THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILE COUNTY
Circuit Court

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC, Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, Zoi Films, LLC, and Carolina Custom Converting, LLC, Defendants,

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

David Wilson, Steve Norvell, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc.,

Of Whom David Wilson, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc. are the Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Appellants.

FINAL BRIEF OF APPELLANTS JOHN GANDIS AND ANDREA COMEAU-SHIRLEY

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Circuit Court Erred By Failing to Apply the Correct Legal Standard for Fiduciary Duty Among Partners and LLC Members of Full and Honest Disclosure of Side Deals and Competitive Activity That Should Have Been Business of the Company?

2. Whether the Circuit Court Erred in Disregarding Fundamental Business Operations and Principles and Instead Focused on The Personal Financial Situation of Wilson to Find that Wilson Was an Oppressed Shareholder?

3. Whether the Circuit Court Erred by Failing to Dissolve the Company, Failed to Order the Company to Purchase the Shares, and Ordered Individual Members, One of Which Was a Non-Voting Member, to Purchase the Shares of Wilson at a Valuation Date Prior to Wilson Removing Substantial Value from the Company?

4. Whether the Circuit Court Erred in Fashioning Equitable Relief for Wilson When Wilson Had Unclean Hands?

II. STATEMENT OF THE CASE

This case spawned from the establishment, management and eventual unraveling of Carolina Custom Converting, LLC (CCC), a company engaged in the plastic film business owned by three members – Defendants/Appellants John Gandis (45%); and Andrea Comeau-Shirley (Shirley) (10%) and Plaintiff/Respondent David Wilson (45%). Wilson filed an action alleging (1) shareholder oppression by Gandis and Shirley; (2) Gandis breached his fiduciary duty to CCC and Wilson; (3) Gandis and Shirley converted company funds and property; (4) seeking dissolution of CCC, or alternatively, disassociation. Gandis and Shirley answered and counterclaimed for Wilson's breach of

his fiduciary duties to CCC and its members. A bench trial was held September 30 - October 3, 2014 before the Honorable D. Garrison Hill.

On January 9, 2015 the trial court entered an Order finding that Gandis and Shirley "froze-out" and "oppressed" Wilson as the other member of CCC and ordered they individually buy-out Wilson's interest for a total of $347,863.23 pursuant to its claimed equitable powers under S.C. Code Ann. § 33-44-810 (the "Order"). (R. pp. 1770-1789). The Order further found that: (1) the evidence at trial did not establish Wilson breached his fiduciary duty to Gandis or other members of CCC; (2) CCC failed to prove its trade secrets claim; (3) the evidence demonstrated that Neologic/Freshwater used CCC's confidential information and therefore the company's trade secrets claim was justified; (4) CCC failed to provide sufficient evidence in support of its civil conspiracy claims; (5) neither party proved their conversion cases; and (6) Wilson was not entitled to prejudgment interest. Appellants filed a Rule 59 Motion on January 20, 2015 asking the trial court reconsider the date for valuation of Wilson's interest or give weight to the valuation when Gandis and Shirley agreed to sell their interest to Wilson during December 2011 and January 2012; its ruling requiring Gandis and Shirley personally buy-out Wilson's membership interest; its conclusion that Wilson fully disclosed the existence and substance of disputed accounts and its application of the law respecting the South Carolina Trade Secrets Act. (R. pp. 1814-1924). The circuit court denied that motion by Order dated January 28, 2015. (R. pp. 1794-1796). This appeal followed.

III. STATEMENT OF THE FACTS[1]

A. The Deal

After VyTech's bankruptcy, Gandis' wife gave him the go ahead to cash in his 401(k) to support his family and pursue entrepreneurship.[2] (R. p. 19, ln. 22 – p. 20, ln. 1). Gandis sold his metal working assets and set out to make CCC a viable entity; living off his 401(k). Wilson, on the other hand, was supporting his family through his EFS work. Without other sources of income or available credit, Wilson requested initial income security at the outset of this new deal. He requested that if he rolled EFS into CCC, that he would initially receive a monthly income to replace his EFS income. (R. p. 55, ln. 6-10). This issue presented an obstacle to creating the combined company.

The men discussed their draft operating agreement and had several questions to explore. Gandis arranged for them to meet with Shirley (an accountant and trusted business advisor to his father) in early 2008. During this lengthy meeting the men discussed their plans and for expansion, management, and operating in the film industry. From late May to early July 2008, Gandis and Wilson exchanged e-mail correspondence dealing with this issue and others. Wilson believed that he could roll EFS into CCC, and still achieve income security by holding back three supplier relationships. (R. p. 45, ln. 3-17). This was his first pitch to Gandis. Gandis consulted with Shirley regarding this initial proposal. She did not like the idea because it did not sound like a partnership and Wilson could not adequately explain how this exclusive supplier relationship would not eventually lead to

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[1] Appellants reference and incorporate CCC's Statement of Facts into their brief and provide the additional facts within this section necessary for discussion of the legal issues pertinent to Gandis and Shirley.

[2] Gandis also pulled money out of a home equity line to provide CCC with initial working cash. (Def. 7).

him cherry-picking the most profitable orders by simply "selecting" these suppliers rather than the suppliers that CCC was using. More importantly as these were purportedly low-cost suppliers, this exclusivity would damage CCC's potential. Accordingly, Gandis informed Wilson his initial proposal would not work. Ultimately Wilson's idea to withhold three accounts was dropped, and in return, Gandis agreed that he would use his lines of credit to make sure that Wilson received monthly income in the startup phase. To that end, beginning in July of 2008, and in exchange for Wilson rolling all of his customers into CCC, Wilson started receiving $8,000.00 per month from the company. (R. p. 78, ln. 8-14). CCC was up and running and Wilson was now to dedicate all his efforts to the company. The following are the contemporaneous e-mail discussions that describe these conversations and how this all played itself out.

On May 30, 2008, Gandis sent an e-mail to Shirley, who at the time had no ownership interest, regarding her attendance at a meeting between Gandis and Wilson the previous week. (R. pp. 980-89). It was later agreed that she would be compensated by receiving a "fixed equity interest" making her a member of CCC with a 10% interest. Gandis writes that, "Dave and I sat down on Tuesday – and had some great discussions on moving our business forward. Dave is in favor [*sic*] moving his accounts over into the CCC account column and collecting a salary for a period of time until we can really get things going." (R. p. 982). He continues, "[w]e also discussed putting Dave on the payroll starting in July. I think we can handle the $8000 that he pays himself. . . ." (R. p. 982). Later in that same e-mail, Gandis writes that there are "three accounts that Dave imports that do not currently go through CCC – we both think it best that these three accounts stay away from CCC. Dave agrees that all future orders (even if they are imports) should be

run through CCC." (R. p. 982). Describing to Shirley what he was told by Wilson, Gandis writes that, "I do not know how much of his income is derived from these three accounts I mentioned – but again … this is something you can help us with. Maybe CCC should not pay the salary portion that the three accounts cover." (R. p. 982).

On June 2, 2008, Shirley responded attaching a worksheet to use in creating a partnership agreement advising Gandis to fill this form out based upon the conversation he and Wilson had in late May 2008: "I'd like to suggest that you complete the questionnaire alone (Although you are documenting the discussion you had with Dave). . . . . Once you fill out the questionnaire (leaving open any items that you have not focused on – we'll get them in the next round). Then send it to me and we can discuss the points together. I can help you think through the best case and worse case planning. . . . " (R. p. 981). Gandis filled out the partnership worksheet based upon his discussions with Wilson.

On June 16, 2008, as promised, Shirley provided her thoughts on the partnership worksheet so that she and Gandis could discuss before circling back up with Wilson. (R. pp. 990-99). The back and forth was set forth on Defendants' Exhibit 7.[3] (R. pp. 1677-83). Page five of the worksheet, paragraph e, addressed Wilson's desire to retain three accounts separate from CCC. Gandis notes it "[n]eeds to be …minus three." (R. p. 1681). Shirley responds, "Everything in our industry…goes through LLC – first right of refusal on every single contract opportunity (new or old customers), and if we refuse, then he can pursue independently through [other] slitting business partners." (R. p. 1681). In the same paragraph, Gandis sets forth his and Wilson's late May 2008 discussion: "There are three accounts that Dave wants to retain something over … maybe easier to discuss this over the

[3] The blue ink represents Gandis' recollection of the late May 2008 discussion with Wilson, and the green ink represents Shirley's responsive advice.

phone." (R. p. 1681). Shirley did not respond to that specific sub-paragraph, but it is apparent her response to paragraph e. covered it. Shirley's June 16, 2008 e-mail also stated that she "[n]eed[ed] a list of every customer, with the old commission in whatever rate he used to charge and a year by year volume/sales figure." (R. p. 990). She asked for this information in an effort to analyze the validity and feasibility of Wilson's request for $8k.

On June 24, 2008 Wilson responded to that request in an e-mail to Gandis with an attachment containing a listing of EFS customers (including the three he wanted to retain) and their purchasing volumes, but without an indication of either their contribution margin or his historical commissions as requested. (R. p. 1752-56). That same day, Gandis responded noting: "Good stuff. . . .What she said she wanted to get was a projection of what the EFS book of business was worth the last couple of years . . . ." (R. p. 1001). He continued: "If I understand what she is trying to do is assign a value (like equity) to the book of business to write into the agreement so that we are shown as 50/50 partners. My part is easy – dollars invested in equipment/hard assets… your[s] is a little more tricky since it is an intangible…. I think what she is looking for is a statement from EFS for the last two years – tax returns/customers – margins, etc." (R. p. 1001). That same day, critically, and zeroing in on the question of what he was bringing to CCC in return for the proposed $8k per month, Wilson made his final pitch: "The real question is this – are the customers, vendors and margins I am bringing to the table worth the salary we are proposing? *If I am to focus all my efforts in the film business on CCC, I am foregoing opportunities to earn money on those opportunities outside of CCC.*" (R. p. 1000)(*emphasis added*).

On July 1, 2008, CCC provided Wilson with an $8,000.00 check, and it continued to do so during the entirety of its start-up phase. Looking back on this arrangement, on April 13, 2009, Wilson said this about the understanding: "The payments I received last year was basically a salary which I required since I was taking my customers from EFS and putting them in to CCC reducing my ability to earn a living." (R. p. 1529). He went on, "[n]ow that the company is profitable and cash flow is better, we are both pulling out money each month which is in the form of a distribution." (R. p. 1529).

Once the start-up phase passed, the company began to make money for its owners. In fact, CCC showed a profit from 2008-10. (R. p. 586, ln. 3-5). 2010 was a banner year for CCC based upon a world-wide film shortage. CCC was able to capitalize on the shortage because it was able to purchase large amounts of inventory. (R. p. 651, ln. 11-25). With inventory on-hand, CCC was able to serve a large number of customers (including other film convertors) that it did not previously service in 2008-09. (*See* R. p. 653, ln. 23-p. 654, ln. 1). In 2011, however, the company's profitability ended when the market dipped precipitously. (R. p. 586, ln. 5; R. p. 1659). During its successful start-up years, CCC grew to roughly 24 employees. (R. p. 39, ln. 2-24).[4] Although 2011 sales started out above budget, by mid-year the forecasted budget was significantly reduced. (R. p. 655, ln. 8-24). By the fall of 2011, Wilson told Comeau-Shirley that his forecast should be reduced to 10% of the projected budget. (R. p. 655, ln. 17-24).[5]

[4] In 2011, CCC's profitability ended and it posted a substantial loss that year. (R. p. 586, ln. 3-5). Specifically, CCC posted a loss of $456,000 in 2011. (R. p. 245, ln. 8-15). The financial health of the company led to strife regarding the internal affairs of CCC and ultimately Wilson seeking employment elsewhere.

[5] A: At some point he tells me to drop the sales to 10% of the number he had given me before.

Q: Drop by 10%?

B. The Banner Year Causes Internal Financial Stress

The banner year of 2010 resulted in a significant tax liability for the owners. Wilson testified that he owed roughly $200k to the federal government. (R. p. 411, ln. 14-15). Wilson did not have the funds to pay this tax liability and neither did CCC. (R. p. 665, ln. 12-16). Wilson claimed that the tax issue was significant and sought assistance from Gandis. As a result of Wilson's financial strain, Gandis asked Shirley to develop a tax strategy that would allow Wilson to reduce or remove his tax liability. (R. p. 665, ln. 23 – p. 666, ln. 15). Gandis' efforts to help Wilson triggered tensions among the members that would end with Wilson leaving.

C. What Went Wrong: *Too Much Inventory*

In 2010 CCC had a banner year generating over $1 million in net income. Wilson, as VP of sales and purchasing poured the vast majority of that cash back into purchasing film stock/inventory. As VP of sales and purchasing, Wilson alone bore the responsibility for both the film purchasing activities and sales; and liquidating film stocks to generate cash. (*see* R. p. 1532 at para. 4). Because Wilson invested the vast majority of the net profit into film stock and failed to make sales on it that meant that CCC did not have cash to distribute to its owners in 2011. This set the stage for Wilson's frustrated economic expectations and ultimately, his decision to leave the Company. The inventory issue, and the failure to turn it over, led to an impending tax scenario that would be the owners' and

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A: No. Drop them to 10%.

Q: So he's asking you to revise the budget for the last half of the year - - that last third of the year, and drop the sales projection by 90%?

A: Yes. I was flabbergasted.

not CCC's responsibility.[6] Thus Wilson himself created this tax liability. The resulting fallout of business to 10% of the budget in mid-year 2011 was the responsibility of Wilson and his failure to anticipate market changes.

By the end of 2010, Wilson built up the company's film stocks in excess of typical levels. (R. p. 145, ln. 22 - p. 146, ln. 1; *see e.g.* R. p. 1606 but not from 2010). As this matter impacted all the owners, the group met numerous times during 2011 to discuss inventory reduction planning. (R. pp. 1588-1606; R. p. 223, ln. 7-25). The owners had agreed to put a "tight clamp down on purchases" (R. p. 1588-89) meaning that each purchase should have a home. To demonstrate the magnitude of the issue created by the excess inventory levels, the company prepared various reports detailing film which has been purchased in prior year(s) which had yet to be converted to cash. (R. pp. 1590-1605). Stated simply, if these film purchases had been avoided through more careful planning by Wilson, that cash would have been available in the company for distributions. In fact, Wilson admits to this failure in execution in his discussions with the prospective buyers where he states "We need to address the purchasing/material planning function…When we had 30 customers and $3,000,000 in sales, I could effectively do both sales and purchasing. Now that we have 100 customers, new products, and $5,000,000 plus in sales, I have lost effectiveness." (R. p. 1662). Unfortunately, Wilson failed to execute the agreed-upon plan; this meant that CCC did not have sufficient cash for a tax distribution. (R. pp. 1763-

[6] A LLC is taxed as a pass through entity, which means that its owners pay the income taxes on profits rather than the company. This is commonly referred to in the accounting world as "phantom income." For pass-through entities, phantom income is often synonymous with undistributed income. Phantom income is an accounting term given to taxable income reported to the Internal Revenue Service but not actually pocketed by the owner. It is called "phantom" because it does not generate cash flow that year, it only exists on paper, but the IRS expects tax revenue on business assets or investments. An example illustrates the point. On paper an LLC may have $80k in distributable profit in a given year, but if it uses $40k to purchase inventory the owner is still taxed on the full $80k. The IRS expects the owner to pay taxes on $80k.

69). This inventory issue and the resulting tax liability caused all members to experience significant phantom taxable income because their cash was tied up in inventory. Wilson already received preferred monthly cash distributions that caused CCC to be late in making payments to vendors. (R. p. 152, ln. 10-22). Wilson was already over $100,000.00 ahead of Gandis in cash distributions, and Gandis had to borrow, in part from a home equity line of credit to pay his tax bill. (R. p. 1328; R. pp. 1003-05; R. p. 107, ln. 16-21; R. p. 256, ln. 6-14).

D. Wilson's Taxes & Draws

During 2011, and almost two and one-half years after steadily injecting capital into the company for start-up costs and Wilson's monthly draws, Gandis exercised his right to end steady capital infusions into CCC. (R. p. 101, ln. 7-19). Wilson claimed that he was not financially prepared to live off of distributions alone. He asked for the members to allow him to begin receiving company loans that could be off-set against future distributions, and Gandis agreed. (R. pp. 255-56). Unfortunately, CCC was already facing cash flow problems as the market turned sour. Gandis grew increasingly uncomfortable with the fact that Wilson had not remitted his tax distributions to the government and worried that this could negatively impact CCC.

In the spring of 2011, knowing what his own tax bill looked like, Gandis became concerned that Wilson may also be in a bind. (R. p. 410, ln. 13-18). Knowing that Shirley had significant experience when it came to reducing tax liabilities, he looked to her for help. (R. p. 228, ln. 18-23). All three members decided that they would meet to discuss the company's finances and their economic expectations. This was set to occur in late

March to early April 2011. As it turned out, Gandis could not make the meeting, but Wilson and Shirley went ahead without him.

In the time leading up to the members' meeting, Gandis and Shirley discussed Wilson's economic expectations, and whether he wouldn't be happier and financially safer as an employee. In one e-mail, Shirley notes the following:

> He keeps wishing that cash would fall from the sky . . . but we have to BUILD the business to support additional cash. . . . I plan to explain to him that the role of an owner (even in an LLC) involves financing his business, mostly through deferred compensation. That an owner's eye is on the upside.
>
> . . . .
>
> I would then propose to him that his actions (e.g. loans from company) seems to indicate that he would really rather be in a structure where he receives good monthly salary and he earns a regular bonus. This alternative structure gives him (a) more cash now and (b) preserves some of his participation [in] the financial results. It also means that he would convert to a situation where his tax obligation matches his cash flow....
>
> . . . .
>
> If we are going to talk about what it means to be an owner, I think it is important that he not feel TRAPPED ***by his LLC*** and realize that . . . at this point in the game ... we can talk restructure of his participation in a way that should be a win-win.

(R. pp. 1035-36)(*emphasis added*).

By the fall of 2011, with Wilson's tax bill not going anywhere, Gandis again reached out to Shirley for tax strategy help. (R. p. 225, ln. 18-23). Shirley offered up the ***idea*** (simplified here) that if Wilson were to convert from a member to an employee, and allocate various losses to him, the latter loss allocations could flow back into past tax years and eliminate the tax liability. (R. pp. 1047-49; R. p. 143, ln. 1-12; R. p. 228, ln. 24 – p. 229, ln. 3; R. p. 666, ln. 7-15; R. p. 669, ln. 9-17). After receiving the broad brushstrokes for the idea, Gandis asked Shirley whether it was in a form that he could forward to Wilson.

She responded he could and Gandis forwarded the e-mail in September 2011. (R. pp. 1047-49).

After Gandis forwarded the tax reduction proposal, the relationship between Wilson and Gandis quickly soured. It is important to note that in all of this correspondence and planning, the idea was never to get Wilson out of the company, but to get him in a position that did not cause him the financial stress of the downturn. (R. pp. 1607-08; R. p. 228, ln. 24 – p. 229, ln. 3; R. p. 666, ln. 7-15; R. p. 669, ln. 9-17). As opposed to proper tax and business planning, Wilson viewed these good faith efforts as an alleged coup to get him out of CCC; a perception that led to this lawsuit and one Wilson successfully sold to the circuit court.

A few days after Gandis sent the tax reduction proposal to Wilson, on October 17, 2011, he responded in a negative fashion, claiming it was flawed and unlikely to help. (R. p. 1609). In addition, Wilson made the following three suggestions/threats. First, he suggested that the Company start making regular accruals and distributions to cover tax liabilities. (R. p. 1609). This was a curious request coming from Wilson, who alone, was responsible for the excess inventories that precluded CCC from having tax distributions. (R. pp. 1616-21).[7] Second, he suggested that he would resign from the company, retain his equity interest, and go work for another film company stating that "he did not have any duty to the Company, but would maintain all of the 'rights and privileges of a member.'" (R. p. 1609). Finally, Wilson suggested that he would simply resign and dissociate; forcing CCC to purchase his interest, and if the other members were "unable to or unwilling to

[7] "As you know, we started saving money this spring so we could make a tax distribution this fall, but our money was spent on film." (R. pp. 1616-21).

buy" him out, he would force a "liquidation." (R. p. 1609). Wilson threw down a gauntlet as he recognized the power that he held over Gandis and Shirley – the control over sales.

Once these negotiations began Wilson was using his mistaken belief that he had the ability to unilaterally force a dissolution/liquidation as a leverage point. (R. pp. 1609-22; R. p. 39, ln. 20 – p. 40, ln. 1; R. p. 243, ln. 25 – p. 244, ln. 6). He continued to insist CCC pay his tax bill. (R. p. 1609; R. p. 229, ln. 21 – p. 230, ln. 4). He was also telling Gandis that if he did not bend, he would shut down the company. (R. p. 39, ln. 20 – p. 40, ln. 1; R. p. 243, ln. 25 – p. 244, ln. 6). Wilson continuously made these threats through the 2011 Christmas and New Year Holidays. (*Id.*). At that point, CCC had 23 employees, all of whom Wilson said he would put out of work. (R. p. 39, ln. 20 – p. 40, ln. 1).

E. Buy-Sell

After Wilson fired off his threatening e-mail, Gandis circled back to come up with a better solution. Wilson continued to ask for loans from the company—which had increased to $12,000.00 per month. (R. pp. 1616-20). Despite having no obligation to provide these loans Gandis reluctantly signed off on the requests because Wilson was an integral member of the team. Nevertheless, as Gandis explained in a letter to Wilson, "[r]ecently we have had to pay several of our vendors late in order to set aside funds to loan to you. It is not in the best interest of our company to pay our vendors late, particularly when we have the funds available to pay them. The current payment of $12,000 a month is too great a burden to pay monthly while assuring our legal obligations be paid in the order as they are outlined above." (R. p. 1616). Gandis continued noting that "it is not my desire to create an undue burden for you and your family either. I have three options for you to consider." (R. p. 1616). Option One: Remain as a member. This option meant

simply that Wilson would maintain his current equity position, but he was put on notice that he would no longer receive preferential treatment. (R. pp. 1616-17). Option Two: Buy-out and become a salaried officer with a bonus plan. (R. pp. 1617-18). Option Three: Shirley's membership modification to eliminate the tax bill, and become a salaried officer with a bonus plan. (R. p. 1618). Each option kept Wilson in the Company. Importantly, Gandis made known to Wilson that he was fine with anyone of them. (R. p. 1619). Wilson refused to engage this discussion and continued to look to the company to fund his tax liability.

Once the discussion of a buyout began, the whole dynamic of the members' relationship continued to change. During the buy-out negotiations, Wilson believed that Gandis and Shirley were trying to leverage him down to below fair value by altering the numbers. (R. p. 1655; R. p. 156, ln. 17 – p. 157, ln. 3; R. pp. 421-26; R. p. 670, ln. 23 – p. 671, ln. 2). Accordingly, Wilson stated that he would buy Gandis and Shirley out using ***their valuation numbers*** for his equity. (R. p. 670, ln. 23 – p. 671, ln. 2). Wilson's offer was accepted. (R. p. 1627-28; R. p. 1671)("My first preference is that he buys us out at the price we offered him – there is no deadline on that ability"; *see also* R. p. 257, ln. 8-10). But, Wilson did not perform and did not buy Gandis and Shirley out at the price they offered. The buy-sell discussion lasted through the end of 2011 and into the beginning of 2012.

When Wilson told Gandis and Shirley that he was seeking a purchaser for CCC; they understood that this meant he was discussing a buy-out with his brother-in-law's family- Steve Norvell. (R. p. 1675). They later learned that Wilson was also in discussions with other parties. At that point, on January 6, 2012, Shirley sent an e-mail to Wilson with

the general concern of whether he was protecting CCC's confidential information during these discussions. (R. p. 1673). Wilson responded that he "certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor. . . . [And that his] desire is to continue discussions with the interested parties about buying out the company as a whole." (R. p. 1674).

One of these parties was a company out of Tennessee called FilmTech. Wilson however was not trying to sell CCC to FilmTech. On January 13, 2012, he received an e-mail from FilmTech discussing "a possible sales agency agreement." (R. pp. 1688-91). Three days later Wilson sent an e-mail to FilmTech discussing their "agreement":

> I look forward to the opportunity to join your organization. . . . Here are the points of discussion for our agreement….Full time employee with draw or salary of $8k per for month for a period of time until my commission reaches a level that supports my needs. ***My goal will be to move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on or qualifying over the past 3 to 6 months.***

(R. p. 1692)(*emphasis added*); *See also* R. pp. 1695-1705). Wilson had made up his mind—he was operating in his best interest. He would not put CCC and standard business practices of paying vendors, employees, and taxes before he paid himself. The Company did not mean anything to Wilson and he was going to leave and take its customers and prospective business with him.

F. Wilson Announces his Intention to Leave the Company

When Wilson and Gandis did not reach a deal, Gandis assumed Wilson would continue as member. Then, on January 17, 2012, Shirley received a phone call from John Zamer, a partner in Jones Day's Atlanta office. (R. p. 163, ln. 11-14; R. p. 675, ln. 10-18).

During that phone call, Zamer told Shirley that he had just spoken with Wilson's lawyer, and that Wilson was going to leave CCC. (R. p. 675, ln. 10-18).

Gandis realized that he had a 23 employee company to protect. One of his initial reactions was to protect his Company's confidential information. (R. p. 163, ln. 18 – p. 165, ln. 8). Accordingly, when he showed up at the Company's Greenville office to accept Wilson's resignation, he brought along a police officer to make sure he would be able to retrieve the Company's property. (*Id.*). The plan did not work, however, because Wilson took the Company's computers, blackberry, and files with him. (R. p. 252, ln. 8-15).

G. Wilson's Side Deals

The agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22). In fact, Wilson continued to run side deals through EFS even after he began receiving the $8k a month as agreed in exchange for rolling all of those customers into CCC. (R. pp. 1318-27).[8] The evidence at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings.[9] Wilson never utilized his CCC email address to conduct side deals, only using his EFS email. (R. p. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied them save one admission recounted by Gandis at trial:

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[8] Gandis testified that Def. 126 reflects sales Wilson ran through EFS without his knowledge beginning in July 2008 which should have gone to CCC. (R. p. 220, ln. 6-14).

[9] Gandis testified that he only learned of these side deals "by accident." (R. p. 215, ln. 6-14).

A: I suspected Dave had done a side deal. And, you know, this was well after he had assured me that everything had rolled into CCC. We were coming off of a bumper year. We made a lot of money in 2010. And I was pretty disappointed to find that out. So I invited him to meet me at the Starbucks close to where we live.

And I asked him, I said, Did [*sic*] you do this deal outside of CCC? And he said, Hey, it's Christmas, you know.

And I was incensed. And, you know...he assured me, yeah, but I haven't done it much. And, you know, it's Christmas and I'm all in. That's what he told me.

(R. p. 235, ln. 5-25 – p. 236, ln. 1-10; *see also* R. p. 660, ln. 3-25 – p. 661, ln. 1-10; R. p. 1528).

H. Trial Court's Ruling

The circuit court found that Gandis and Shirley "froze-out"/oppressed Wilson through a litany of supposed oppressive and unfairly prejudicial conduct designed to squeeze Wilson out of CCC. (R. pp. 1777-78.). The lower court also held that Appellants failed to prove their claim for breach of fiduciary duty against Wilson based on his side dealings because "[t]he evidence did not establish that Wilson had agreed to transfer the three import accounts...to CCC in 2008." (R. p. 1783).

IV. LEGAL ARGUMENTS AND AUTHORITIES

This is a case about business and the relationships of owners. It is also one about an individual who put his financial interests before those of the company and the fallout leading to complicated business litigation—with a deadly purpose. Business is simple math. Cash flow must exceed expenses or a business will cease to exist, much less provide payroll, pay vendors, and if there is any left—pay the owners. It is axiomatic that state and federal law requires employees be paid first, contractual and business relations require the payment of vendors for the goods and services necessary for a business, taxes must be

remitted to the government authorities, and the remainder may be distributed by the owners. In this case, there was one owner, Wilson, that sought to be paid first—before anyone—notwithstanding legal and business priorities of payment to anyone else. Wilson's me-first mindset permeates this case, required multiple proposed plans to attempt to placate Wilson, and ultimately manifests itself through Wilson's violations of his duties to his other owners who are striving to protect the interests of the company. Disregarding the other owners' effective management and attempts to accommodate Wilson's me-first demands with the priorities of the business as a whole, the trial court below ignored the business judgment rule, misapplied the standard for fiduciary duty requirements between LLC members, overreached and held that business conduct by the owners in managing a company and protecting it against an owner who was out for himself was oppression, and went so far as to hold that business activities by the owners were unconscionable to impose individual liability. If there is any ability of small business owners to conduct business and maintain appropriate business prerogatives against a demanding minority owner in this State, the lower court's order must be reversed.

A. Standard of Review

"[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review." *Wheeler v. Estate of Green*, 381 S.C. 548, 554 (Ct. App. 2009). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville County*, 380 S.C. 528, 534, 670 S.E.2d 663, 666–67 (Ct. App. 2009). "When legal and equitable actions are maintained in one suit, the court is presented with a divided

scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17 (Ct. App. 2006).

A. The trial court erred in applying an incorrect legal standard and finding that Wilson did not breach his fiduciary duties to Gandis and Shirley.

1. Standard of Review

An action for breach of fiduciary duty is one at law. *Verenes v. Alvamos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "In an action at law, the appellate court will correct any error of law, but it must affirm the [trial court's] factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (internal citation omitted).

The lower court made a fundamental legal error and applied an incorrect standard of disclosure for fiduciary duty. In discussing the operation of fiduciary duty in this case, it is important to note that the business started as a simple partnership and at some point became a limited liability company with no written operating agreement. Accordingly, the standard of fiduciary duty in the partnership and limited liability context is applicable. The court found that "the parties agreed that Gandis and Wilson founded the business as equal partners[.]" (R. p. 1774). In addition, the court found that Wilson was to lead CCC's sales efforts with Gandis managing operations. (R. p. 1774). CCC was later organized as a manager-managed LLC but no written operating agreement was ever completed. (R. p. 1774). Gandis and Wilson were 45% owners and Shirley accepted a 10% non-voting interest in exchange for providing her services. (R. p. 1774).

The Order states that Defendants, however, failed to prove their claim for breach of fiduciary duty. (R. p. 1783). The basis of this holding was that "the evidence did not establish that Wilson had agreed to transfer the three import accounts to CCC in 2008."

(R. p. 1783). The court further stated that a "reasonable inquiry in 2009 by Defendants would have established the full extent of EFS activities with these import accounts, yet even with full knowledge of West Carrollton sales by EFS, Defendants did nothing." (R. p. 1784). These holdings constitute errors of law in that they impose a duty on Defendants that does not exist in the context of fiduciary duty and disregard Wilson's fiduciary obligations to CCC and his co-owners which is an affirmative duty to disclose such relationships. Wilson had an affirmative duty to disclose to Gandis his ongoing financial interest in other ventures. The lower court erred by flipping the responsibility to the non-violating party.

Our courts have long recognized that the duty of a partner is to exercise the utmost good faith, fairness and loyalty as required by statute and common law. *Anthony v. Padmar, Inc.* 320 S.C. 436, 448-49 (Ct. App.1995).[10] In expounding on "utmost good faith, fairness, and loyalty" the court explained that "[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Id.* at 449 (internal citations omitted). A fiduciary relationship is founded on the trust and confidence imposed by one person in the integrity and fidelity of another. *Ellis v. Davidson*, 358 S.C. 509, 519 (Ct. App. 2004). A fiduciary relationship exists "when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004)(internal citations omitted).

[10] *Citing* S.C. Code Ann sec 33-41-540(1990)(partner is accountable as a fiduciary) and *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961)(establishing that partners are treated as fiduciaries each to the other; their relationship is one of mutual trust and confidence, imposing upon them the usual trust requirements of loyalty, good faith, and fair dealing.).

"Partners are fiduciaries to each other and their relationship is one of mutual trust and confidence imposing upon them requirements of loyalty, good faith and fair dealing." *Id.* at 251. "Partners in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (Ct. App. 2004). This Court has stated a fiduciary's duty of disclosure imposes an "obligation of *refraining from taking any advantage of one another by the slightest misrepresentations or concealment*." *Moore*, 360 S.C. at 252, 599 S.E.2d at 473(*emphasis in original*). Accordingly, the fiduciary standard under partnership law is one in which Wilson was required to disclose to Gandis all known information that is significant and material. The court imposed on Gandis a duty to investigate that which he has been told was a zero volume account and may well continue to be a zero volume account. The trial court erred by failing to take into account Wilson's repeated habit of failing to identify the names of the three accounts, particularly as Wilson had presumably already provided Gandis a complete listing of the EFS accounts with their two-year sale volumes. The court also failed to explain how any account that was on the listing should be retained by Wilson without absolute clarity of identification. By failing to recognize this standard established by law, the lower court committed a fundamental error of law.

The South Carolina Limited Liability Act recognizes the fiduciary relationships that exist among members stating:

> (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).
>
> (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

> (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
>
> (2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
>
> (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.
>
> (c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
>
> (d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

S.C. Code Ann. § 33-44-409. Subsection (b)(3) expressly states that a member's fiduciary duty of loyalty to a member-managed company and its other members requires that he refrain from competing with the company before dissolution.

CCC was incorporated as a LLC with Wilson and Gandis as its sole members. Their shared membership and interest carried with it a fiduciary relationship. As such, Wilson owed Gandis fiduciary duties, including that of full and honest disclosure of material facts, refraining from concealment or misrepresentation and competing with the company; all of which he indisputably breached. The trial court committed error by disregarding the duty and evaluating whether or not the evidence established Wilson agreed to transfer three import accounts to CCC in 2008. Its evaluation was more akin to a contract rather than a breach of fiduciary claim. The appropriate inquiry was whether the evidence

showed Wilson fulfilled his fiduciary duties to Gandis and CCC by acting in good faith, disclosing material facts to Gandis, and refraining from competing with CCC before its dissolution. This constitutes an error of law because the trial court essentially placed the burden of proof on the wrong party.

Assuming *arguendo* that the lower court's conclusion is correct, it should read "Plaintiff proved he disclosed all material facts relevant to his agreement with Gandis to him as his partner and fellow member of CCC ...(three import accounts would be excluded from the deal... acted in good faith and did not compete with the company through some other venture)." The evidence presented at trial shows Wilson absolutely failed to abide by these fiduciary duties.

Further, Wilson breached his statutorily mandated fiduciary duty to "refrain from competing with [CCC] in the conduct of the company's business before the dissolution of the company." S.C. Code Ann. § 33-44-409(b)(3). Wilson unequivocally admits that he ran side deals through EFS while CCC was operating, including during the times when he was receiving $8,000 a month from the company. He contended this was allowed because his agreement with Gandis carved out these three accounts. (R. p. 378, ln. 25 – p. 379, ln. 18). As noted above, the testimony and evidence at trial showed that the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that company's customers were supposed to be transitioned to CCC. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22). In fact, Wilson continued to run side deals through EFS even after he began receiving the $8,000 a month as agreed in exchange for rolling all of those customers into CCC. (R. pp. 1318-27). Gandis testified that he only

learned of these side deals "by accident" and that when he confronted Wilson about them Wilson denied he was doing side deals. (R. p. 215, ln. 6-14; R. p. 217, ln. 3-22). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (R. p. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). When Gandis confronted Wilson about these side deals he denied them save one admission recounted by Gandis at trial. (R. p. 215, ln. 6-14). These actions could not be further from the full and honest disclosure of material facts required of a business partner (to fulfill his fiduciary duties to other members/partners). Wilson did not just fail to mention his side dealing, an act in and of itself sufficient for a breach of fiduciary duty finding. He took affirmative and deliberate measures to conceal his side dealings from Gandis and CCC.

2. Appellants' breach of fiduciary duty claims were not time barred

Generally, in South Carolina, a plaintiff has three years from the time he knew or should have known he had a cause of action to bring suit. S.C. Code § 15-3-530; *Maher v. Tietex Corp.*, 500 S.E.2d 204 (S.C. Ct. App. 1998). A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994). The statute begins to run from this point – the date upon which plaintiff discovers the injury – and not when Plaintiff learns the

identity of all the alleged wrongdoers. *Tollison v. B&J Machinery Co., Inc.*, 812 F. Supp. 618, 619-20 (D.S.C. 1993).

The Order concluded that Appellants received notice of Wilson's side dealing activities in July 2009, and because they failed to engage in a reasonable inquiry when they received notice that Wilson had in fact conducted side deals Appellants assert should have gone through CCC, their counterclaims for breach of fiduciary duty were time barred. (R. pp. 1783-84). The Order again made no specific citation to any evidence or trial testimony supporting this conclusion and failed to take into account the totality of the record – most importantly Wilson's active concealment of his side dealings.

"Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014). As noted above, the agreement between Gandis and Wilson was for EFS to roll all of its business into CCC. Gandis later discovered that unbeknownst to him, Wilson continued to run side deals with EFS after all of that company's customers were supposed to be transitioned to CCC. (R. p. 211, ln. 18-22; R. p. 216, ln. 14-18; R. p. 217, ln. 20-22; R. pp. 1318-27). Gandis testified that he only learned of these side deals "by accident" and that when he confronted Wilson about them Wilson denied he was doing side deals. (R. p. 215, ln. 6-14; R. p. 217 ln. 3-22). The evidence and testimony at trial showed that Wilson took active efforts to keep his partner in the dark on his side dealings. Specifically, Wilson never utilized his CCC email address to conduct his side deals, only using his EFS email. (R. p. 215, ln. 6-14). He never copied Gandis on the side deal correspondence or informed him that he was conducting this business outside of CCC for his sole benefit. (R. p. 215, ln. 6-14). When Gandis

confronted Wilson about these side deals he denied it except the admission in late 2010 when he attempted to justify his side dealing saying "it's Christmas." (R. p. 215, ln. 6-14; R. p. 1528). Up until this point Wilson deceived his business partners to conceal his illicit activities, thus tolling the statute to at least late 2010 when he offered the paltry excuse that it was Christmas.

At trial Wilson submitted email correspondence from June 17 and October 30, 2009 related to EFS sales to West Carrolton. (R. pp. 1006-08). That email correspondence did not provide Appellants sufficient notice of the scope of Wilson's illicit activities, and is insufficient to support that finding. Moreover, it may have related to deals Wilson maintained were precluded as an import deal that predated CCC. Nevertheless, assuming *arguendo* that it did, Appellants' claim for breach of fiduciary duty was not time barred because it related back to Wilson's initial filing on April 27, 2012. *See* SCRCP 15(c). Gandis and Shirley answered and filed counterclaims alleging breaches of fiduciary duty. Later, when CCC was added to the case via Wilson's Second Amended Complaint, it counterclaimed seeking the same relief. Therefore, Appellants' breach of fiduciary duty claims against Wilson were timely pursuant to SCRCP 15(c) as they related back to the original April 27, 2009 filing.

3. Wilson violated his fiduciary duties to CCC and its members by competing with the Company after January 2012

Finally, Wilson also immediately set out to compete with CCC utilizing confidential company information. The Reporter Comments to § 33-44-409 make clear competitive activity constitutes a breach of a member's fiduciary duty to the company – "[t]he duty to not compete terminates upon dissociation...[h]owever, a dissociated member is not free to use confidential company information after dissociation." The trial court

found that Neologic/Freshwater used CCC confidential information to compete with the company. (R. p. 1788).[11] Wilson provided this confidential information to Neologic and therefore breached his fiduciary duty to the other members of CCC.[12]

Because the trial court misapplied the law and standard on fiduciary duty, the remainder of the Order's oppression analysis becomes suspect. Gandis and Shirley's actions were proper, legally based business acts taken by owners to protect the interests of the company against an owner who had concealed breaches of fiduciary duties for which he personally profited. In applying the wrong standard, the trial judge consequently viewed the Gandis and Shirley's acts as "oppressive" rather than as ones taken to protect their company. The context cannot be understated, CCC and the individual owners faced a large looming tax liability and business challenges including the need to wean from the reliance on personal debt/credit to fund the business when there was a business slow down. Wilson was an owner who was breaching his fiduciary duty to Gandis and Shirley and was side dealing/taking corporate opportunities for his own benefit. The fiduciary duty imposed by the law is there to prevent Wilson's disloyal actions.

The trial court's error of law colored the Court's findings on the remaining claims in this case. The Order reflects an utter failure to take Wilson's nefarious and unlawful conduct into account in evaluating the other claims – namely Wilson's shareholder oppression cause of action. The lower court's fundamental legal error on the breach of

[11] "Evidence shown at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing its trade secrets claim."

[12] This breach of fiduciary duty would be independent of the claims possessed by CCC and addressed by CCC on brief.

fiduciary duty claim colored and tainted its oppression analysis and conclusion. This error is substantial and bleeds into the entire analysis of the case.

B. No Shareholder Oppression Occurred in this Case

1. Standard of Review

"A corporate dissolution is an action in equity." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). "A shareholders' derivative action, as well as an action for stockholder oppression, is one in equity." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation marks omitted). In an action in equity, the appellate court may find facts according to its own view of the preponderance of the evidence. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

2. The trial court erred in finding Appellants "froze-out" & oppressed Wilson

The trial court found that Gandis and Shirley "froze-out" and "oppressed" Wilson as the other member of CCC by:

- Initiating an "Exit Strategy" for Wilson on August 16, 2011;
- Giving Wilson the option to eliminate the tax burden from prior phantom income allocations, including the transition from member to employee in order to keep receiving the $8,000 a month he had been receiving and prevent future phantom income issues or remain a member and be treated as such;
- Using company funds to repay a line of credit held by Gandis through which he funded CCC since its inception rather than dispersing that money solely to Wilson as a tax distribution (to cover his tax liability);

- Monitoring Wilson's company emails despite the fact that he had no expectation of privacy as evidenced from his own ability to access accounts of others (R. pp. 1752-56);
- Informing Wilson that he may not receive distributions for two or more years;
- Managing CCC's money supply in a way Wilson contends made it appear as if cash was more limited than it actually was;
- Limiting Wilson's access to CCC financial information so as to restrict his ability to export or otherwise distribute company data as of January 7, 2012;
- Removing Wilson from signatory authority on the operating account;
- Removing his ability to make wire transfers for the company;
- Not including him on certain discussions concerning CCC business operations (although the discussions did not pertain to the subject matters which the statute outline requires full member involvement);
- Physically locking Wilson out of the company following his resignation;
- Demanding Wilson return CCC's computer and blackberry following his resignation which he had removed whilst claiming to the officer present that he was only taking personal assets from his office;
- Terminating CCC funded cell phone plans for Wilson and his family while maintaining coverage for other members (Gandis) after accepting his resignation;
- Terminating health insurance coverage for Wilson and his family after accepting his resignation as of the month following his resignation;
- Forming ZOi after Wilson's departure from CCC to compete with the company.

(R. pp. 1777-78). Based on these findings, the Order directed Gandis and Shirley individually to buy-out Wilson's interest in CCC for $347,863.23. (R. p. 1789). The Order's conclusion however was in err as Wilson was not "oppressed" or "frozen-out."

S.C. Code Ann. § 33-44-410 empowers a LLC member to "maintain an action against a limited liability company or another member or manager for legal or equitable relief...to enforce: (1) the member's rights under the operating agreement; (2) the member's rights under this chapter; and (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company." S.C. Code Ann. § 33-44-410. Section 801 allows the circuit court to dissolve an LLC under certain circumstances including if a member establishes that "the managers or those in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." S.C. Code § 33-44-801(4)(e). Section 801 permits the court to fashion equitable remedies other than dissolution in such cases, including ordering a buyout of the disgruntled member's interest when "one or more members have engaged in fraudulent or unconscionable conduct...." S.C. Code § 33-44-801 Reporter Comments.

South Carolina courts have explicitly refused to fashion a standard/test for determining what constitutes shareholder "oppression" calling for consideration of various factors for evaluation on a case-by-case basis. In *Kiriakides v. Atlas Food Systems & Services, Inc.*, the South Carolina Supreme Court established how courts should determine whether majority shareholders oppressed the minority. 343 S.C. 587, 541 S.E.2d 257 (2001).[13] In establishing oppression considerations the Court recognized "that the terms

[13] The case established how to determine if majority shareholders acted oppressively within the meaning of S.C. Code Ann. § 33-14-310 which is substantively identical to § 33-44-801.

oppressive and unfairly prejudicial are elastic terms whose meaning varies with the circumstances presented in a particular case" which should be determined on a case-by-case analysis. *Id.* at 602. "Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation [and] withholding information from minority shareholders." *Ballard*, 399 S.C. at 594, 733 S.E.2d at 110. The *Ballard* Court noted that an oppressed minority shareholder "faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment." *Id.* at 595.

"Freeze out" and "squeeze-out" are used interchangeably and the terms mean "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants." *Kiriakides*, 343 S.C. 587 at n.26. "Common freeze out techniques include termination of a minority shareholder's employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation." *Id.* "Often, these tactics are used in combination.... The primary vulnerability of a minority shareholder is the specter of being locked in...having a perpetual investment in an entity without any expectation of ever receiving a return on that investment." *Id.* at 604-05. "The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion [and] [t]he court should be cautious...so as to limit them to genuine abuse rather than instances of acceptable tactics

in a power struggle for control of a corporation." *Id.* This cautionary admonition looms large in this case. The Court continued:

> [W]e do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party's reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33–14–300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

Id. at 599, 541 S.E.2d at 264. Importantly in the context of this case "[S]ection 33–14–300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder." *Id.* 343 S.C. at 600, 541 S.E.2d at 265. "Given the language of our statute, a 'reasonable expectations' approach is simply inconsistent with our statute." *Id.*

Oppression, fraud, and unfairly prejudicial conduct in the context of a shareholder suit remain elusive terms and no attempt has been made to define them as "[they] are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants." *Kiriakides* at 598. "The concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" *Ballard,* 399 S.C. at 588 (internal citations omitted).

Kiriakides involved a family owned close corporation (Atlas), where the brother held the majority share. *Id.* at 591. His siblings, the plaintiffs in the case, were minority

shareholders. *Id.* Siblings brought suit against Brother and Atlas seeking dissolution for oppression. *Id.* at 593. The Court found the facts "present[ed] a classic situation of minority 'freeze out'" and noted several supporting factors including Brother paying Sibling less than what was owed to her based on her ownership; Brother's conduct in transferring 21% of a wholly owned subsidiary to his children instead of to a partnership which included the Siblings; Brother and his family receiving substantial benefits from ownership of Atlas while Siblings had no such expectations of benefit; Atlas having no intention of declaring dividends in the near future; Atlas' extremely low buyout options for the minority, offering them $4,000,000 in 1998 when one minority had been told by an accountant in 1995 that his interest alone was worth $10,000,000; and there being no market otherwise for the minority's stock. *Id.* at 603-06. These circumstances, coupled with findings of fraud, led the court to conclude that "the totality of the circumstances demonstrated that the majority had acted 'oppressively' and 'unfairly prejudicially'" and affirm the order requiring Brother buyout his Siblings' interests. *Id.* at 606-07.

Later in *Ballard* the Supreme Court found that Ballard (20% minority shareholder in Warpath Development) had been oppressed by the majority. Ballard incorporated Warpath for the development of a marina on Lake Keowee. *Id.* at 590. Following years of negotiations with Duke (owner of the lakefront property), Warpath entered a lease to use the property for a marina concept. Ballard later entered into a Stock Purchase Agreement with the three Appellants. Under the Agreement, the three paid Ballard $1M in exchange for half the 40k shares he held and the additional 60k unissued shares so that Ballard would hold 20% and they hold 80% when all the stock was issued. Following the sale of Ballard's interest, it was discovered Warpath could only fit just over half the number

of projected slips. Upset over the decrease in projected income, the majority shareholders tried to convince Ballard to return the money paid for his shares or to return his 20k shares and leave the company. *Id.* at 592. Ballard rejected both options, and was then removed as director at the first shareholder meeting. At that same meeting, all three majority shareholders were elected to the board and appointed as officers. Immediately after, the Appellants approved issuance of an additional 900,000 shares. *Id.* Issuance of the additional shares conflicted with the Articles of Incorporation, which authorized 100,000 shares and the Agreement, which stated Ballard would ultimately own 20% of Warpath. It also diluted Ballard's interest from 20% to 2%. In addition, the court found it granted the majority more control over allocation of benefits. *Id.* at 597.[14] Thus the court found that the majority's actions, while not as egregious as those in *Kiriakides*, constituted oppression. *Id.* at 595, 733 S.E.2d at 110.

In *Kiriakides* and *Ballard* the minority shareholders were offered at best a Hobson's choice, if one at all. In *Ballard*, the majority shareholders acted with a singular purpose – get the minority out of the business and control the allocation of any benefits flowing from it exclusively to their own interests. Ballard had no options to protect himself and remain a meaningful part of the business due to the drastic and illegal alteration of his ownership interest. In *Kiriakides*, the majority likewise welded his superior power to shut out the minority to service his own interests. None of this occurred in this case.[15]

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[14] By increasing the amount of shares, the majority would be allowed further means through which to dictate and control the allocation of returns in favor of their own interest and to the exclusion of Ballard's.

[15] Recently, in *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015) this Court affirmed a finding that a minority shareholder of a family owned auto-service company was not oppressed. The minority shareholder, Son, brought an action for oppression and breach of fiduciary duty against the other shareholder family members and the company among other things. This Court examined the facts under the circumstances and in light of the decisions in *Ballard* and *Kiriakides* and found Son had not been oppressed: "Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and

The actions of Gandis and Shirley deemed "oppressive" certainly did not equate with the actions of the majority shareholders in *Kiriakides* and *Ballard*. They did not even rise to the level of those of the Son in *Mason* where this Court found no minority oppression. In this case Wilson was not "oppressed" or "frozen-out" of the business by Gandis and Shirley. He did not find himself in a "trapped investment" or suffering "indefinite exclusion from participation in business returns." In fact, Wilson had repeatedly expressed a desire to increase his family's investment and both times the remaining shareholders accepted the offer to sell. Rather Wilson took issue with the business decisions made and acted upon by his fellow CCC members and argued to the lower court that those actions constituted oppression. The trial court mistakenly agreed.

a. Evidence and circumstances of the case do not support a finding of oppression

It must be reiterated that this is a business case. The baseline for the dispute in this case is the continued existence of a business. Expenses and taxes must be paid from revenues produced. When revenues fall, owners are not able to continue to pay themselves out of cash flow and debt that has limits unless you are the government. One troubling aspect of the Order is the seeming absence of any consideration of real world business factors. The focus of the Order is driven by Wilson's hindsight advocacy oriented approach that he was an oppressed shareholder. This is not an academic exercise and the factors utilized by the lower court did not occur in a vacuum. Wilson was an actor seeking the

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benefited from those activities. He received the benefits of his casing scheme. He was not reelected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other stockholders enjoyed.... He was the one stockholder who refused to repay the Company for personal expenses .... Additionally, most of the testimony on the record indicates he had knowledge that adjusting the Company's inventory to diminish its tax liability was fraudulent." *Id.* at 55-56, 770 S.E.2d at 419.

best deal for himself—not CCC. There was not oppression. Much like the *Mason* case, Wilson was the actor who made or spurred the actions from Gandis and Shirley as they responded to his demands and tried to find a workable way to grow the business. The lower court also erred in disregarding the impact on the health of the company when two options were considered. Specifically, Wilson sought to remove his tax obligation by demanding the company increase its debt leverage and make a priority distribution to him. The additional leverage as well as the heightened disparity amongst the members' relative interests would very likely impair the company's future value. Instead the lower court has, in essence, granted a minority member veto power over the business judgment rule when he is unsatisfied. The consequences to small business owners for such a ruling are profound. The Order and its oppression analysis failed to consider several undisputed facts and circumstances that demonstrate Wilson could not have been an oppressed as the lower court found. The particular grounds identified for the trial court's oppression holding aside, these undisputed facts in and of themselves require reversal of the lower court's oppression finding.

i. Wilson controlled his destiny and CCC and therefore could not have been oppressed

The undisputed facts and evidence presented at trial show that Wilson was in control of his destiny and CCC and could not have been oppressed. First, is it undisputed Wilson had the option to either be bought out by Gandis and Shirley or purchase their interest for the same price (valuation). As detailed above, in mid to late 2011 there were exchanges among CCC members about Gandis and Shirley buying Wilson's interest. (*See supra* pgs. 20-21). Wilson began to claim it was his preference to buyout the other two. (R. pp. 1623-28). He believed they were altering numbers to drive down the buyout figure

offered for his interest and therefore stated that he would buy them out using their valuation numbers for his equity. (R. p. 1655; R. p. 156, ln. 17 – p. 157, ln. 3; R. pp. 421-26; R. p. 670, ln. 23 – p. 671, ln. 2).[16] Gandis and Shirley accepted this offer. Wilson, however, failed to obtain a serious purchaser. Thus, in mid-late 2011 Wilson had the option of either selling his interest and getting out of the company or buying the other members' interests at the same price/valuation. A minority shareholder simply cannot be oppressed when the other members (and alleged oppressors) agree to buy his interest or sell theirs to him using the same valuation. It was an equal and reciprocal buy-sell situation in which Wilson had the power and ability to choose either option. He chose to do neither.

Second, Wilson had the option and ability to remain with CCC and be treated as the other members. The so called "exit strategy" cited by the Order as "oppression" kept Wilson in the business. He continued to be over $100,000.00 ahead in compensation over Gandis. CCC needed to equalize Gandis and Wilson in lean times however Wilson objected to losing his favored status. To treat owners equally is not oppression but good business. As detailed above, in late 2011 CCC was in a cash flow crunch and could no longer continue providing Wilson loans which had increased to $12,000 a month. Gandis and Shirley gave him three options to consider, the first of which was to remain a member and be treated as such - a top line participant as an owner. This meant Wilson would maintain his equity position but no longer receive preferential treatment in the form of monthly advanced distributions as the distributions would require debt to fund. The other two options altered his membership status to address his personal cash flow/tax situation. Importantly, all three kept Wilson in CCC and Gandis made it known to Wilson he was

[16] Shirley referred to this arrangement as a Texas Draw. Gandis and Shirley were willing to sell their ownership for the amount that was offered to Wilson.

fine with any one of them.[17] In short, Wilson had the option to remain with CCC and be treated the same as Gandis and Shirley. He chose not to do so. No longer agreeing to afford a member preferential treatment not required by agreement or law simply cannot equate to oppression. The former is a discontinuation of a gratuitous and unnecessary act while the latter requires affirmative acts that prevent a member from receiving what he or she is legally and rightfully owed. Wilson controlled the options of whether he bought the other owners' shares, sold his shares, or stayed in the company and be treated as the other members.[18] Having multiple options for business planning for future business activities is not oppression. It is effective management of a business and the expectations of its owners. Why did Wilson not exercise any of the options? The answer is clear from Wilson's own conduct. Wilson controlled CCC because he was responsible for the company's sales without which no business survives. He acted as the conduit between CCC and its customers and therefore welded enormous power over the company. A fundamental aspect of shareholder oppression is that those in control weld their power in a prejudicial, unfair, and inequitable manner to the detriment of the less powerful member. It is antithetical to the notion of oppression that a member with total control over a business's livelihood can be oppressed. In this case not only did Wilson have this power, he welded it to his benefit and the detriment of Gandis, Shirley, and CCC.

ii. Wilson took all the good out of CCC

The trial court's finding of oppression is also incongruent with the undisputed fact that Wilson ultimately made off with all the good aspects/assets of CCC – namely its stock

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[17] At trial Gandis testified that he wanted Wilson to remain with the company. (R. p. 229, ln. 5-8).

[18] These options are especially important because of the control over sales that Wilson had and the threats he made when he threw down the gauntlet after receiving Gandis and Shirley's proposal.

of customers and prospective business. A party making off with a business's assets cannot be oppressed.[19]

The buy-sell discussions between Wilson and the other two members lasted through the end of 2011 and into early 2012. Wilson informed Gandis and Shirley he was seeking a purchaser for CCC. During this time, Gandis and Shirley became concerned that Wilson was sharing CCC's confidential information with prospective purchasers and reminded him to refrain from doing so.[20] Wilson responded that he "certainly would not divulge information that could be potentially harmful to the company in the hands of a competitor....[and his] desire is to continue discussions with the interested parties about buying the company...." (R. p. 1673). Contrary to this statement, the evidence revealed that Wilson was attempting to get a job with FilmTech, a competing business in TN. (R. p. 1685). In a January 2012 email Wilson stated that "[he] look[ed] forward to the opportunity to join [the] organization...." and that "[m]y goal will be to move as much of the business I manage at CCC to Filmtech as quickly as possible. In addition, I will work to bring prospective business that CCC has been working on or qualifying over the past 3 to 6 months." (R. p. 1692). A member who is taking the business and the last six months of CCC prospects to a competitor cannot be oppressed. Filmtech ultimately did not hire Wilson. He, however left CCC, taking with him the company's confidential information to a competitor and his new employer Neologic. (R. p. 1788).[21]

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[19] Gandis and Shirley incorporate the arguments of CCC regarding the confidential information and trade secret misappropriation.

[20] This is consistent with the arguments regarding the fiduciary duty owed to CCC that Wilson not act in his own interest but in the interest of CCC.

[21] Trial court found Neologic/Freshwater was utilizing CCC confidential information.

Wilson capitalized on CCC's information after his departure and generated cash for Neologic with it. Wilson cannot claim that he was oppressed for failure to receive regular distributions following his departure. The circuit court's expert confirmed that neither Gandis nor Shirley received distributions following his departure. Accordingly, this case does not present a situation where the minority has been prevented from receiving the economic benefits retained by the majority. Instead, the evidence of this case showed that after leaving CCC, Wilson almost immediately took advantage of the information he took from CCC and generated cash for his family. (*See* R. p. 1757; R. pp. 1760-62).[22] A list of Neologic customers submitted at trial showed that 23 out of the 27 were customers of CCC. (R. p. 1333; R. p. 883, ln. 17-24). When it became clear to Wilson that he would no longer receive preferential treatment by way of advanced monthly distributions/loans he set out to take everything of value he could out of CCC, concealed his own selfish actions, acted as if he was attempting to sell the company to a third party, and used the time to find a better deal for himself to the detriment of CCC. In proving his effectiveness as a salesman, Wilson convinced the lower court to focus on his dire personal financial situation (of his own making)[23] to convince the lower court that he was oppressed.

iii. Wilson was always ahead of other members in cash distributions

Under the LLC statute "[a] member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services

[22] R. pp. 1760-62 - discussing transaction with company named Imperial—a company that Wilson never transacted business with prior to CCC.

[23] It should be noted that Wilson had a number of prior failed business ventures in the film industry due to a disagreement with other owners about appropriate debt loads that led to his expulsion and an instance where his venture as a sole proprietor led to his own personal bankruptcy. (R. p. 306, ln. 8-13; R. p. 365, ln. 2-3). Personal financial distress was apparently very common for Wilson. He resisted accounting controls, responsible cash management, and business/financial management at CCC.

rendered in winding up the business of the company." S.C. Code Ann. § 33-44-403. Section 405(a) mandates distributions made before dissolution be made in equal shares to the members and Section 406 prohibits distributions if:

> (1) the limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or
>
> (2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

S.C. Code Ann. § 33-44-406(a). The undisputed evidence presented at trial established that Wilson was always ahead of Gandis and Shirley in cash distributions. (R. p. 115, ln. 12-18; R. p. 153, ln. 18; R. p. 256, ln. 10-14). Wilson does not dispute that he received numerous monthly payments as advanced distributions which neither Gandis nor Shirley received. Wilson did not simply get his proportional interest in distributions; he undeniably received above and beyond the other members throughout his tenure at CCC and remains substantially ahead of them to this day. Simply put, Wilson received more cash distributions than he was actually entitled to under the LLC statute. Oppression requires a member failing to receive what is owed to him. One receiving more than they are entitled to under the statute simply cannot be oppressed.

iv. Gandis and Wilson met to discuss potential business the day he resigned

The Order's oppression finding also ignores the fact that Gandis and Wilson had a sales meeting to discuss what needed to be done to get the Company going the day Gandis and Shirley learned he was leaving CCC. (R. p. 163, ln. 5-13). It makes no sense that a member who is far along in a plan to oppress and freeze-out another member would meet

with him to discuss sales plans and opportunities going forward. On the contrary, having such a meeting indicates one thing – Gandis thought and planned for Wilson to remain a part of CCC at that point. Wilson's own words corroborate this fact when he wrote on January 6, 2012 that "[s]ince John and I began discussions regarding CCC buying me out and extending an employment arrangement, John has insisted that the goal was not to force me out of the company but to give me some security and incentive to help grow the business." (R. p. 1674). Wilson's own word "incentive" is the polar opposite of oppression and indicative that this was not a "trapped investment," but merely an ownership interest that required work to grow it and keep its value. That is business.

In sum, none of the factors identified in *Kiriakides* and *Ballard* as indicators of shareholder oppression are present in this case. The undisputed facts and circumstances show Wilson was not and could not have been "oppressed." Wilson did not find himself rendered powerless and vulnerable to the calculated actions of the other members. He was not "trapped in his investment" in CCC without the prospect of receiving a beneficial return. On the contrary, he remained and stands to this day substantially ahead of Gandis and Shirley in distributions received. The only valuable investment Wilson made into CCC was the stock of EFS customers he rolled into the business and the subsequent development of those and other customers with Gandis' help in product development and sourcing. He took that investment when he left CCC. The *Ballard* Court recognized, "[r]elationships in business, like any other relationship, can quickly sour when they are predicated on unmet expectations, whether justified or not." 399 S.C. at 590. This case is one in which a business relationship soured when Wilson's unrealistic and selfish expectations of preferential treatment were not met.

b. The Order's grounds for finding oppression fail

The grounds listed in the Order as supporting its oppression holding are contradicted by the evidence presented at trial. The Order sets forth a laundry list of alleged "prejudicial acts" evidencing Wilson's oppression. (R. pp. 1777-78). Wilson not getting his way in a business relationship is not a "prejudicial act" against him but an oft true business reality that an owner does not get their own subjective expectations met. It is a fact that Gandis and Shirley as CCC members had no obligation to do any of the things listed as oppressive acts by the lower court.[24] As detailed in Appellants' Motion to Reconsider, the alleged oppressive acts were nothing of the sort and all done as real world responses that responsible businesses take every day to protect a business. (*See* Mot. Recon.). None of the actions listed were oppressive acts.

C. The trial court erred in ordering the individuals members to buyout Wilson's interest in absence of unconscionable conduct

Assuming Wilson was oppressed, the Order erred in ordering Gandis and Shirley individually to purchase his interest in CCC. The trial court fashioned this remedy pursuant to its equitable powers under S.C. Code §§ 33-44-401 and 801. (R. p. 1789). While those provisions allow a court to order a buyout of an oppressed member's interest, the Reporter Comments to Section 801 make it clear that fraudulent or unconscionable conduct is required to order individuals buyout another member: "a buy-out might be appropriate where, for example, one or more members have (i) engaged in fraudulent or unconscionable conduct...or (iii) engaged in serious misconduct....". § 33-44-801 Rep.

[24] There is an important procedural point to address regarding the facts and the courts application of the facts. The lower court refused to allow post trial briefing. This refusal amplified its misconception and misinterpretation of the evidence and grounds it relied upon. The Order itself does not cite to any supporting evidence and does not cite to any trial testimony. The Order does reveal that it was submitted by an advocate and the advocate's view of the evidence was amplified by not allowing post trial briefing.

Comm. The Order did not find Gandis' or Shirley's actions unconscionable or fraudulent. It simply deemed them "oppressive." Only in denying Appellants' Rule 59 motion did the trial court attempt to remedy this fatal error by summarily stating that "[t]he evidence revealed that Mr. Gandis and Ms. Comeau-Shirley deliberately collaborated to oppress Wilson. Their conduct was unconscionable." (R. p. 1795). Neither order deemed their actions "fraudulent." The trial court failed to specify what conduct it deemed unconscionable and any basis for its conclusion.[25] Without a specific finding that Gandis and Shirley's actions were unconscionable ordering individual buyout was not an option.

The LLC statute does not define "unconscionable conduct" and what constitutes such under the statute appears to be an issue of first impression in South Carolina. Black's defines "unconscionable" as "(of an act or transaction) showing no regard for conscience, affronting the sense of justice, decency, or reasonableness...shockingly unjust or unfair." BLACK'S LAW DICTIONARY (10th ed. 2014). Unconscionable conduct arises in case law most often in contract disputes. In that regard, "unconscionability" is a narrow doctrine whereby a challenged contract must be one which no reasonable person would enter, and inequality so gross as to shock the conscience. *Brown v. Green Tree Services, LLC*, 585 F.Supp. 2d 770 (D.S.C. 2008). Our courts define "unconscionability" as the absence of meaningful choice for one party due to one-sided provisions with terms so oppressive that no reasonable person would make them and no fair person would accept them. *Holler v. Holler*, 364 S.C. 256 (Ct. App. 2005). Based upon these recognized definitions and iterations of unconscionable/unconscionability one's conduct must go well beyond simple oppression and be so one-sided, unjust, shocking to the conscience and unfair that no

[25] This was yet another error in the proceedings below exasperated by the denial of post-trial briefing.

reasonable person would undertake such acts. The Reporter's Comment denotes a higher burden of devious activity beyond oppression necessary to order individuals buyout an oppressed member. Assuming Gandis and Shirley's actions were oppressive, they certainly were not unconscionable. The actions deemed oppressive by the Order were business decisions made and acted upon to address ordinary issues such as tax liabilities and ensuring cash flow to pay debts. They did not reach the level of offending human decency to a degree no reasonable person would undertake or tolerate them. Furthermore, South Carolina courts have shown clear hesitancy to disregard statutorily created corporate liability shields and hold individual LLC members liable for acts taken on behalf of the company. In *16 Jade St., LLC v. R. Design Const. Co., LLC*, 398 S.C. 338, (2012) the Court initially held that a LLC member was not shielded from personal liability under the LLC Act under the circumstances of that case but subsequently withdrew and entered a superseding opinion walking back the opening to individual liability. *16 Jade St., LLC v. R. Design Const. Co., LLC*, 405 S.C. 384 (2013). Similarly, the judiciary has long respected and looked to the business judgment rule to evaluate whether actions by those in power within a business are actionable because acts that appear nefarious or unlawful may very well be justified reasonable business decisions under the circumstances. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Deytens*, 291 S.C. 214, 217, (Ct. App. 1987).

Holding individual LLC members liable to another member in the absence of fraudulent or unconscionable behavior sets a dangerous precedent, creates bad policy and an unfriendly business climate. The Reporter Comments to 801 reflect the legislature's

recognition of this simple concept and provides the rare exception (individual liability) to the majority rule (corporate liability) requires reprehensible and shocking acts. The individual Appellants' allegedly oppressive acts are not ones calling for imposition of this rare and exceptional remedy. Therefore, should this Court find Wilson was oppressed it should order that CCC rather than Gandis and Shirley buy-out Wilson's interest.

1. Trial court erred in its valuation of Wilson's interest in CCC

The Order also erred in valuing Wilson's interest by relying on Stoddard's adjusted December 30, 2011 valuation thereby greatly inflating the value of Wilson's interest while failing to consider his actions that greatly devalued CCC. (R. p. 1789).[26] Should the Court deem buyout appropriate the valuation of Wilson's interest should be based upon the court appointed accounting expert's 2013 valuation. To do otherwise allows Wilson to "double dip" by being paid a certain value for his interest and allowing him to continue to capitalize on the business that he took from CCC.

2. Gandis and Shirley should only have to pay their proportional share

The Order is profoundly unfair to the minority member Shirley. It relied upon Stoddard's schedule derived from Bradshaw's work (R. pp. 1281-84), for the computation of Wilson's equity value. (R. pp. 1782-83, R. p. 1789). The Order erred by not relying upon that same schedule prepared by Bradshaw in identifying what portion of that figure was attributable to Gandis and Shirley based on their respective relative capital account in the company. The evidence showed that Shirley owned 10% of CCC, had no voting rights and did not participate in daily business operations. At worst, she should only have to pay

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[26] There was no consideration of the taking of its customers, theft of its confidential information, and the costs imposed by the use of scorched earth litigation tactics to the financial detriment of the business.

her proportional share based on her relative capital account. The Order erred by imposing an inequitable remedy on her as a 10% non-voting owner.

D. Wilson Wrongfully Obtained Equity Despite his Unclean Hands

"He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Straight v. Goss*, 383 S.C. 180, 207 (Ct. App. 2009)(Court found the minority shareholder's "own inequitable conduct came directly to bear on the transactions of which [he] now complains."). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* 383 S.C. at 206. The trial court afforded Wilson equitable relief to which he was precluded from receiving due to his "unclean hands." The lower court flatly ignored the litany of inequitable conduct perpetrated by Wilson and erroneously in violation of the unclean hands doctrine awarded him equitable relief. Logical fallacies in the Order allowed Wilson to receive relief to which he was not entitled.

1. Wilson's Numerous Inequitable Acts Were Well Established at Trial

a. Usurping Corporate Opportunities: Illegal Side Dealing

Wilson was to roll all of his EFS customers into CCC in exchange for a monthly draw. Gandis provided the draw however Wilson did not roll all EFS customers into CCC but instead conducted a steady stream of side deals which he attempted to conceal from the other members.[27] Wilson argued below that he and Gandis agreed to exclude three import

[27] Discovery showed that Wilson transacted over $1.7 million in illegal side deals while being paid with Gandis' personal money. (R. pp. 1318-27). Gandis was unaware his partner was conducting side deals for his own gain which could and should have come through CCC.

accounts from coming into CCC. Even if this were true, which Appellants deny, there was undisputed evidence presented at trial that Wilson was doing illegal side deals including one which he attempted to excuse by claiming "it's Christmas."

b. Erasing Computers and Blackberry

Wilson destroyed evidence both before and during the litigation. (R. p. 1312; R. pp. 1314-17). Wilson's pre-litigation evidence destruction is particularly troubling because he received an evidence preservation letter the day after taking CCC's computers and Blackberry. (R. pp. 1706-08). His destruction of evidence prevented Appellants from conducting complete discovery on their fiduciary duty claims, and hindered others from defending themselves.

c. Theft of CCC Confidential Information and Trade Secrets

The evidence presented at trial showed Wilson shared CCC trade secret and confidential information with competitors when he was attempting to get a new job under the false pretense of selling the business. (*See* R. p. 1788)("Evidence at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim.").

d. Litigation Tactics

Wilson's original and amended pleadings requested the court order dissolution. Gandis and Shirley thus assumed that CCC would be dissolved and acted accordingly. In a December 6, 2012 hearing scheduled for the dissolution relief he requested, Wilson argued against dissolution by telling his counsel (who relayed the message to the court) that a legitimate offer had been made to purchase Appellants' equity. (R. pp. 1288-1309; R. p. 257, ln. 11 – p. 259, ln. 25). The court was told "we've made an offer to purchase

this business for almost half a million dollars, their interest. That hasn't been – they haven't accepted or rejected that yet. But we think this business has value." (R. p. 1294). The court did not order dissolution and the purchase of Gandis and Shirley's interest never came to fruition. Wilson then came to trial demanding buyout of his interest in CCC. Not only did the trial court order the buyout, it erroneously valued Wilson's interest at a point before his own actions greatly devalued the company. The Order simply turns a blind eye to Wilson's numerous egregious and consistent inequitable actions. In short, Wilson undertook a campaign of deliberate and undeniably inequitable actions for his personal gain and to the detriment of CCC and his fellow members. He exercised control over the sales and the future of the business. Because of his own personal financial situation, he used Gandis for funding, acted as an owner when business was good, and when Company sales under his direction plummeted and taxes had to be paid, he did not want to suffer the pain of ownership and he sought to be paid as an employee-with a mantle of ownership. At all times, he placed his interest above those of the collective good of the Company. Other deeds chronicling Wilson's unclean hands have been addressed previously and are contained *passim*. It is antithetical to the concept of equity that someone who acted in this manner can be rewarded by the court's award of equitable relief. The trial court disregarded Wilson's known and established history of inequitable conduct and wrongfully awarded him equitable relief in the form of an ordered buyout contrary to the established principle of "unclean hands." The Order therefore should be reversed.

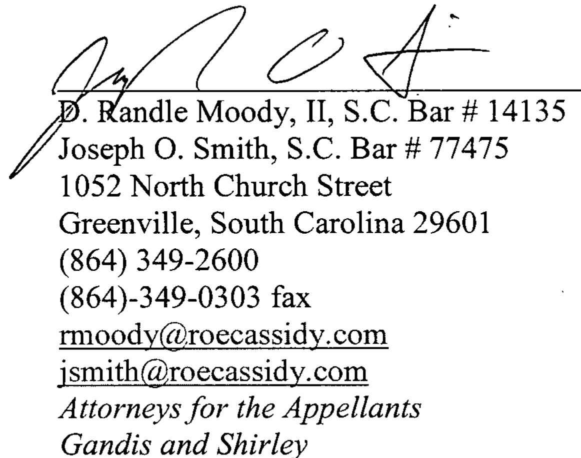
V. CONCLUSION

Wilson wanted all the upside of business ownership, none of the downside of ownership, and the security of being an employee. Reality and universally recognized

business principles require choosing one or the other. Business ownership entails greater risk for the accompanying possible greater reward. On the other hand, an employee enjoys little to no risk by receiving a salary but no possibility of reaping the potentially larger rewards accompanying ownership. Wilson uniquely received both the owner and employee upside for several years with CCC. When the business needed him to choose one or the other he took actions and maneuvered to maximize the upside and the trial court's order gave him just that. After absconding with CCC's valuable assets, namely its stock of customers and confidential information over to his new employer, the circuit court ordered Gandis and Shirley pay him for his interest in a devalued CCC company. Wilson wins threefold should the Order be upheld – (1) receipt of distributions over and above other members; (2) controlling CCC's valuable assets for use by his new employer Neologic and (3) payment for his interest in CCC at a price he only could have received had he not dismantled the company for his own benefit. Thus, for the reasons set forth above, the Circuit Court's Order of January 9, 2015 should be reversed.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.



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June 20, 2016
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILE COUNTY
Circuit Court

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000476

Case No. 2012-CP-23-02887

David Wilson, individually and derivatively on behalf of Carolina Custom Converting, LLC, Plaintiff,

v.

John Gandis, Andrea Comeau-Shirley, Zoi Films, LLC, and Carolina Custom Converting, LLC, Defendants,

John Gandis and Andrea Comeau-Shirley, Third-Party Plaintiffs,

v.

Carolina Custom Converting, LLC, Third-Party Defendant and Counterclaim Plaintiff,

v.

David Wilson, Steve Norvell, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc.,

Of Whom David Wilson, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc. are the Respondents,

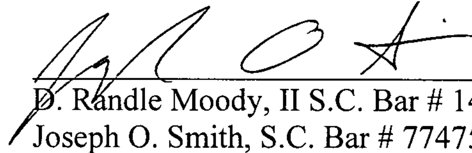
and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants John Gandis and Andrea Comeau-Shirley complies with Rule 211(b), SCACR.

ROE CASSIDY COATES & PRICE, P.A.



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June 21, 2016
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
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Of Whom David Wilson, NeoLogic Distribution, Inc. and Fresh Water Systems, Inc. are the Respondents,

and

John Gandis, Andrea Comeau-Shirley, and Carolina Custom Converting, LLC, are the Appellants.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants John Gandis and Andrea Comeau-Shirley by depositing a copy of same in the United States Mail, postage pre-paid, this 21th day of June, 2016, addressed to the attorneys of record as follows:

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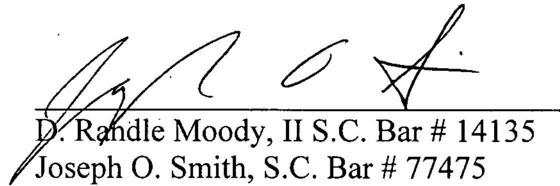

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June 21, 2016

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SC Court of Appeals

VIA FEDERAL EXPRESS

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: **David Wilson v. John Gandis**
Appellate Case No. 2015-000476
Lower Case No. 2012-CP-23-02887
RCCP 2209.0002

Dear Ms. Kitchings:

Enclosed please find the original and fifteen (15) copies of the **Final Brief of the Appellants** in the above-referenced appeal. Also enclosed is a Proof of Service for the same. Please file the enclosed documents in your usual manner and kindly return one filed, clocked copy of the same to me in the stamped, self-addressed envelope provided herein.

If you have any questions or concerns, please do not hesitate to call. Thank you for your assistance.

With kind regards, I am

ROE CASSIDY COATES & PRICE

Ellen S. Griffin
Paralegal to Joseph O. Smith

Enclosures: (as stated above)

cc: W. Andrew Arnold with Enclosures
Bruce B. Campbell with Enclosures
Burl F. Williams with Enclosures