney review the 2624 Bayonne, LLC, operating agreement before he signed it. (R. p. 329, ln. 4-13.) Despite these attempts made at trial that Rhodes had an attorney review the 2624 Bayonne, LLC, operating agreement prior to signing it, no evidence exists in the record that this occurred. Rhodes merely speculated at trial about the reason the operating agreements were not signed. (R. p. 329, ln. 18-24.)

The operating agreement for Station 22 of Charleston, LLC, which was never signed, was not prepared by Michael Gratz. That agreement is different than the other unsigned operating agreements for 2624 Myrtle, LLC, and 2802 Middle Street, LLC. When asked about the Station

22 operating agreement in his deposition, Rhodes stated: "That's – that's not one I care for. This is a totally different operating agreement from the three I asked for." (R. p. 228, ln. 4-6.)

Rhodes has argued that the 2624 Bayonne, LLC, operating agreement reflects the parties' twenty-year long verbal agreement, and that the allocation of profits and losses *for tax purposes* in the partnership tax returns for these projects reflect the parties' oral agreement. (R. p. 224, ln. 13–p. 225, ln. 21.) The parties had been doing business together for ten years prior to the Bayonne project. Rhodes relies on this one operating agreement, notwithstanding upwards of fourteen projects done together, including 22 Lafar, which had a very different operating agreement and was also never signed, to contend that he is not required to repay Haskin for funds Haskin advanced on Rhodes's behalf. (R. p. 228, ln. 1–p. 229, ln. 14.) None of the projects at issue in this case have signed operating agreements or any other written agreements. (R. p. 356, ln. 7-19; p. 290, ln. 17-24; p. 329, ln. 14-16; p. 230, ln. 6-12; p. 233, ln. 24–p. 234, ln. 3; p. 234, ln. 11–p. 236, ln. 1.)

F. The Circuit Court erred when it failed to recognize the "part performance exception" to Fla. Stat. Ann. § 608.4211(2), misapplied Florida law, and disregarded the evidence of the course of conduct between the parties to conclude that Rhodes was not liable for his share of the losses under Florida law.

The Circuit Court erred in concluding that "[t]he course of dealings between the parties does not support Haskin's contention that either Rhodes Investments or Rhodes agreed to contribute to Haskin's losses." (R. p. 8.) The Circuit Court further erred when it concluded that "[t]here was no overall 'partnership.' Rather, there were a series of joint ventures that were undertaken in the form of LLCs." (R. p. 17.) There are no findings of fact in Circuit Court's Order of Judgment or its Supplemental Order that any agreement exists whereby Haskin would absorb all of the losses.

The Circuit Court misapplied Florida law in concluding that "[b]ased on the findings of fact explained in this Court's Order of Judgment, this Court found that the agreement between the parties regarding business operations of 2624 Myrtle, LLC and 2802 Middle, LLC did not include one in which Rhodes or Rhodes Investments would contribute to losses sustained by Haskin." (R. p. 18.) The Circuit Court found that "2006 Florida statutes provided that 'all members of a limited liability company may enter into an operating agreement which need not be in writing, to regulate the affairs of the limited liability company and the conduct of its business...." (R. p. 18.) The Circuit Court cited Fla. Stat. 608.4211(2) to support its finding that promises by a member to contribute to a company must be in writing to be enforceable. (R p. 18.) The Circuit Court also found that "[a] promise to contribute to the limited liability company is not enforceable unless it is set out in writing signed by the member" and that "the members, managers, and managing members of the limited liability company are not liable, solely by reason of being a member or serving as a managing member ... for a debt, obligation, or liability of the limited liability company". (R. p. 18 (citing Fla. Stat. 608.4227(1).)

Even assuming that the limited liability acts of the jurisdictions in which the various LLCs were formed, either South Carolina or Florida, govern this dispute, the Circuit Court should have reached the same conclusion, namely that Rhodes is liable for his one-half share of the costs incurred in carrying 2624 Myrtle and 2802 Middle at a loss, and one-third of the costs associated with carrying 22 Lafar. Rhodes breached the parties' partnership agreement and the damages were sustained by Haskin, individually, and not any of the LLCs. The losses that were incurred from the parties' joint ventures were not "losses" attributable to the LLCs. This is not an action in which the LLCs, or their members, are seeking "contribution," as defined in the LLC acts, from Rhodes to the LLCs. Rather, Haskin, individually, is seeking damages for Rhodes's

failure to honor their verbal agreement to split the losses just as they had, personally, split the profits.

Application of the LLC laws would not alter the fact that the parties' oral agreement is enforceable or that profits and losses are to be allocated pursuant to that agreement. *See* S.C. Code Ann. § 33-44-103; Fla. Sta. § 608.423(1) (2012)[3] (both providing "all members of a limited liability company may enter into an operating agreement, **which need not be in writing**, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company") (emphasis added); *see also* Fla. Stat. Ann. § 608.4261 ("[t]he profits and losses of the limited liability company shall be allocated among the members in the manner provided in the articles of organization or the operating agreement")).

As noted above, Haskin is not alleging that Rhodes is required to make a "contribution" to the LLCs. *See* Fla. Stat. Ann. § 608.402(7) (defining "contribution" as "any cash, property, or services rendered or a promissory note or other obligation to contribute cash or property or to perform services, **which a person contributes to the limited liability company** as a member") (emphasis added); *see also* S.C. Code Ann. § 33-44-401 ("A contribution of a member of a limited liability company may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed, or other agreements to contribute cash or property, or contracts for services to be performed.").

Misapplication of Fla. Stat. Ann. § 608.4211(2)

The Circuit Court misapplied Florida law and failed to recognize the "part performance exception" to Fla. Stat. Ann. § 608.4211(2). Fla. Stat. Ann. § 608.4211(2) does not apply to this

[3] The citations to Florida law are to Florida's former Limited Liability Company Act, which was replaced in its entirety by a revised act. However, the revised act, at Fla. Stat. Ann. § 605.1108, clarifies that it only applies to LLCs formed on or after January 1, 2014. Moreover, its "Savings Clause" statute, Fla. Stat. Ann. § 605.1106, mandates that the former act would continue to apply to LLCs formed pursuant to the same.

case. Even if Haskin was seeking to enforce an oral agreement by Rhodes to "contribute" to the LLCs, this statute would not render that agreement unenforceable. This "part performance" exception, which is most commonly seen in the context of the statute of frauds, has been specifically recognized in Florida as also being applicable to this statute's writing requirement. *See Capone v. Estate of Ison*, No. 06-80945-CIV, 2007 WL 7144356, at *2 (S.D. Fla. May 29, 2007) (concluding that an LLC member's oral promise to contribute to the LLC is enforceable where part performance has occurred); *Gerry v. Antonio*, 409 So. 2d 1181, 1183 (Fla. Dist. Ct. App. 1982) ("When an oral contract has been fully performed by one party, the statute of frauds may not be employed as a defense."); *see also W. B. D., Inc. v. Howard Johnson Co.*, 382 So.2d 1323 (1980).

In the present case, Haskin performed in conformity with the parties' **oral agreement**, not any written operating agreement. (R. p. 265, ln. 20-21; p. 267, ln. 15-16; p. 270, ln. 3-5; p. 320, ln. 18–p. 321, ln. 3.) The Circuit Court incorrectly characterized full performance of the parties' oral agreement as part performance pursuant to unsigned operating agreements. (Supp. R. p. 2, ln. 17-18.) At trial, the Circuit Court opined that:

> You've had partial performance. You've almost had entire performance as far as that goes. The only thing you haven't had is what happens upon liquidation, in other words, when they sell the piece of property, the question remains, is their right to contribution to losses? **That's the only thing that's unperformed on those operating agreements at this point in time.**

(Supp. R. p. 2, ln. 17-24 (emphasis added).)

The Circuit Court, in making the foregoing conclusion, failed to make reference to anything specific within the operating agreements related to Rhodes's part performance – be it construction of the homes, management of the projects, or otherwise. Further, no reference was made to any details of the parties' arrangement that are set forth in the operating agreements

because such are not included in any written operating agreement. Mr. Livingston testified that the parties had not followed the process of liquidation set forth in the unsigned operating agreements by selling off the sole asset of the company. (R. p. 396, ln. 24 – p. 397, ln. 10.) Mr. Livingston stated that "the actual termination of the company is what liquidation really means." (R. p. 396, ln. 24 – p. 397, ln. 10.) The Circuit Court's reliance on the liquidation provision in the operating agreement is misplaced, as is its conclusion that the written operating agreements were followed. There is a preponderance of substantial, credible evidence that contradicts a conclusion that the parties relied on that provision or any other provision in the written operating agreements.

The Bayonne Operating Agreement

Out of fourteen projects, only the 2624 Bayonne, LLC, operating agreement was signed. Even if this Court views the 2624 Bayonne, LLC, operating agreement as applicable to this case, which it is not, it is clear from the parties' course of conduct that they did not follow that agreement in their other projects. (R. p. 356, ln.7-19; p. 329, ln. 14-16; p. 228, ln. 1–p. 229, ln. 14; p. 230, ln. 6-12; p. 233, ln. 24 – p. 234, ln. 3, p. 234, ln. 11 – p. 236, ln. 1; p. 247, ln. 11-13.) One feature of the 2624 Bayonne, LLC, operating agreement was that Haskin *would have received* a preferred return of six percent once the property sold. Haskin never sought nor received a preferred return. (R. p. 358, ln. 2-24; p. 272, ln. 3-19.) In fact, when the 2624 Bayonne property was sold in 2007, a larger percentage of gain was allocated to Rhodes, thereby allowing Rhodes to take a larger distribution than Haskin and to provide for equal ending capital accounts between the two members.

Even assuming the written operating agreements do control, which they do not, in Florida, a written agreement may be modified by the subsequent conduct or course of dealing of

the parties. *Rhodes v. BLP Associates, Inc.*, 944 So.2d 527 (2006); *see also St. Joe Corp. v. McIver*, 875 So.2d 375, 382 (Fla. 2004); *Gallagher v. Dupont*, 918 So.2d 342, 347 (Fla. 5th DCA 2005); *White v. Ocean Bay Marina, Inc.*, 778 So.2d 412 (Fla. 3d DCA 2001); *Franklin Life Ins. Co. v. Davy*, 753 So.2d 581, 586 (Fla. 1st DCA 1999); *Beach Higher Power Corp. v. Granados*, 717 So.2d 563, 565 (Fla. 3d DCA 1998).

It has also been held that a contract can be modified even where the written contract specifically prohibits amendment or modification unless it is in writing and signed by the parties. *See White*, 778 So.2d at 412 (Fla. 3d DCA 2001); *Beach Higher*, 717 So.2d at 563; *Linear Corp. v. Standard Hardware Co.*, 423 So.2d 966 (Fla. 1st DCA 1983); *Pan American Eng'g Co. v. Poncho's Constr. Co.*, 387 So.2d 1052 (Fla. 5th DCA 1980).

This Court should find that, though the 2624 Bayonne, LLC, operating agreement was executed, it was irrelevant to the 2802 Middle and 2624 Myrtle projects because the parties conducted themselves in accordance with their oral agreement as detailed herein, not in accordance with the provisions of that agreement. Even if the 2624 Bayonne, LLC, operating agreement was followed in any degree, which it was not, the parties modified its terms by their course of conduct to the point that it was never controlling.

CONCLUSION

For the reasons stated, this Court should reverse and vacate the Circuit Court's prior Orders and find that Samuel Rhodes, Jr., is liable for one-half of the losses suffered on the 2624 Myrtle, LLC, and 2802 Middle Street, LLC, projects and one-third of the losses on Station 22 of Charleston, LLC, or alternatively, remand this case for a new trial.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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March 13, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

RECEIVED
MAR 14 2017
SC Court of Appeals

Appellate Case No. 2016-001170

William B. Haskin, Jr.,.....Appellant,

vs.

Samuel W. Rhodes, Jr., Rhodes Investments, Inc.,
Rhodes Consulting, LLC, and Tracey M. Bozzelli..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Brief complies with Rule 211(b), SCACR.

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