THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Appellate Case No.: 2016-001612
Civil Case No.: 2014-CP-40-4234

Luis Endara,.....Appellant,
v.
AVSX Technologies, LLC;
Bobby Johnson; and
Mary Kay Johnson,.....Respondents.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

I. The trial court committed reversible error by refusing to charge Appellant's timely request to charge the South Carolina Uniform Partnership Act that was raised by the pleadings and supported by the evidence, resulting in the prejudicial denial of Appellant being able to put to the jury his status as a partner.

STATEMENT OF THE CASE

This is an appeal from a four day jury trial held before the Honorable Craig D. Brown January 25-29, 2016 in the Richland County Court of Common Pleas. At issue was the ownership of AVSX Technologies, LLC (hereinafter "AVSX").

Appellant's complaint was filed on July 3, 2014 alleging among other things his status as a member of AVSX and in the alternative his status as a Partner with a 50% ownership interest in AVSX. Respondents filed an Answer on August 8, 2014 denying all of Appellant's claims. Respondents have maintained that Appellant was never more than an employee of the business and was duly fired on March 21, 2014.

At the end of the third day of the trial, a charge conference was held. Appellant presented to the Court requested charges on the South Carolina Partnership Act (Tr. p. 554, 14-16). The court denied Appellant's requested jury charges on partnership law (Tr. p. 592, 1-3) and only allowed for charges based upon limited liability company law. As a result of Appellant being denied his request to charge on the South Carolina Uniform Partnership Act, the jury was presented with a verdict form that only allowed the jury to consider whether or not Appellant was a limited liability company member (Tr. p. 784, 11-785, 12). The jury verdict returned on January 29, 2016 found that Appellant was not a member of AVSX and a Form 4 was filed on February 2, 2016.

Appellant filed a Motion for New Trial on February 10, 2016 to cure the erroneous and prejudicial instructions to the Jury that resulted from the Court's failure to charge the equitable doctrine of unjust enrichment and the law of the South Carolina Uniform Partnership Act. An Order Denying Plaintiff's Motion for a New Trial was filed on May 9, 2016. Appellant filed a Motion to Alter or Amend the Denial of the Plaintiff's Motion for a New Trial to cure the erroneous and prejudicial reliance upon happenings off the record and outside of the Courtroom to determine whether or not to grant Appellant a new trial rather than relying upon the trial record and admitted evidence. An Order Denying Appellant's Motion to Alter or Amend the Denial of Appellant's Motion for a New Trial was filed on June 24, 2016. Appellant thereafter filed a timely appeal.

FACTS

In March of 2007 Appellant and Respondent Bobby formed a business for profit, Protection 24, in which Appellant alone contributed in excess of $125,000 of personal money as initial capitalization (Tr. p. 202, 15–204, 13; Plaintiff's Exhibit #8). In September of 2007 Appellant personally guaranteed a $35,000 business loan to further contribute to Protection 24. On January 31, 2008 Appellant and Respondent Bobby Johnson opened a second business for profit, Guardian Eagle Security, LLC, and began the winding up of Protection 24 (Tr. p. 204, 23-25). During contract negotiations with prospective clients of their business Appellant and Respondent Bobby decided the best course of business would be to not name themselves as members in the Articles of Organization (Tr. p. 207, 1-15). At the incorporation of Guardian Eagle Security, LLC there was no written operating agreement and the parties' course of performance was that Appellant and Respondent Bobby would equally share in both the losses and profits of the business while equally sharing in managerial authority (Tr. p. 212, 19-214, 4).

Respondent Bobby admits that he and Appellant built and developed the business together, and that they are the only owners of the business (Tr. p. 693, Plaintiff's Exhibit #3). Appellant and Respondent have previously appeared in regulatory actions, wherein both referred to Appellant as an owner (Plaintiff's Exhibit #14). From the beginning of their joint business venture Appellant and Respondent Bobby agreed to forgo immediate personal financial reward in order to reinvest in the growth of their business, instead of taking money out of the business (Tr. p. 206, 5-210, 17). At the time of the formation of Guardian Eagle Security, LLC Appellant and Respondent Bobby mutually agreed that the best business strategy was to have Julio Reis as the only listed member of the LLC while they in fact were the true owners of the company and Mr. Reis was to act as a mere figurehead with no authority to act whatsoever. Upon information and belief based upon personal concerns, Respondent Bobby negotiated with Appellant to make his wife, Respondent Mary Kay Johnson, the figurehead LLC member in place of Julio Reis in order to help financially to provide for her. Upon the belief that he and Respondent Bobby would continue to act as the true co-owners of AVSX Appellant agreed to replace Julio Reis with Respondent Mary Kay Johnson (Tr. p. 206, 22-214, 4). On February 7, 2011, Appellant and Bobby Johnson together made a business decision to dissociate Julio Reis as the only member of their LLC, and to replace him with Respondent Mary Kay Johnson, wife of Respondent Bobby Johnson; Appellant and Respondent Bobby continued to manage and operate the business as the only co-owners or members and Respondent Mary Kay Johnson was relegated to the same figurehead status as Julio Reis with no authority whatsoever *id.* On September 1, 2011, Appellant and Respondent Bobby together changed the name from Guardian Eagle Security, LLC to AVSX Technologies, LLC (Plaintiff's exhibit #9). On or about March 21, 2014 Appellant received a letter from counsel for Respondents claiming that Appellant was a mere

employee rather than a co-owner of AVSX and thereby terminating him from employment (Plaintiff's Exhibit #5). Since Respondents have claimed that Appellant is a "terminated employee" they have also denied him his rights as co-owner of AVSX.

STANDARD OF REVIEW

"The circuit court must charge the current and correct law to the jury McCourt v. Abernathy, 318 S.C. 301 (1995); Cohens v. Atkins, 333 S.C. 345 (Ct.App. 1995). "When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial" Daves v. Cleary, 355 S.C. 216 (Ct.App. 2003). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error" W.A. Baker, Jr. v. Weaver, 309 S.E.2d 770 (Ct.App. 1983); Eaddy v. Jackson Beauty Supply Company, 136 S.E.2d 297 (S.C. 1964).

ARGUMENT

The trial court committed reversible error by refusing to charge Appellant's timely request to charge upon the South Carolina Uniform Partnership Act that was raised by the pleadings and supported by the evidence, resulting in the prejudicial effect of the jury not being able to consider Appellant's status as a partner and the verdict of Appellant not being a limited liability company member.

"Judges shall not charge juries in matter of fact, but shall declare the law" SC Const. Art. 5 § 21. "The law is the right of the party arising out of a state of facts. A jury ought to be instructed about what right springs out of a fact to be determined by them" Collins-Plass Thayer Co. v. Hewlett, 95 S.E. 510 (S.C. 1918). A judge shall charge to the jury the applicable law of a fundamental part of a Plaintiff's claimed right to recovery Eaddy v. Jackson Beauty Supply

Company, Inc., 136 S.E.2d 297 (S.C. 1964). "[T]he judge can be required to declare only so much of the law as is applicable to the case on trial..." Norris v. Clinkscales, 25 S.E. 797 (S.C. 1896). "Where an issue is implicitly suggested by the pleadings and is supported by the evidence, the trial court is obligated to instruct the jury concerning it" Mouzon v. Moore & Stewart, Inc., 317 S.E.2d 756 (Ct.App. 1984) *citing* Tucker v. Reynolds, 233 S.E.2d 402 (S.C. 1977). "A jury should be instructed only as to the issues raised by the pleadings and supported by the evidence. The matters to be covered in the instructions depend upon the issues joined by the pleadings and supported by the evidence" Kelly v. Brazzell, 172 S.E.2d 304 (S.C. 1970). "[T]he court acts correctly when it charges the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues" Tucker, 233 S.E.2d 402 (S.C. 1977).

"[I]t is the right of the parties to make requests for instructions, where a timely request is made for instructions which correctly propound the law and which are also warranted by the evidence and pleadings in the case, and if written where so required, it is the duty of the court to give them, even though awkwardly drawn, unless covered by other instructions given, or by the general charge... This is so, although the evidence is conflicting or slight, since the party asking an instruction is entitled to the benefit of whatever inferences the jury may think proper to draw from the proof, however slight. Hence, an instruction which is correct should not be refused merely because the trial court does not accept the theory on which the party requesting such instruction relies" Carraway v. Pee Dee Block, Inc. 273 S.E.2d 340 (S.C. 1980) *citing* 88 C.J.S., Trial § 407. It is prejudicial and warrants reversal for a trial court to refuse a timely requested charge when the charge involves a substantial feature of the case, is supported by the pleadings and evidence, and lies at the foundation of the claimed right of recovery Wall v. Parker, 74

S.E.2d 418 (S.C. 1953); W.A. Baker, Jr. v. Weaver, 309 S.E.2d 770 (Ct.App. 1983); Mouzon, 317 S.E.2d 756 (Ct.App. 1984); Carroll v. Smith-Henry, Inc., 313 S.E.2d 649 (Ct.App. 1984); Ellison v. Parts Distributors, Inc., 395 S.E.2d 740 (Ct.App.1990); McCourt v. Abernathy, 547 S.E.2d 603 (S.C. 1995); Cohens v. Atkins, 333 S.C. 345 (Ct.App. 1999); and Carraway, 273 S.E.2d 340 (S.C. 1980).

Appellant initially plead ten causes of action including relief for the wrongful dissolution of the partnership of Respondent Bobby Johnson and himself (Appellant's Complaint p. 9). Throughout the four day trial ample testimony and exhibits relating to the existence of a partnership between Appellant and Respondent Bobby Johnson were introduced into evidence ("Everything that's come out during this trial is that--whether the jury believes it or not, is this: and that is that [Appellant] and Bobby Johnson were partners" *The Honorable Craig Brown*, Tr. p. 320, 7-10). Respondent Bobby Johnson admits to forming a partnership with Appellant *Plaintiff's Exhibit* #3. Opening statement by counsel for Appellant presented to the jury Appellant's claim to his share of the partnership ("They--they formed a partnership and they called it AVSX" *Opening Statement by Mr. Sautter* Tr. p. 43, 11-12; [O]ur position is – is that [Appellant] is a 50 percent partner of this business *id.* at p.44, 17-18). Appellant continued to seek relief based upon his status as a partner in the business by taking the stand and calling six witnesses to testify as follows to his status as a partner:

> ("[Appellant] and [Respondent] Bobby [Johnson] owned it 50/50" *testimony of Julio Reis*, Tr. p.148, 7; "[Respondent] Bobby [Johnson] said, you know, "You need to help me. We need to open another company." And -- and that's when the partnership got created, when we agree[d] that we would eventually open another company, which later was named Protection24 in 2007" *testimony of Appellant*, Tr. p. 202, 12-18; "[W]e wanted to venture into other types of business..." *id.* at 206, 7-8; "It was two brothers decided to open business and trusted each other" *id.* at 206, 20-21; "In my mind, [our partnership] began the moment that Jimmy Wilson fired [Respondent Bobby Johnson] as our general manager of Palmetto Alarm", *id.* at p. 235, 4-6; "...[Respondent] Bobby [Johnson] and I -- agreed to be

equal partners" *id.* at 293, 8-9; "...I would've simply explained to him that business relationship that my partner and I have, which is we're the – we're the 50/50 owners..." *id.* at 299, 20-22; "So it was my understanding at the time that it was joint venture between [Respondent Bobby Johnson and Appellant]" *testimony of Jason Wolfe*, Tr. p. 366, 16-18; "I thought that [Respondent Bobby Johnson and Appellant] were partners in the business" *testimony of Matthew Edwards*, Tr. p. 378, 14-15; "[I]n operations they ran it like they were partners" *testimony of Daniel Spohn*, Tr. p. 397, 17-18; "And the way they ran their business day to day was as a partner -- as partners" Tr. p. 11-13; *id.* at 462, 11-13; [Plaintiff's exhibit number 3] tell[s] the history of how Bobby and Luis came together to start the company that is now AVSX" *testimony of Eric Bouvet*, Tr. p. 453, 1-4).

Appellant originally pled for relief upon partnership and limited liability company membership, but elected to put to the jury the question of partnership as a remedy for relief. "Election is simply what its name imports: A choice, shown by an overt act, between two inconsistent rights [remediable rights, nor remedies], either of which may be asserted at the will of the chooser alone" Ebner v. Haverty Furniture Co., 136 S.E. 19 (S.C. 1926) *citing* Bierce v. Hutchins, 205 IT. S. 340, 27 S. Ct. 524, 51 L. Ed. 828. After pleading partnership and introducing testimony and exhibits regarding partnership, Appellant timely submitted written requests that the jury be charged upon partnership law ("What you've given me here, though – let me see here. You're citing [S.C. Code §§] 33-41-210, 33-41-50 – 510, which are the Uniform Partnership Act *The Honorable Craig Brown*, Tr. p. 554, 14-16; *Plaintiff's Requests to Charge*). However, Appellant's request to charge on partnership law was denied ("I don't think that any partnership statutes are applicable in charging this jury" *The Honorable Craig Brown*, Tr. p. 592, 1-3). "Where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at the conclusion of the instructions" Keaton v. Greenville Hospital System, 334 S.C. 488 (S.C. 1999) *citing* State v. Whipple, 324 S.C. 43 (1996).

Appellant's requests to charge on partnership law were properly requested as they involved a substantial feature of the case, arose out of the pleadings and evidence, and lied at the foundation of Appellant's claimed right of recovery Baker v. Weaver, 309 S.E.2d 770 (Ct.App. 1983). Appellant filed this action so that his status to the company could be adjudicated. Appellant decided that a route to recovery was to convince the jury of his status as a partner and then have the jury charged applicable partnership law that was supported by the pleadings and trial testimony. The trial court erred by refusing Appellant's properly requested jury charges and denied Appellant his choice of remedies to be presented to the jury *see* Ebner, *supra.*

The refusal to charge on partnership law was prejudicial to Appellant as it denied his right to present to the jury relief sought since the initial pleadings and alleged throughout four days of trial testimony (Failure to charge applicable law is prejudicial Allen v. Hatchell, 131 S.E.2d 516 (S.C. 1963)). The given jury charges are reversible error as they in no way addressed the properly requested partnership law (Tr. p. 770-786) ("Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved" Abernathy, 547 S.E.2d 603 (S.C. 1995). Appellant was denied his request to charge to the jury partnership law.

The trial court's refusal to charge Appellant's properly requested charges resulted in the jury only being presented with law that did not cover Appellant's claim as a partner and were limited to a verdict form that limited the jury to deciding whether or not Appellant was a limited liability company member ("You have to find he was a member" *closing argument by Mr. Todd Ellis*, Tr. p. 710, 25). The jury therefore returned a verdict finding that Appellant was not a limited liability company member and pursuant to the verdict form their deliberations were concluded and could not consider granting Appellant any relief ("What you need to do is go in

the back, get this case over with, of what you've known, probably from the first day: [Appellant] is not a member. Decide for the defendant. Get this case over with. Thank you" *closing argument by Mr. Todd Ellis*, Tr. p. 728, 2-6).

CONCLUSION

Appellant properly requested for the jury to be charged upon applicable South Carolina Uniform Partnership Act law. The trial court was constitutionally bound to charge that requested law to the jury but refused to do so. That refusal resulted in jury charges and a verdict form that in no way addressed Appellant's claim for relief as a partner that was originally pled for and supported by the evidence introduced throughout the four day trial. Upon being limited to only considering whether Appellant was a limited liability company member, the jury found that he was not and no relief was available.

The refusal to charge the requested partnership law prejudicially denied Appellant of his claim for relief and is therefore reversible error. Appellant requests that the denial of Appellant's properly requested jury charges on the South Carolina Uniform Partnership Act be reversed and that a new trial be granted so that properly requested jury charges may be charged to the jury.

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CERTIFICATE OF SERVICE

I certify that I have served Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal on respondents by depositing three copies of each in the United States Mail, postage prepaid, on March 27, 2017, addressed to their attorney of record at their offices as follows:

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RE: Luis Endara v. AVSX Technologies, LLC; Bobby Johnson; and Mary Kay Johnson
Appellate Case No.: 2016-001612
Civil Action No.: 2014-CP-40-4234

Dear Ms. Kitchings:

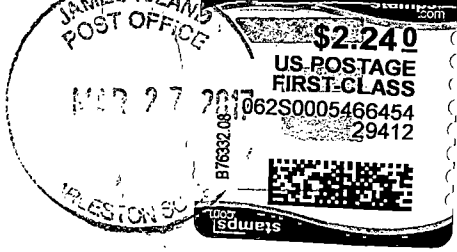
Please find enclosed with this correspondence, one original and one copy of Appellant's Initial Brief, Appellant's Designation of Matter to be Included in the Record of Appeal and the Certificate of Service of same. Please file the original and return one of the copy to me in the enclosed envelope. By copy of this letter with enclosure, I am serving Todd Ellis.

Thank you for your assistance. Should you have any questions, please do not hesitate to contact this office.

Sincerely,

Michael Ellis

cc: Todd Ellis, Esquire



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