IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

Andrew P. (Andy) Ballard, ... Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. ..... Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

1. Procedural History

This matter was commenced by Respondent on July 30, 2008. Respondent's complaint was amended on August 25, 2009. This matter, including all claims and counterclaims, was tried from March 15-17, 2010. Respondent's legal causes of actions were dismissed at trial leaving only equitable claims. Appellants' counterclaims were likewise dismissed before the conclusion of trial. As such, the jury was dismissed and Respondent's equitable claims were tried before the court. After consideration, the Court entered an Order file stamped May 4, 2010 in favor of the Respondent on oppression, as well as ordering the escrow of 60,000 shares of Warpath. Appellants filed a motion for reconsideration and new trial on May 14, 2010. Appellants' motion was denied on May 21, 2010. A notice of appeal was thereafter timely filed.

2. Factual History

In or around 2003 Respondent Andrew Ballard ("Ballard") began laying the groundwork for the development of the land around the Warpath Landing public access site to Lake Keowee located in Pickens County, South Carolina. Appellant, Warpath Development, Inc. ("Warpath") was incorporated by Ballard on September 8, 2004. (Articles of Incorporation, Pl. Tr. Ex. 3.) In 2006, after several years of negotiations with Duke Power and proceedings before the Federal Energy Regulatory Commission

("FERC"), Ballard finally secured the lease to the property in the name of Warpath. (Lease, Pl. Tr. Ex. 2.) The lease provided Warpath with approval to develop the land as a multi-use marina and retail venture.

At or about late 2006/early 2007, Ballard began seeking additional investors for Warpath. Appellants Tim Roberson ("Roberson"), Rick Thoennes ("Thoennes"), and Rick Thoennes, III ("Thoennes III"), were introduced to Ballard. At the initial meeting, Roberson, Thoennes, and Thoennes III heard Ballard's presentation and received a copy of conceptual plan. (Tr. Trans. at 259, 449) The conceptual plan details the layout and overall concept of the development. (Lease, Pl. Tr. Ex. 2.) The conceptual plan called for the development and installation of a marina with space for dry stack and wet boat slips, lodging, restaurant, store and convention center. In evaluating this investment, Roberson, Thoennes, and Thoennes III put together *pro formas*. (Pl.'s Tr. Ex. 13) These *pro formas* were shared with Ballard over several meetings. (Tr. Trans. at 449-50.) Over the course of several meetings, Roberson, Thoennes, and Thoennes III were also provided representations as to the state of the development and testified that Ballard led them to believe that the development was at a point that breaking ground was imminent. (Tr. Trans at 449.) After some discussions, meetings regarding the *pro formas*, investigation and completion of what Roberson, Thoennes, and Thoennes III believed to be the requisite amount of due diligence, an agreement was reached with Ballard for the purchase of 80% of the corporation in exchange for the payment of $1,000,000 plus future payments totaling $150,000 after the "grand opening". This agreement was memorialized in a written Stock Purchase Agreement entered into on May 29, 2007. (Stock Purchase Agreement, Pl. Tr. Ex. 1.)

Immediately, Roberson, Thoennes and Thoennes III set to work. (Tr. Trans. at 262.) Within a few months of closing, architectural renderings had been obtained and a meeting with Duke Power had been had. (Tr. Trans. at 453-55.) Unfortunately, it became clear to Roberson, Thoennes and Thoennes III that the development was not as they claim was represented by Ballard. Specifically, the conceptual plan called for 100-200 wet boat slips with no limitations placed on the geography of where those slips could be located. (Tr. Trans. at 262, 453-57; Def. Tr. Ex. 1.) Working within the known constraints placed on the marina development by Duke Power and other regulatory agencies, the architect was able to accommodate 200 paid wet boats slips within the marina cove. (Id.) After viewing the rendering, Ballard indicated to Roberson, Thoennes and Thoennes III that Duke Power would not approve the layout of 200 slips. (Tr. Trans. at 263, 454-55.) Despite the prediction by Ballard, the rendering was presented to Duke Power and Duke Power's response was exactly as Ballard had predicted. (Id. at 263, 456.) After returning to the architect with the constraints imposed by Duke Power, the architect was able to only squeeze 102 wet boat slips into the space allowed, which was far less than the 200 represented and planned for. Additionally, Appellants complained that Ballard led them to believe that the development was in its last stages of permitting and that construction could begin in the fall of 2007. This also proved inaccurate.[1]

On account of these and other developments, Roberson, Thoennes and Thoennes III were concerned about the financial viability of the venture and believed that they had been deceived Ballard as to the true nature of the development. (Tr. Trans. at 408-12, 528-29; Pl. Tr. Exs. 10 and 11; Defs. Tr. Ex. 5, 6, and 7.) After discussing the matters initially among themselves, believing that Ballard had misled them, they reached out to

[1] Final permits were eventually obtained following trial during the summer of 2010.

Ballard, who had been absent from development planning and implementation for sometime, for his thoughts and present him with some options. (Tr. Trans. at 402-05.) Specifically, due to their belief's in Ballard's fault, Ballard was presented with a proposal from Roberson, Thoennes and Thoennes III, which called for either (1) return of the $1,000,000 in exchange for their stock to permit Ballard to move forward with some different partners or, in recognition of the diminished value of the project, (2) return of some portion of the $1,000,000 and they all continue on together. (Def. Tr. Ex. 5.) Ballard rejected their proposals outright. In return they were also met with silence and an unwillingness to participate. (Def. Tr. Ex. 6 and 7; Tr. Trans. at 168-69, 403.) Ballard was then approached by Roberson regarding the leadership of the corporation, as well as the possibility for the need to issue additional shares to allow for necessary business flexibility going forward. (Def. Tr. Ex. 6; Tr. Trans. at 403-04.) At that time, all parties had already discussed the possibility of approving a small equity stake for someone who they were considering approaching about running the hospitality side of the company. (Tr. Trans. at 400-02.)

Ballard ultimately consented to Roberson assuming the presidency, but remained silent on the authorization of additional shares. (Tr. Trans. at 403-04.) A meeting of the shareholders was called wherein Roberson, Thoennes and Thoennes III were elected directors and the authorization of 900,000 additional shares was approved which upon amending the articles of incorporation would result in an increase in shares from 100,000 to 1 million. (Pls. Tr. Ex. 4 and 5) No additional actions, including amending the amendment of the articles of incorporation, were ever taken.

Shortly after this shareholders meeting, Ballard filed the instant lawsuit seeking an injunction to prevent his dilution. Ballard eventually amended his complaint to assert various causes of action for oppression, breach of contract, anticipatory breach of contract, breach of fiduciary duty, a shareholder derivative claim, etc. In response, Appellants denied all claims and asserted counterclaims. At trial, Ballard dismissed all legal claims and remedies electing to move forward with equitable remedies. Before the close of evidence, Appellants dismissed all counterclaims leaving only Ballard's equitable claims to be tried by the court. After testimony, argument and post-trial briefings, the Court issued an order finding in favor of Ballard on the issues of oppression and ordering the buyout of Ballard's 20,000 shares. Additionally, the court ordered the escrow of 60,000 shares of Warpath pursuant to S.C. Code Ann. § 33-6-210. The court left open the issue of the valuation of Ballard's shares for a separate hearing, if necessary.

ANALYSIS

1. Standard of Review

This appeal is as to an order of the trial court sitting in equity. As such, the Court reviews this matter *de novo* and may find facts in accordance with its view of the evidence. Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).

2. The trial court's finding of oppression is not supported by the evidence, therefore, as a matter of law, should be reversed.

A. Legal Standard for Oppression

The trial court in this matter found in favor of Ballard on the issue of oppression pursuant to S.C. Code Ann. § 33-14-300(2)(ii) and ordered the buyout of Ballard's shares

pursuant to § 33-14-310(d)(4). § 33-14-300(2)(ii) provides that "the directors or those in control of the corporation 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." § 33-14-310(d)(4) permits a court to "make such order or grant such relief, other than dissolution" including "providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders."

Under South Carolina law, by legislative design, an action for minority shareholder oppression is a restrictive cause of action and claims of oppression are analyzed "case-by-case" and "supplemented by various factors which may be indicative of oppressive behavior...." Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 603, 541 S.E.2d 257, 266 (2001). The facts of the Kiriakides decision, identified by the Supreme Court in the opinion as a "classic" example of oppression, considered factors such as (1) the majority shareholder was deliberately manipulating the number of outstanding shares of the minority shareholders in order to reduce distributions; (2) the majority shareholder was deliberately depriving the minority of their interest in a subsidiary; (3) due to the actions of the majority shareholder there was no prospect of the minority shareholders receiving any financial benefit from their ownership of shares; (4) the majority shareholder and his family actually received substantial monetary benefit from their ownership of the shares; (5) despite the fact that the company has substantial cash and liquid assets, very little debt and therefore, the ability to declare dividends, notwithstanding that ability, the majority had indicated it would not do so in the foreseeable future; (6) the majority shareholder was in total control of the corporation is totally estranged from the minority shareholders; (7) the company by and through the

majority made extremely low and fundamentally unfair buyout offers to the minority shareholders, and (8) the company is not appropriate for a public stock offering at the present time. See id. at 343 S.C. at 604-605; 541 S.E.2d at 267. Specifically, the Supreme Court held that "[t]hese factors, when coupled with the referee's findings of fraud, present a textbook example of a "freeze out" situation." Id. at 343 S.C. at 605; 541 S.E.2d at 267.

B. Trial Court's Finding and Support

When considering the totality of the circumstances, in finding oppression the trial court expressed ten factors supporting its decision. (May 4, 2010 Order.) Paraphrasing, the trial court found as follows in support of its finding:

(a) Appellants expressed a desire to have Ballard removed from the corporation;

(b) Appellants decided to have the corporation issue additional stock to increase the return on investment;

(c) Appellants removed Ballard as a director by refusing to elect him as one of four directors at the first stockholders meeting after they obtained control of the corporation;

(d) Without sufficient justification, Appellants passed a corporate resolution to authorize the issuance of 900,000 additional shares to raise capital;

(e) Upon the issuance of the 900,000 shares, absent the acquisition of additional shares by Ballard, Ballard's

ownership percentage would have been reduced from 20% to 2%;

(f) After Ballard was no longer a director, he was excluded from management and was not provided information regarding the status of the development;

(g) During the pendency of this case, the shareholders elected Ballard a director;

(h) Roberson testified that if his future plans to run the completed development come to pass, he has considered hiring some family members to assist him in running the marina. If the board so chose at that time, in order not to drain cash flow, Roberson testified that employee incentives and bonuses could be offered in the form of equity, which could necessarily go to Roberson's family members if they were hired.

(i) The corporate authorization of additional shares of Warpath was taken in violation of the Articles of Incorporation which, absent an amendment, only permitted a ceiling of 100,000 shares.

(j) The Appellants' counterclaims against Ballard were dismissed at trial.

(May 4, 2010 Order at 10-12.)

C. Trial Court's finding of oppression is not legally supported by the evidence

The evidence in this case simply does not support a finding of oppression. Kiriakides, while setting the legal standard for evaluating allegations on oppression, also expressly sets forth factually what the Supreme Court of South Carolina found to be the default or "classic" case of minority shareholder oppression. A comparison of the claims of Ballard cited by the court in its order against the factors set out in Kiriakides demonstrates clearly that the facts of this case and the findings of the trial court do rise to the level .

The factors, as expressed by the trial court's order purportedly supporting a finding of oppression, even if assumed to be correct, whether take in whole or in part, do not support a finding of oppression. This case does not present a "classic" case of oppression. Ballard was upset and filed this lawsuit because there were decisions being made and actions taken for the good of the corporation and shareholders as a whole, and not simply to satisfy Ballard's individual interests. Unlike Kiriakides and others, this case lacks any evidence of any nefarious action on the part of any of the Appellants directed solely at harming Ballard's interests. The problems with the development affected all shareholder's equally. The decisions made by the Warpath board and approved by the shareholders complained of by Ballard affected all shareholder's equally. Ballard cannot establish that he is seeing no return from the development, because there is no active business. All that is occurring at the development is the further expenditure of time and money. Ballard occupies an equal position relative to all of the other

shareholders. No one is receiving a benefit. No one is making money. Ballard has not been oppressed.

When the evidence is examined, it is clear that the trial court's decision is not built upon a sound set of factors supporting oppression. Taking each factor set out above individually:

(a) Without question, on October 28, 2007, Rick Thoennes, III wrote an email asking the question "Don't we want to get him out of the deal?" (Pl.s Tr. Ex. 10.) That was the first and last time that question was uttered. That utterance was not agreed to at that time or any other time by either Rick Thoennes or Tim Roberson, and no actions were ever taken to force out or deprive Ballard of his interest in Warpath. (Tr. Trans. at 254, 470, 557.) In fact, the proposal to Ballard that followed that email actually offered to rescind the Stock Purchase Agreement, which would have removed Roberson, Thoennes and Thoennes III as shareholders and returned 100% of Warpath stock to Ballard. When questioned at trial on this issue, Thoennes III stated as follows:

> (Q): What was going on at that time, your state of mind and kind of what everybody else was thinking at that time?
> (A): Well, obviously at that point in time we were upset about what was happening with the project, that we weren't going to get the number of boat slips that we thought we were going to get or that I thought Andy had led us to believe we were going to get. So we were upset. And in making that comment that I wanted him out of the deal, at that point in time I did feel that way because I didn't feel like I wanted to be in business with someone who's misleading me.
> ***
> (Q): At any point did you ever express to Andy Ballard that you wanted him out of the deal?
> (A): No.
> (Q): At any point did you, or Mr. Roberson or your Father ever take any steps to remove Andy Ballard from this – from his position as a shareholder in this matter, in this ---
> (A): No
> (Q): --- in Warpath?

(A): No

(Tr. Trans. at 529-30.) Thoennes and Roberson both testified consistently. (Tr. Trans. at 416, 557.) Ballard likewise testified that he knew they were upset, but there was never any attempt to remove him. (Tr. Trans. at 165-66.)

This is a non-issue. As set forth in the background above and explained in testimony, the Appellants believed at the time that they had been deceived by Ballard. Harboring ill feelings or resentment towards a partner at some point in time is no basis to support a claim of oppression.

(b) As for the vote take to authorize 900,000 additional shares of Warpath, the evidence is that the actions were not taken for some nefarious purpose as Ballard wants the Court to believe. Being that it was Roberson's suggested corporate action agreed upon by all directors, Roberson explained in testimony as follows:

> (Q): ... What was the purpose behind increasing the number of shares, the authorized shares?
> (A): Well, like I mentioned a while ago, it really goes back to a problem that began to evolve soon after we started work on the project. We've heard a lot today about docks not being what we expected. The number of docks, that equates to the fact that the revenue was not what we expected. *** So those revenues just would not exist. I shared with my partners in meetings and in emails that this represented a business problem, and we had to find a business solution to it. It's just a – it's a lack of operational revenue. It relates more to -- it relates to that. It does not relate to capital.
> ***
> (Q): And your discussions or yours is paragraph 6, which talks about providing the capital to obtain long-term financing on the project, is that right?
> (A): That's correct.
> (Q): And that's a – that's an obligation that you acknowledge that you took on?
> (A): I took it on, exactly right. And I still have it.
> ***
> (Q): Now the nine hundred thousand shares that we were talking about, does that in any way – are you talking about that obligation at all?

(A): No. I mean, my – the amount of money that I had to put into the project didn't change because we got less docks. That didn't – it didn't affect my bank account or my ability to put X amount of money in the project. The shortfall in revenues based on less docks and delayed opening affected operational revenues year in and year out, the things that you pay your employees with and hopefully have some left over. So in a statement somewhere there I give examples of how that could be used to conserve cash. If you think you're going to have this much cash, let's say, next year to disperse with employees and you only have this much cash, you got a business problem. What do we do to solve it? My suggestion was that we have as an option the opportunity to replace some cash expenditures with stock options as an example.

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(Q): ... The vote and the motion to increase the number of shares from a hundred thousand to a million, that was not any attempt by you to avoid your obligation to provide capital to get financing to build this project?

(A): No.

(Tr. Trans. at 395, 398-400.) Further, to the extent that the Respondent makes an issue about the magnitude of the authorized shares increasing from 100,000 to 1 million, Roberson testified that there was no significance to the number. "[I]t was the next round number without having to say someone owned you know, some oddball percentage or some odd ball number of shares." (Tr. Trans. at 394.)

Legally, South Carolina law provides that all corporate powers rest with the board of directors unless otherwise provided in the code or by shareholder agreement disclosed in the articles and on the share certificates. See S.C. Code Ann. § 33-8-101. Specifically, the code provides that unless reserved to the shareholders in the articles, the right to issue shares rests with the board. See id. § 33-6-210. To the extent the articles need to be amended to increase the number of authorized shares, that is done by majority vote. See id. § 33-10-101. In conveying that right to the shareholders as a body, in §-101(b) and the Official Comments, the code makes clear that a shareholder has no vested property right resulting from any provision of the articles. The comments go on to provide that to

allow otherwise creates a "tyranny of the minority." This is so because if there was a property right, then each individual shareholder's consent would be necessary to effect change, no matter how small. In this case, the lawful acts of the Appellants were effected by majority vote. Ballard's self-interests cannot trump the will of the majority.

The act of taking a vote to potentially issue future shares is a central issue in this case and is not anywhere expressly prohibited in the Stock Purchase Agreement or in the Articles of Incorporation. In fact, Ballard admitted at trial that provided there was a vote to "amend the articles", "absent some sort of anti-dilution or non-dilution ... the corporation has a right to issue new shares ...." (Tr. Trans. at 120.)[2] Additionally, to the extent it is necessary, the uncontroverted evidence is that Appellants took these actions in good faith because they believed they were in the best interests of future financial viability of the corporation. Ultimately, being that there is no prohibition, the evidence is that the Appellants took actions they had a legal a right to take. Furthermore, Ballard's interests were not and have in no way otherwise been harmed by the vote.[3] Taking legal actions for legitimate business purposes cannot support a claim for oppression.

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[2] (Q): ... And you would agree with me that absent some sort of anti-dilution or non-dilution ... the corporation has a right to issue new shares, is that right?
(A): If they amend the articles of the – amend the articles.
(Q): And the shareholders can vote to amend the articles of incorporation, correct?
(A): That's correct.
(Q): And they can vote to amend it to increase the number of authorized shares, is that right?
(A): That's correct.

(Tr. Trans. at 120-21.)

[3] In fact, if Ballard believed that his interests would have been harmed (i.e, his complaint of dilution) he had legal recourse in the form of preemptive rights. S.C. Code Ann. § 33-6-300 defines preemptive rights, which are in essence the right of a shareholder to avoid dilution. The code provides for limitations, however, in drafting the Articles of Incorporation, Ballard not only specifically reserved preemptive rights, which was legally unnecessary, he actually did away with the exceptions in the code when he provided that preemptive rights shall apply "without exception to all common stock issued by this corporation for any consideration whatsoever." (Articles of Incorporation, Pl's Tr. Ex. 3.) (emphasis added.)

(c) As for not reelecting him director, other than Ballard's own testimony uttered for the first time at trial, there is no evidence that Ballard actually ever requested that his name be submitted for a vote. Ballard's allegation is no where reflected in the minutes of that meeting of which Ballard received a copy. (Pl's Tr. Ex. 4 & 5.) Ballard could have requested an amendment to the minutes but did not. Since Ballard's alleged director nomination was not put to a vote there is no evidence that the Appellants "removed him as a director." Therefore, it is not viable evidence of oppression.

(d) With regard to the trial court finding no justification for the authorization of additional shares, Appellants direct the Court to section (b) above. The code specifically provides that legally the articles can be amended by majority vote and shares can be issued by the board. In this case, the board has never acted except to recommend that additional shares be authorized. The only act was the act of the shareholders to vote favorably to increase the number of authorized shares. This recommendation of the board and action by majority vote of the shareholders was legally taken and otherwise justified as testified to by Roberson in part set forth in section (b) above. (Tr. Trans. at 395, 398-400.) Ballard has no rebuttal to Roberson's business justification. As such, taking a legal and justified action does not support a find of oppression.

(e) See (b) above. In addition, if 900,000 shares of stock were issued then absent the acquisition of more shares, Ballard's interest would be 2%, Thoennes' interest would be 2%, Thoennes III's interest would be 2% and Roberson's interest would be 4%. If any stock were issued, all shareholders would be subject to equal dilution. (Tr.

Trans. at 527.) The fact that the shareholders took a legal action that would affect all equally is not evidence of oppression because if one's interest were diluted then all interest would be diluted. There is no evidence of unfair treatment to Ballard. Ballard sole complaint seems to be that he disagrees with the management. If Ballard only wanted Warpath to be managed in such a way solely served the self-interests of Ballard, then he should have retained 100% of the stock of Warpath. However, Ballard gave up the ability to solely control the management of Warpath when he elected to take on partners. His objections to the legitimate and justified strategy employed to make the development more financially viable is not basis for a finding of oppression.

(f) With regard to the alleged failure to communicate with Ballard, the evidence in the record establishes that Ballard received regular communications and correspondence from Ballard and the Appellants from May 2007 to shortly after May 2008. Communications with Ballard broke down because July 2008 he sued the Appellants. Now, comically, Ballard wants to complain that they did not talk to him after he sued them. Ballard complains as if it is commonplace that litigants on opposite sides talk regularly. This complaint is preposterous and in no way evidence of oppression.

(g) The trial court found that Warpath holding an annual meeting in September 2009 and Ballard being re-elected as a director is evidence of oppression. In what way is it oppressive for Ballard to re-elected as a director? In explanation, Roberson and Thoennes both testified that Ballard's activity and interest in the operations of the corporation began to increase, therefore they felt it appropriate to bring him back within the management. (Tr. Trans. at 440-42, 578-79.) There is simply no evidence of

any ill motive. In any event, being named a director is a positive development not oppressive conduct.

(h) As for Roberson contemplating bringing in family members to help run the marina, Roberson testified that after he agreed to take on the management of Warpath and at the time they thought that the marina would break ground in the near future, he was seriously considering hiring a family member, his nephew-in-law, to assist him in running the marina. However, the marina is not and was not financed and no ground has been broken. Ballard apparently imagines a future where Roberson's family profits richly off of Warpath, while he gets nothing.[4] This is pure fiction and gross speculation. There is no evidence that any discussion was ever had about making any of Roberson's family members partners.

Furthermore, common sense says that Thoennes and Thoennes III have a say in this also. Like Ballard, they are also hopeful for a future payoff and they did not already receive $1,000,000. The evidence is that Thoennes and Thoennes III would not vote to allow Roberson and his family to take over Warpath to their financial detriment. (Tr. Trans. at 577.) Simply hiring family members to work at the marina cannot support a claim for oppression South Carolina.

(i) With regard to the alleged violation of the Articles of Incorporation, this was actually a separate cause of action set forth by Ballard that was never addressed by the trial court. Reserving any argument over the existence or non-existence of such a cause of action, in this case, there, however, was no violation of the

[4] This allegation and factor in the trial court's decision is clearly an attempt to bring the facts of this case within the facts of the Kiriakides matter. However, in Kiriakides, the issue was not gross speculation, and, otherwise does not even factually compare. Factually, the majority shareholder had hired his oldest son and his other children at substantial salaries to run the corporation to the exclusion of the minority shareholders and their families. Kiriakides, 541 S.E.2d at 260-61.

Articles. The shareholders voted to authorize the issuance of additional shares. The Warpath board could not issue new shares in an amount that exceeded the maximum allowed in the articles. Therefore, it is necessary to amend the articles in order to execute the action approved by the shareholders. That amendment has not occurred, but nothing is preventing its future occurrence. The only violation would be the issuance of shares before the articles have been amended. Until such time, there has been no violation. Therefore, the purported "violation" cannot support a claim for oppression.

(j) Finally, it is absurd that Ballard wants to profit from Appellants acting on advice of counsel and opting to dismiss their counterclaims at trial. Going into to trial, Appellants were pursuing counterclaims for fraud, negligent misrepresentation and breach of contract for the losses sustained as a result of Ballard's alleged misrepresentations. In trial, similar to Ballard offering no evidence to support his legal claims, no evidence was offered by the Appellants on the fraud cause of action. It was Ballard's counsel who raised all issues at trial with respect to fraud. In fact, the only evidence offered by Appellants was for negligent misrepresentation. Unfortunately, Roberson was unwilling to pass judgment on the motives of Ballard with respect to the misrepresentations. Due to the fact that Appellants were not unified, they opted to take counsel's advice and dismiss the counterclaims. Therefore, other than what was made available in deposition which clearly set forth a belief that Ballard misrepresented the geographic restrictions on the marina, the Court never had the opportunity to hear from Thoennes and Thoennes, III on the counterclaims. The evidence of what Ballard knew about the geographic restrictions on the marina ahead of time was significant and was supported by a good faith belief that Ballard's actions were improper. The fact that the

evidence did not come together at trial such that the Appellants were unified in their claims against Ballard is no basis for a claim of oppression.

For these reasons, considering each factor and the totality of the circumstances, the trial court's order finding Appellants' conduct oppressive should be reversed.

3. Trial court's order requiring the escrow of 60,000 shares is unsupported in the law and should be reversed.

In its order, the Court improperly ordered the escrow of 60,000 shares of Warpath pursuant to S.C. Code Ann. § 33-6-210. § 33-6-210 provides that "[e]xcept as otherwise provided in subsection (f), the corporation must place in escrow shares issued for a contract for future services or benefits...." The 60,000 shares ordered to be escrowed broke out to 20,000 each for Roberson, Thoennes and Thoennes, III. In reaching its decision, the Court necessarily had to find that the consideration of $1,000,000 paid at the time of closing did not cover all 80,000 shares received. This finding by the Court is erroneous and completely ignores the finding of the Warpath Board of Director's, which consisted solely of Ballard, decision in May 2007 to presently issue the 60,000 shares. According to South Carolina law, this decision had to be based on a finding that the consideration offered at that time was adequate.

The undisputed facts are that Ballard held 40,000 shares of Warpath personally at the time of closing. Ballard agreed in trial that he intended to presently convey 80% of the corporation to the Appellants. (Tr. Trans. at 161: 17-19.) This is also supported by the Stock Purchase Agreement. (Pl. Tr. Ex. 1.) In order to convey 80% of Warpath, Ballard had to give up 20,000 of his personal shares and then have Warpath issue the remaining 60,000 unissued shares from its treasury. In order to issue shares from the

treasury, South Carolina law required that the Warpath board could only issue the shares upon adequate consideration, whatever that may be. S.C. Code Ann. § 33-6-210(c) At the time of this undertaking, Ballard was the sole shareholder and director of Warpath. At or after the closing, these actions to convey 80% of the corporation were accomplished. What is in dispute is whether the $1,000,000 paid to Ballard was solely for his 20,000 share or for all 60,000 shares. The testimony is conflicting, but the totality of the evidence is clear.

Ultimately, the disputed testimony can be disregarded because Ballard's and Warpath's actions speak for themselves. According to S.C. Code Ann. § 33-6-210, "[b]efore the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and nonassessable." At the time of May 2007, the 60,000 shares at issue were not placed in escrow "to be issued", they were actually issued by the corporation. Factually and legally, in order to issue shares, the board of directors of Warpath, consisting solely of Ballard in May 2007 and up until May 2008, had to have determined that the consideration received was adequate and that determination is conclusive. The disputed testimony is irrelevant because the evidence demonstrates conclusively that the shares were presently issued and were not escrowed. These actions conclusively show that, regardless of what he testified to at trial, Ballard, acting in his capacity as the sole member of the Warpath board of directors, had to have believed at the time of issuance

that there was adequate consideration given for the issuance of the 60,000 shares, *i.e.* the $1,000,000 paid for 80% of the corporation.

To now take the present position, Ballard must by necessity challenge his own decision as the sole director of Warpath, which is an absurd result.[5] To get around the fact that legally it was his decision, Ballard argued to the trial court that it was not really his decision because the Appellants were really in control and it was their lawyer who should have acted. However, legally and factually, that is not the case. There is no disputing that Ballard was the sole member of the board of directors until May 2008. Ballard testified as much at trial.

Next, Ballard seeks to have it both ways. He wants the Court to find that the Appellants were in control even though he legally was and then also try to suggest that Appellants intent was evidenced by the fact that the check for $1,000,000 was written to him personally. The manner of how the check was addressed is not an issue. This is just more proof that Ballard was the sole person in charge of Warpath. Ballard was Warpath when the Appellants were negotiating. Legally and factually, Ballard was actually in control of Warpath during the negotiations. Therefore, common sense dictates that the Appellants would issue the check directly to Ballard since Ballard asked that it be done.

Ultimately, Ballard was represented by separate counsel to advise him during and after the negotiations and had the power, as the sole director, to order that the shares be escrowed if he or his lawyer believed them to be for future services. If he or his lawyer actually believed that the shares were not issued for the $1,000,000 paid, but for future

[5] Ballard asserts that the "corporation" must act to escrow shares as if that is significant. This position is perplexing. According to the South Carolina code, unless legally or contractually delegated to another entity, a corporation acts through its board of directors. See S.C. Code Ann. § 33-8-101. Warpath must act through its board, which was Ballard.

consideration, they could have required that the shares be escrowed, but did not. Ballard and his lawyer also had time to review and comment on the Stock Purchase Agreement. If he or his lawyer actually believed that the shares were issued not for the $1,000,000 paid, but for future consideration, they could have required that a provision for the escrow of the shares be included in the Stock Purchase Agreement, but did not. The clear answer to why they did not take such actions is because everyone, including Ballard and his lawyer, understood that the Appellants paid $1,000,000 for 80% of the corporation no matter how many shares 80% represented or who or where they were coming from. Ballard's *ad hoc* argument, inexplicably accepted by the Court, just does not add up.

For these reasons, there is no legal or factual basis for the Court to displace the decision of Warpath and its board of directors made over three years ago that the consideration for the present issuance of the 60,000 shares was adequate. According to South Carolina law, that decision was conclusive. Therefore, for these reasons the trial court's order should be reversed.

CONCLUSION

In South Carolina, the Kiriakides case is a "classic" case of minority shareholder oppression and sets the standard by which allegations of oppression are judged. Kiriakides and the South Carolina Business Corporations Act also makes it very clear that South Carolina does not seek to expand minority shareholder claims of oppression to the point that the Courts are endorsing a tyrannical minority. The remedies for oppression are extreme remedies and should be used only employed in such cases that are factually warranted, not because the trial court or a plaintiff seeks a result. In this case, as herein establish, the facts do not support a claim for oppression and do not legally

warrant an order escrowing shares of Warpath that are rightfully the property of the Appellants. For these reasons, the trial courts order should be reversed and the matter should be remanded for entry of judgment in favor of the Appellants.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

Andrew P. (Andy) Ballard,.....Respondent,

v.

Tim Robertson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc.....Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

ISSUES ON APPEAL

1. Have the appellants carried their burden to convince the Court that Judge Miller erred in finding that the appellants acted in a manner that is illegal, oppressive, or unfairly prejudicial to the plaintiff, Andrew P. Ballard, within the meaning of S.C. Code § 33-14-300(2)(ii)?

2. Have the appellants carried their burden to convince the Court that Judge Miller erred in ordering pursuant to S.C. Code § 33-6-210 that the appellants escrow stock that the individual appellants received from Warpath Development, Inc.?

STATEMENT OF THE CASE

This is a suit by a minority shareholder, Andrew P. Ballard ("Ballard"), against the majority shareholders and the corporation for oppression and to require the escrow of the shares to be earned by the majority shareholders when they fulfill their obligations under a contract with the corporation.

Ballard is a long time resident of Greenville and has worked in real estate development. Transcript p. 76, line 10-p.77, line 14. He learned that there was no quality public marina on Lake Keowee and that Pickens County controlled lakefront property owned by Duke Energy Corporation ("Duke") and designated for such purposes. Transcript p. 77, line 15-p. 79, line 25. After years of work, Ballard secured the approval of Pickens County and a lease from Duke for over 60 acres on Lake Keowee for a marina and associated amenities (the "Lease"). Transcript p. 80, line 1-p. 83, line 16. Duke entered into the Lease on January 3, 2007, with the appellant Warpath Development, Inc. ("Warpath"). Plaintiff's Exhibit 2. Attached to the Lease is a conceptual plan for the marina, which is expressly incorporated into and made part of the Lease. Plaintiff's Exhibit 2 ¶ 4, p. APB 78.

Ballard was Warpath's organizer and sole shareholder and director. Transcript p. 84, lines 18-24; p. 109, line 24-p. 110, line 4. Warpath's Articles of Incorporation authorized Warpath to issue 100,000 shares. Transcript p. 90, line 23-p. 91, line 25; Plaintiff's Exhibit 3. Ballard was issued 40,000 shares upon Warpath's organization. Transcript p. 90, lines 10-25.

Thereafter on May 29, 2007, Tim Roberson ("Roberson"), Rick Thoennes ("Thoennes"), and Rick Thoennes III ("Thoennes III") (collectively, "the individual

appellants") entered into a contract (the "Contract") with Ballard and Warpath through which they became the controlling shareholders of Warpath. Plaintiff's Exhibit 1; Transcript p. 84, lines 2-13.

According to the terms of that contract, the individual appellants "will pay to Ballard upon closing the sum of $1,000,000 in exchange for 20,000 shares of Ballard's 40,000 shares and will receive from the corporation additional shares so that Ballard will hold 20% of the stock and the other 80% will be held by [the individual appellants] when all shares are finally issued." Plaintiff's Exhibit 1 ¶ 1. Under the Contract, the "final holdings" of the shareholders were: Ballard with 20,000 shares, Roberson with 40,000 shares, Thoennes with 20,000 shares, and Thoennes III with 20,000 shares. Plaintiff's Exhibit 1 ¶ 1.

Roberson provided the $1,000,000; Thoennes and Thoennes III provided no cash investment. Transcript p. 245, line 25-p. 246, line 4; Transcript p. 286, lines 6-7. The $1,000,000 was paid to Ballard individually, and not to Warpath. Transcript p. 117, lines 6-10; Transcript p. 242, lines 9-16; Transcript p. 286, lines 3-4. The individual appellants bought Ballard's 20,000 shares, and an additional 60,000 shares were issued to them by Warpath. Transcript p. 248, line 24-p.249, line 8.

The Contract further provided: "Roberson agrees to provide the necessary capital to obtain long term financing on the project," Plaintiff's Exhibit 1 ¶ 6, and "Ballard will not be required to sign any personal guarantees to obtain financing by the corporation," Plaintiff's Exhibit 1 ¶ 7. Thoennes and Thoennes III have worked as developers; they agreed to execute an agreement with Warpath defining their duties, including, but not limited to, "development work, execution of loan documents, assistance with proformas,

assistance with obtaining permanent financing and other such service as may be appropriate." Plaintiff's Exhibit 1 ¶ 5; Transcript p. 218, lines 6-9; Transcript p. 219, line 23-p. 220, line 10.

Approximately a year later on May 1, 2008, the appellants held the first stockholders meeting following the Contract. Plaintiff's Exhibits 4 and 5. At that meeting, the individual appellants, representing 80% of the shares, elected themselves directors and did not elect Ballard a director. Plaintiff's Exhibit 4; Transcript p. 109, line 1-p. 110, line 17. The individual directors then held a Board meeting and adopted a motion "to authorize the corporation to issue 900,000 additional shares of Treasury Stock in order to raise capital, pay expenses and offer employee incentives." Plaintiff's Exhibit 5. Then, the Board, made up of the individual appellants, proposed to the shareholders that "the corporation issue an additional 900,000 shares for the purpose of raising additional capital, paying expenses and offering employee incentives." Plaintiff's Exhibit 4. Ballard voted against the motion, but the individual appellants voted for it. Plaintiff's Exhibit 4.

The minutes of the shareholder meeting do not contain an amendment of Warpath's Articles of Incorporation, and the Articles have never been amended to authorize the issuance of stock beyond the 100,000 shares authorized in the Articles. Plaintiff's Exhibit 4; Transcript p. 92, lines 1-5; Transcript p. 247, line 23-p. 248, line 3; Transcript p. 348, lines 7-10; Transcript p. 500, lines 9-15.[1]

[1] Surprisingly, in the Statement of the Case in their brief the appellants continue to suggest, as they did at trial, that Ballard somehow misled them and that their reactions to Ballard's representations somehow justify the actions they took in the May 2008 shareholder meeting. Appellants Brief pp. 3-4. These statements are improper content for a Statement of the Case, which "shall not contain contested matters." Rule 208 (b)(1)(C), SCAR. As set out below, Ballard has hotly contested the appellants' claims that he misled them. More importantly, the

On July 30, 2008, Ballard filed the original complaint in this action. Complaint. He alleged that the appellants had breached the Contract by authorizing issuance of 900,000 additional shares by Warpath "in order to raise capital" with the result that Ballard's ownership would be reduced to 2% (20,000 of one million shares). Ballard's complaint cited, among others, the provisions of the Contract which provided that Roberson agreed to "provide the necessary capital to obtain long term financing on the project" and that "the final holdings" of Warpath stock would consist of Ballard owning 20,000 shares, with no obligation to raise additional capital or sign a personal guarantee. Ballard sought an injunction against the issuance of additional shares.

On September 10, 2008, the appellants filed their answer and counterclaims. They denied liability and counterclaimed for breach of contract, reliance and promissory estoppel, and breach of contract accompanied by a fraudulent act. They alleged that Ballard had committed fraud by making false representations to them with respect to approvals from Duke and Pickens County to build the marina development per the conceptual plans attached to the Lease. Answer and Counterclaims, Sixth Defense and Counterclaim.

After conducting discovery, on August 3, 2009, Ballard moved to amend his complaint, and the amended complaint was filed on August 25, 2009. Motion to Amend; Plaintiff's Exhibit 27; Amended Complaint. Ballard added claims for breach of the Articles of Incorporation; for breach of the Contract because the defendants had not fulfilled their obligations under the Contract, had made clear that they do not intend to

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appellants are estopped and barred from making such allegations. In this case, they presented counterclaims alleging that Ballard had misled them; at trial, they dismissed those counterclaims with prejudice. Thus, at the appellants' own motion, it has been conclusively determined that Ballard did ***not*** mislead the appellants, and that conclusion is also the law of this case.

fulfill them, and are not capable of fulfilling them; for breach of the covenant of good faith and fair dealing; for breach of fiduciary duties; and for a buyout of his shares because the individual defendants had acted and were acting in a manner in violation of S.C. Code §§ 33-14-300 and 310. Ballard also added a derivative claim that restated many of the preceding claims in the name of the corporation.

On August 27, 2009, two days after Ballard filed his amended complaint alleging corporate oppression, the defendants issued a notice of shareholder meeting where they proposed to elect a slate of directors, including Ballard. Plaintiff's Exhibit 7.

On September 9, 2009, the defendants filed their answer denying liability and adding a number of counterclaims. Answer and Counterclaims. In addition their original counterclaims, the defendants alleged that Ballard committed fraud by representing that the project was "shovel ready" and that "it was possible to have 200 wet boat slips at the development." The defendants also alleged that the same statements were negligent misrepresentations and securities violations under S.C. Code § 35-1-501. Answer and Counterclaims, Third, Fourth, and Fifth Counterclaims.

Then, on September 29, 2009, a shareholder meeting was held where all the shareholders, including Ballard, were elected directors. As of the trial of this action, no meeting of the directors had been called or held. Transcript p. 99, line 15-p. 100, line 23; p. 101, line 25-p. 102, line 6; p. 115, line 16-p. 116, line 14; p. 505, lines 16-18; p. 568, line 19-p. 569, line 17. Thus, the individual appellants, who controlled 80% of Warpath's stock, elected Ballard a director of the company they controlled just 20 days after they had accused him for a second time of fraud.

After a hearing on summary judgment and dismissal motions, the parties consented to an order to maintain the status quo pending trial, under which the Court ordered that the defendants not take any future action to authorize or issue any Warpath shares in excess of those owned by Ballard and the individual appellants. Order Filed January 11, 2010.

The case was tried on March 15, 16, and 17, 2010 before the Hon. Edward W. Miller, Circuit Judge. Order Filed May 4, 2010 p. 1. At the outset of the trial, Ballard's counsel explained to the Court that Ballard had chosen to pursue equitable remedies for his claims, whereas the appellants were presenting legal issues through their counterclaims. Transcript p. 18, line 12-p. 19, line 24. Therefore, because of the counterclaims, initially the case was tried before a jury.

After Ballard presented his case, the appellants' lead witness was the appellant Roberson, the President of Warpath. Transcript p. 378, lines 15-22. After Roberson was cross-examined, on their own motion the appellants dismissed with prejudice all of their counterclaims, including their allegations of fraud by Ballard. At that point, Judge Miller dismissed the jury and continued to hear evidence on Ballard's equitable claims. Transcript p. 510, lines 8-12; Transcript p. 515, line 17-p. 517, line 7.

Also at the trial, Ballard moved the Court under S.C. Code § 33-6-210 to require the appellants to place in escrow the Warpath shares received by the individual appellants from the corporation. Transcript p. 580, line 31-p. 581, line 17; Transcript p. 588, lines 6-14; Plaintiff's Post Trial Memorandum pp. 1-2, 5. That statute provides that "the corporation must place in escrow shares issued for a contract for future services or benefits."

During the course of the trial, Judge Miller heard the testimony and cross-examination of Ballard and all three of the individual appellants. After the conclusion of the trial, Judge Miller took the case under advisement. Transcript p. 76, line 1-p. 579, line 14.

On May 4, 2010, Judge Miller's Order was filed with the Clerk. Judge Miller found that the appellants acted in a manner that is illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2) (ii). Judge Miller ordered the appellants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d) (4) and set up a procedure for determining fair value. Judge Miller reaffirmed the injunction against the defendants taking steps to issue additional Warpath shares in order to preserve the status quo pending the purchase of Ballard's shares. Order Filed May 4, 2010.

Judge Miller also ordered under S.C. Code § 33-6-210 that the defendants place in escrow the 60,000 shares that were issued to them by Warpath.

In light of his ruling for a buyout, Judge Miller determined that it was unnecessary for him to reach Ballard's remaining claims.

On May 20, 2010, Judge Miller denied the appellants' motion for reconsideration and/or for a new trial. Order Filed May 20, 2010. The appellants served their notice of appeal on June 18, 2010.

ARGUMENT

STANDARD OF REVIEW

In an action in equity, the appellant has the "burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382,

388, 544 S.E.2d 620, 623 (2001). Further, the appellate court does not "disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." 344 S.C. at 387, 544 S.E.2d at 623. *See also Brenco v. South Carolina Department of Transportation*, 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved." *Department of Social Services v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). Thus, while the Court may find facts in accordance with its own view of the evidence, the appellants have the burden of convincing this Court that Judge Miller – who observed all the witnesses and saw all the evidence firsthand – committed error in concluding that the appellants had acted in a manner that is illegal, oppressive, or unfairly prejudicial as to Mr. Ballard and had an obligation to put in escrow the shares they received from Warpath under the Contract.

OPPRESSION OF THE MINORITY SHAREHOLDER

A Court may order the purchase of a shareholder's stock at fair value upon a finding that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial" to the shareholder. S.C. Code §§ 33-14-300(2) (ii), 33-14-310(d) (4). In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 602-603, 606-607, 541 S.E.2d 257, 266, 268 (2001), the Supreme Court made clear that the statute requires a "case-by-case analysis," that the meaning of the statutory language "varies with the circumstances presented in a particular case," that the Court considers "the totality of the

circumstances," and that each case turns on "an inquiry of all the circumstances and an examination" of many factors.

In this case, Judge Miller heard all the evidence firsthand, including the testimony of all the parties – who constitute all the shareholders, directors, and officers of the corporation. He considered the evidence and issued a lengthy Order detailing ten different factors that lead to the conclusion the appellants acted in a manner that is illegal, oppressive, or unfairly prejudicial to Ballard. The appellants have the burden of establishing that Judge Miller erred in his determination, and the appellants must overcome the fact that Judge Miller was in the best position to judge the evidence and the credibility of all the parties. This burden is particularly heavy here, because Judge Miller has special expertise in corporate matters like this case; he serves as one of three Business Court Judges in South Carolina. South Carolina Supreme Court Order of September 7, 2007.

As shown at trial and as set out in Judge Miller's Order, the evidence demonstrates that:

- After acquiring control of Warpath, the individual appellants became disappointed in the investment;
- They decided to run Ballard, the minority shareholder, out of the company;
- They passed a resolution to issue additional stock to recoup their perceived losses, to improve their return on investment, and to get around Roberson's contractual obligation to provide the necessary capital, in a way that would dilute Ballard's interest significantly;

- The appellants' attempt to issue 900,000 shares was in violation of Waparth's Articles of Incorporation, which allow for only 100,000 shares;
- The individual appellants removed Ballard as a director and shut him out of Warpath's affairs;
- Later, they reversed course and elected Ballard a director, in a ruse that was a litigation tactic, but continued to exclude Ballard from Warpath's affairs;
- Roberson planned to hire relatives and a friend and passed a resolution which would allow them to receive stock, while Ballard would receive no such benefits; and
- The appellants pursued harmful and baseless fraud claims and other claims against Ballard, which they ultimately were forced to dismiss with prejudice.

In their brief, the appellants run through each of the ten factors cited by Judge Miller and attempt to second-guess his evaluation of the competing credibility of the witnesses and his weighing of the evidence. The appellants have failed to carry their burden to show that Judge Miller erred in his ruling in light of the "totality of the circumstances" presented in this case and detailed in Judge Miller's Order. In particular, the evidence more than supports each of the factors listed by Judge Miller, and, taken together, they establish beyond any doubt that the appellants acted in an illegal, oppressive, and unfairly prejudicial manner toward Ballard.

1. Judge Miller found that the individual appellants wanted Ballard out of the corporation.

The appellants have difficulty challenging this conclusion, because they set out their intention in writing and admitted it at the trial. Prior to the shareholders meeting where they ousted Ballard as a director and authorized the issuance of 900,000 additional shares, in an email exchange the three individual appellants made clear their intentions as to Ballard. Thoennes III wrote Thoennes and Roberson: "Don't we want to get [Ballard] out of the deal?" Roberson responded to the two other individual appellants: "I think he will take his 1M and run . . . after a little threatening, posturing, and whining." Plaintiff's Exhibit 10. Thereafter, they set up a shareholders meeting where they removed Ballard from involvement in the management of the corporation he created, authorized the issuance of 900,000 additional shares "to raise capital" in order to get around Roberson's obligation to "provide the necessary capital to obtain long term financing," and thereby threatened Ballard with a resulting ownership of only 2% of Warpath. Plaintiff's Exhibits 4 and 5.

In their trial testimony, the individual appellants contradicted each other, had to admit they wanted Ballard out of Warpath, but tried to minimize their plans in a way that contradicted prior sworn deposition testimony. Despite Roberson's email statement that Ballard would run "after a little threatening, posturing, and whining," Roberson actually tried to tell Judge Miller and the jury: "I personally didn't care." Transcript p. 498, lines 3-7. But in his deposition testimony, which was read to the jury, Roberson had answered "Yes" when asked "You wanted [Ballard] out of the deal?" Transcript p. 309, line 24-p. 310, line 2.

In his deposition excerpts read at trial, Thoennes III admitted that "there did become a point where" he wanted Ballard out of the deal. Transcript p. 368, lines 11-14.

At trial on cross examination, he was forced to admit that he wanted to get Ballard out of Warpath. Transcript p. 535, lines 20-24. Also in his deposition, Thoennes III testified that the individual appellants wanted to get Ballard out of the deal to try to recover some of the money they felt they had lost as compared to their expectations for the investment. At trial, he denied that intent but had to backtrack when confronted by his deposition testimony: "I did say that there." Transcript p. 535, line 25-p. 536, line 24.

Thoennes in his direct testimony admitted that he wanted to "force Any Ballard out of Warpath" but tried to minimize the individual appellants' actions by saying he held that desire for "a period of a few weeks." Transcript p. 556 line 23-p. 557, line 6. Just minutes later in cross examination, Thoennes stated that "I don't know whether I said that or not" and denied that the individual appellants were trying to get Ballard out of Warpath. Transcript p. 564, line 22-p. 566, line 22.

The attempt by the individual appellants to minimize their plans to get Ballard out of the company is also contradicted by their own actions. After their email discussion, they set up a shareholders meeting; removed Ballard as a director; authorized the issuance of 900,000 additional shares to raise capital in a way that would dilute Ballard to a 2% owner; and took all this action without consulting with Ballard in advance. Plaintiff's Exhibits 4 and 5; Transcript p. 110, line 18-p. 111, line 3; p. 112, lines 8-14. Their actions and their testimony demonstrate that it was not true that the individual defendants "didn't care," as Roberson testified; or that they did not have financial gain in mind, as Thoennes III first testified at trial; or that their desire to "force Andy Ballard out of Warpath" lasted only a few weeks, as Thoennes testified.

Judge Miller's finding was supported by the overwhelming weight of evidence and was based also on an evaluation of the credibility of the individual appellants' testimony.[2]

2. Judge Miller found that the individual appellants decided to have Warpath issue additional stock to increase their return on investment.

At trial and on appeal, the individual appellants have engaged in verbal gymnastics in an attempt to avoid the clear, direct language of Roberson's description of their plan to issue additional stock. It is undisputed that Roberson was the only one of the individual appellants who had made a cash investment in Warpath; he provided the $1 million which bought Ballard's 20,000 shares. Transcript p. 245, line 25-p. 246, line 4. In an email prior to the shareholder meeting that authorized 900,000 additional shares, Roberson explained his reasoning to Thoennes:

> "When an investor realizes that an expected ROI [return on investment] is not forthcoming, his only viable option is acquire more equity at a reduced rate. In order to properly refinance the project, I would suggest that we increase the number of outstanding shares to 500,000 with a mixture of both preferred and common stock."

Plaintiff's Exhibit 11.

This email clearly expresses Roberson's conclusion that the only way he can increase the individual appellants' return on investment is to reduce their per share cost by acquiring additional shares at a reduced price. Thereby, they would reduce Ballard's interest in the corporation and his share of Warpath's value and earnings. This plan flies

[2] Again, in their brief appellants try to justify their actions based upon their supposed belief that "they had been deceived by Ballard." Appellants Brief p. 11. As explained in footnote 1, the appellants are estopped and barred from making this contention, because on their own motion they dismissed with prejudice their counterclaims, which were based on their claims of being misled by Ballard. It is now the law of the case that Ballard did not mislead them.

directly in the face of the plain language of the Contract, which requires Roberson (without limitation) to provide the necessary capital to obtain long term financing of Warpath, makes clear that Ballard does not have an obligation even to sign a personal guarantee, and sets the final holdings of the shareholders, including Ballard's 20% ownership. This email is also consistent with the deposition testimony of Thoennes III that the individual appellants wanted "a way for [them] to recover some of what [they] thought they had lost" in the investment. Transcript p. 536, lines 20-24.

Indeed, Roberson testified that at the time of the May 2008 shareholders meeting: "The return on investment was not suitable." Transcript p. 302, line 5-p. 303, line 14.

At that meeting, as set out in the exchange between Roberson and Thoennes, the individual appellants authorized the issuance of additional shares by Warpath, over Ballard's objection. Plaintiff's Exhibits 4 and 5.

In his direct testimony, Roberson tried to claim that his plan for issuing more stock "does not relate to capital" – even though when the individual appellants adopted the resolution authorizing issuance of more stock, the first stated purpose was "to raise capital." Transcript p. 395, lines 5-25. Roberson even went so far as to testify at trial that he was not thinking about acquiring more equity to improve his return on investment when he wrote that "[w]hen an investor realizes that an expected ROI is not forthcoming, ***his only viable option*** is to acquire more equity at a reduced rate" and proposed the issuance of more stock. Transcript p. 486, lines 1-5; Plaintiff's Exhibit 11 (emphasis added).

In their brief, the appellants cite various provisions of the South Carolina Corporate Code dealing with issuance of stock by corporations and pre-emptive rights.

Appellants' Brief pp. 12-13 and note 3. But these provisions are beside the point. In determining whether the appellants acted to oppress Ballard or acted in an unfairly prejudicial manner, at issue with respect to this factor is the individual appellants' reason for issuance of additional stock. Judge Miller found, in accordance with the overwhelming record, that when the individual appellants took this step, they were intending to increase their return on investment.

In reaching his conclusion, Judge Miller weighed the clear and direct language of Roberson's own email against his unconvincing attempts to explain his way out of his own words and his and his colleagues' actions. The appellants have no basis to challenge Judge Miller's finding.

3. Judge Miller found that the individual appellants removed Ballard as a director at the first shareholder meeting after they took control of the corporation.

This fact is undisputed. There is no question that at the first shareholder meeting, when the individual appellants authorized the issuance of 900,000 shares of additional stock, they also did not elect Ballard as a director – even though he was the founder of the corporation and had conceived of the idea of the marina, secured the support of Pickens County and Duke, and obtained a long term lease for this unique property. As Thoennes testified, the individual appellants removed Ballard because "we were ticked off" as a result of the delays in the project – even though the delays were not Ballard's fault. Transcript p. 242, line 17-p. 243, line 20.

In their brief, the appellants cannot dispute that they removed Ballard as a director by not electing him at the first shareholder meeting following their acquiring control of Warpath. Their only argument is their attempt to contest Ballard's testimony that he

asked to be elected a director, that his name was placed in nomination, and that the nomination failed for lack of a second. Transcript p. 110, lines 6-16.

This issue is purely a matter of witness credibility. For the reasons set out above and below, Judge Miller had many, many reasons to question the credibility of the individual appellants. Ballard testified to these facts; they are entirely consistent with the record; and Judge Miller had every opportunity to observe the credibility of the witnesses and to decide which testimony to credit.

4. Judge Miller found that despite Roberson's contractual obligation to provide the necessary capital for Warpath to obtain long term financing, the individual appellants passed a resolution to issue additional stock to raise capital.

This finding is conclusively established by the written record. The individual appellants had elected themselves the directors of Warpath, they passed a resolution that Warpath issue 900,000 additional shares "in order to raise capital," and they passed a shareholder resolution, over Ballard's objection, to authorize the issuance of the shares "for the purpose of raising additional capital." Plaintiff's Exhibits 4 and 5.

At trial Roberson actually tried to deny these facts. Roberson was asked: "Is it not true that when you authorized the issuance of the nine hundred thousand shares your first purpose was to raise capital?" Roberson's response, which flies directly in the face of the minutes of the corporation of which he is the President, was: "No, that's not true." Transcript p. 471, line 24-p. 472, line 3. When confronted with the minutes of his own corporation, he was forced to contradict himself totally: "Well, it certainly is." Transcript p. 472, lines 4-13.

In this way, the individual appellants sought to get around Roberson's clear contractual obligation to provide the necessary capital. Roberson tried to deny what was set out in black and white, to avoid admitting his attempt to get around the Contract. Judge Miller's finding is indisputable.

5. Judge Miller found that upon the issuance of the 900,000 shares, Ballard's interest in Warpath would be 2%, or a tenth of his "final holdings" as set out in the Contract.

This finding is also indisputable. It is a simple matter of calculating the mathematical effect of issuing an additional 900,000 shares beyond the 100,000 already issued.

The appellants argue that the ownership interests of all the shareholders would be equally reduced by the issuance of additional shares. This argument is an attempt to disregard the Contract to which the appellants agreed when the individual appellants acquired their stock. All the parties agreed that Roberson would have the responsibility to "provide the capital necessary to obtain long term financing." That obligation is unlimited and unqualified. The Contract could have contained a limitation on that requirement if that was the agreement, but Roberson's obligation has no limit. At the same time, Ballard had no obligation whatsoever to provide any additional investment, and the Contract went so far as to provide expressly that Ballard would not be required even to sign a personal guarantee.

The issuance of additional stock, as shown above, was an attempt by the individual appellants to get around Roberson's contractual obligation by issuing stock "to raise capital" and, as part and parcel of the same effort to rewrite the binding agreement,

to allow the individual appellants to improve their financial position as compared with the Contract by improving their return on investment through the acquisition of newly-issued stock at a cheaper price.

6. Judge Miller found that after Ballard was rejected as a director, the appellants closed him out of the management of Warpath and shut him out from information related to Warpath's financing and status.

Again, there is no dispute that Judge Miller's finding is correct; the appellants did close Ballard out of receiving information regarding Warpath. Transcript p. 149, lines 16-19; p. 153, lines 10-15; p. 156, line 24-p. 157, line 8; Appellants' Brief at p. 15 ("[c]ommunications with Ballard broke down"). The appellants' excuse is that Ballard brought suit, and they argue that the suit somehow justified not providing information to an owner of twenty percent of the company and Warpath's founder.

Ballard was required to file suit because of the threat by the appellants to issue 900,000 additional shares. In his initial complaint, Ballard sought only an injunction against that action. In any event, as shown above, the individual appellants were carrying out a plan to run Ballard out of Warpath, to circumvent their obligations under the Contract, to increase their return, and to remove Ballard from governance of Warpath. There is absolutely no reason to believe that they would have kept Ballard informed had he not filed suit.

7. Judge Miller found that the individual appellants later elected Ballard as a director only as a litigation tactic, and then never called a meeting of the Board.

In other words, they perpetrated a ruse on Ballard, to make it appear that they were not oppressing him in order to undercut his amended complaint.

The following facts are established. On August 3, 2009, Ballard moved to amend his complaint. August 3, 2009 Motion to Amend. On August 25, 2009, he filed an amended complaint which included for the first time his claim of oppression by the majority shareholders and specifically cited their refusal to elect him a director. Plaintiff's Exhibit 27; Amended Complaint ¶¶ 13, 59-61; Transcript p. 113, line 5-p. 114, line19. Two days after the filing of the amended complaint and twenty-four days after the filing of the motion to amend, the individual appellants gave notice of a shareholders meeting at which they announced their intention to elect Ballard a director. Plaintiff's Exhibit 7; Transcript p. 114, line 20-p.115, line 15. Thereafter, Ballard was elected a director; but in the intervening eight months prior to trial, no directors meeting was held, and Ballard was provided no information about the company. Transcript p. 99, line 15-p. 100, line 23; p. 101, line 25-p. 102, line 6; p. 115, line 16-p. 116, line 14; p. 505, lines 16-18; p. 568, line 19-p. 569, line 17.

Based on these facts, there is no reasonable conclusion other than that Ballard's election was nothing more than a "litigation tactic," as Judge Miller found. It was abusive of Ballard and oppressive of him as a shareholder.

Once again, the individual appellants gave entirely unbelievable testimony in trying to explain away their behavior. Roberson testified that it was only "a coincidence" that the shareholders' meeting was called soon after Ballard amended his complaint to add an oppression claim, and that it was time to have a shareholders meeting because they were held annually. Transcript p. 475, line 20-p. 476, line 9. When confronted with the fact that the last shareholders meeting was on May 1, 2008, that Warpath did not hold a shareholders' meeting in May of 2009, and that the shareholders meeting was not held

until September 29, 2009, Roberson explained only: "I guess we were late then." Transcript p. 476, lines 6-17. Similarly, Thoennes gave the completely implausible testimony that the timing of the election of Ballard as a director was "pure coincidence." Transcript p. 567, lines 7-17.

This election is conspicuously a mere ploy, because only twenty days before the shareholders meeting the appellants had filed their answer and counterclaims to the amended complaint, claiming that Ballard had defrauded them. They never provided a legitimate explanation for why they would elect Ballard as a Board member of a corporation they controlled when they were accusing him on the public record of fraud.

This farce of an election was merely another manipulation of the corporate processes in an attempt to put Ballard at a disadvantage.

8. Judge Miller found that Roberson planned to hire a number of his relatives and a friend to work at Warpath and that the individual appellants' corporate resolution provided that these relatives and this friend could be provided stock in Warpath, whereas there are no plans for Ballard to be a Warpath employee and receive similar benefits.

Again, the following facts are undisputed; contrary to the statement in the appellants' brief, there is no "gross speculation." Appellants' Brief p. 16. Roberson testified in his deposition (which was read to the jury) and at trial that he planned to hire his niece; his niece's husband; his sister; another of his sisters; and a friend. Transcript p. 311, lines 1-23; Transcript p. 322, line 24-p. 323, line 8;Transcript p. 473, lines 3-p. 473, line 20. When they passed the resolution authorizing the issuance of 900,000 additional shares of Warpath to raise capital, the individual appellants also intentionally provided that they could issue stock to "offer employee incentives." Plaintiff's Exhibits 4 and 5.

No one contends that the appellants ever planned to hire Ballard; they had worked diligently to get him out of the company, one way or the other.

It is clear from this testimony that Roberson, Warpath's President and leader of the majority shareholders, had definite plans to employ his family and a friend at the marina and make them shareholders, while Ballard, as minority shareholder, would not have a similar benefit.

9. Judge Miller found that Warpath's Articles of Incorporation provide for the issuance of only 100,000 shares and that the Articles have never been amended.

Therefore, the resolution passed by the individual appellants is contrary to the Articles of Incorporation, and issuance of additional stock pursuant to the individual appellants' resolution would violate the Articles. Plaintiff's Exhibit 3.

As before, the key facts are not in dispute. The appellants have never contended that they amended the Articles of Incorporation and concede that the amount of outstanding stock cannot exceed 100,000 without amendment of the Articles. Transcript p. 247, line 23-p. 248, line 3; Transcript p. 348, lines 7-10; Transcript p. 500, lines 9-15. Despite the fact that the individual appellants' resolution was passed two and one half years ago, the Articles have never been amended. It is thus undisputed that the authorization of the issuance of 900,000 of additional Warpath shares is contrary to Warpath's Articles of Incorporation.

10. Judge Miller found that the individual appellants – officers, directors, and majority shareholders of Warpath – made baseless and serious claims of fraud against Ballard, a minority shareholder.

In fact, the claims were so frivolous that the appellants dismissed them with prejudice on their own motion after the conclusion of Roberson's cross examination.

This finding is one of the most serious. On the public record in his home town, the appellants made harsh claims of fraud against Ballard, fraud in his conduct of business affairs and fraud in connection with the sale of securities. Ballard is a businessman and a developer. No more serious and hurtful charge could be made against him and no more serious harm could the appellants inflict upon him. Through their public allegations, they threatened to destroy his reputation. Undoubtedly, the appellants hoped that these allegations would shake Ballard and allow them to resolve this case on a very favorable basis.

These claims were so baseless that the appellants dismissed them without prejudice, to avoid the verdict of a disgusted jury.[3] This set of actions, like no other, demonstrates the individual appellants' willingness to oppress Ballard and treat him in an unfairly prejudicial manner. It is particularly egregious that they took this action against him because they owed him a fiduciary duty as directors, officers, and majority shareholders. S.C. Code §§ 33-8-300 and 33-8-420; *Lesesne v. Lesesne*, 307 S.C. 67, 413 S.E.2d 847 (Ct. App. 1991).

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[3]In their brief, the appellants try to suggest there is some kind of equivalence between Ballard and the appellants, by stating that Ballard's "legal causes of action were dismissed at trial leaving only equitable claims," Appellants' Brief at 1, and that their dismissal of their counterclaims with prejudice after the cross examination of their lead witness was "similar to Ballard offering no evidence to support his legal claims," Appellants' Brief at 17. In fact, Ballard's counsel made clear before the trial began that Ballard was seeking only equitable relief. Transcript p. 18, line 12-p. 19, line 24. Ballard did not dismiss any claims at trial; he opted to pursue equitable relief, including injunctive relief, restitution, and a buyout under S.C. Code §§ 33-14-300 and 310. Ballard's choice of remedies is in no way similar to the appellants' abrupt dismissal with prejudice of their harsh and baseless counterclaims immediately after the cross examination of their lead witness.

The appellants based their fraud claims on two supposed misrepresentations: Ballard's alleged statement that the project was "shovel ready" and his alleged statement that "it was possible to have 200 wet boat slips at the development." Answer and Counterclaims to First Amended Complaint ¶¶ 105, 123.

As to the first alleged "shovel ready" misrepresentation, the Department of Health and Environmental Control ("DHEC") took longer than the appellants expected to issue a permit for the marina. The appellants tried to make this circumstance the basis of fraud claims against Ballard. (The appellants had to admit that they did not remember Ballard using the phrase "shovel ready." Transcript p. 256, lines 15-18.)

Roberson's testimony totally undercut the "shovel ready" claim. First, he was a very sophisticated businessman, a former CEO of a two hundred million dollar corporation with six hundred employees who had participated in an eighteen million dollar acquisition. Transcript p. 268, line 22-p. 270, line 14; Transcript p. 270, line 24-p. 273, line 22; Transcript p. 277, line 18-p. 278, line 14; Transcript p. 479, lines 18-21. Roberson admitted that he knew that Ballard did not control "whether, when or if" DHEC issued a permit. Transcript p. 489, lines 19-22. Roberson understood when he signed the contract that final permits had not been obtained. Transcript p. 489, line 23-p. 490, line 2. In fact, the Contract itself explicitly stated that final permits had not been issued and provided for the contingency that they might never be issued. Plaintiff's Exhibit 1 ¶¶ 3 and 4; Transcript p. 236, line 20-p. 237, line 16. Given those contractual provisions, Roberson had to admit that Ballard did not guarantee that the agency would issue a permit. Transcript p. 491, lines 8-10. Roberson conceded further that Ballard "probably couldn't" predict what DHEC would do. Transcript p. 492, lines 19-23.

Further, Thoennes himself was an expert in permitting, as Roberson knew. Transcript p. 491, lines 2-4; Transcript p. 222, lines 1-3; Transcript p. 286, lines 8-25 Transcript p. 351, lines 18-19. Thoennes knew that permits were not in place, knew there was uncertainty about whether permits would be issued, and had a chance to meet with DHEC if he had wanted to. Transcript p. 235, lines 11-p. 236, line 13. During the due diligence period, Thoennes and perhaps the other individual appellants talked with Duke, and Roberson and/or Thoennes met with the Pickens County Administrator. Transcript p. 87, line 23-p. 89, line 13; Transcript p. 233, line 7-p. 234, line 12; Transcript p. 281, line 4-p. 283, line 19; Transcript p. 493, lines 3-8. Roberson conceded that the Administrator of Pickens County, which controlled the property, would know as much about permitting the property as anyone and that what the Administrator told him was consistent with what Ballard told him. Transcript p. 493, lines 6-24.

Thoennes also testified that he met with Pickens County officials, that he talked with them about permits, and that what the Pickens County officials told him was consistent with what Ballard had told him. Transcript p. 233, line 7-p. 234, line 12.

Similarly, Roberson had to concede that there was no basis for the appellants' claim that they had been misled by Ballard that the marina would have two hundred wet boat slips. The Lease between Duke and Warpath expressly provided that the marina would have "100- 200" boat slips and contained no guarantee of two hundred. Plaintiff's Exhibit 2 pp. APB 00114, 00121; Transcript p. 103, lines 3-18; Transcript p. 297, line 9-p. 298, line 25. The individual appellants had a copy of the Lease before they entered into the Contract, knew the terms of the Lease, and Thoennes (and perhaps others of the individual appellants) had talked with Duke prior to signing the Contract and had an

opportunity to ask Duke any questions he wanted to pose. Transcript p. 102, line 25-p.103, line 2; Transcript p. 225, line 9-p. 229, line 11; Transcript p. 356, line 24-p. 357, line 5; Transcript p. 478, lines 22-25. In the end, Duke Power approved a design that accommodated one hundred two (102) slips. Transcript p. 105, line 22-p. 106, line 1.

Roberson had to admit that Duke's decision was "fully consistent" with the Lease and that he had communicated that conclusion to Duke in writing. Transcript p. 477, lines 9-21. Roberson admitted that Ballard had told him before he signed the Contract that Duke had told Ballard to seek the maximum for everything in the Lease, and Roberson admitted that the decision as to the number of slips was Duke's decision, not Ballard's. Transcript p. 478, lines 11-21; p. 103, line 19-p. 104, line 5. Roberson agreed that Thoennes had said that what Ballard told the individual appellants prior to the signing of the Contract was "exactly what Duke Power told him." Transcript p. 479, lines 1-5. Likewise, Thoennes himself testified that what Ballard told him about boat slips was "exactly what the Duke Power people told" him. Transcript p. 230, line 22-p. 231, line 10.

In summary, Roberson testified that he could not say whether Ballard misled him. Transcript p. 481, lines 3-4. Indeed, when interrogated by Ballard's counsel at deposition (which was read at trial), Thoennes testified: "I don't think he intentionally lied." Transcript p. 239, lines 23-25. When asked whether Ballard committed fraud in connection with his representations regarding permits, Roberson testified: "I don't think so." Transcript p. 494, lines 13-17.

Given his testimony, at the conclusion of the cross examination Ballard's counsel asked Roberson: "Would you like to withdraw your counter-claims against Mr. Ballard

now given your testimony?" Roberson's response was: "I'd have to let my counsel and my partners confer over that." Transcript p. 510, lines 8-13. The appellants went to lunch immediately thereafter, and immediately following lunch they dismissed all their counterclaims, including their fraud claims, with prejudice. Transcript p. 516, lines 11-24.

At trial, these counterclaims were exposed for what they were – baseless and destructive allegations used as a litigation tactic by officers, directors, and majority shareholders against a minority shareholder.

In their brief, the appellants try to avoid responsibility for their actions by claiming that they did not pursue their fraud claims at trial. Appellants' Brief p. 17. However, at trial, appellants' counsel stated that the appellants were pursuing and had evidence of fraud in the inducement, as well as negligent misrepresentation. Transcript p. 12, line 20-p. 13, line 1. As well, appellants' counsel told the jury that his clients "felt like they had been swindled by Mr. Ballard," Transcript p. 66, lines 12-15, argued that Ballard had not acted with "forthright honesty upfront," Transcript p. 73, lines 4-5, and asked for a verdict on the appellants' counterclaims without limitation, Transcript p. 73, lines 21-23.

Further, appellants' counsel cross-examined Ballard regarding his supposed misrepresentation. Transcript p. 167, lines 19-25. During the plaintiff's case, Ballard's counsel presented deposition testimony of the individual appellants. In presenting his cross-examination of the individual appellants through deposition designations, appellants' counsel presented testimony from the appellants purporting to establish that

they had been misled. Transcript p. 251, lines 10-16; p. 252, lines 1-8; p. 254, lines 11-18;p. 261, line 16-p. 262, line 4; p. 373, lines 14 -25.

The fact is that from their response to the original complaint, to their response to the amended complaint, and through the trial, the individual appellants claimed and publicly alleged that Ballard had committed fraud, and that he was otherwise liable to them. They recanted and abandoned their claims only when the cross examination testimony of their lead witness, Roberson, destroyed their position.

Conclusion. Taken individually and together, these facts establish beyond any question that the appellants acted illegally, oppressively, and in an unfairly prejudicial manner toward Ballard. As set out above, much of the appellants' arguments are attempts to question Judge Miller's credibility determinations. Also as set out above, repeatedly the individual appellants gave contradictory and completely implausible testimony and testimony that contradicted their own written documents. They publicly alleged completely baseless and false allegations of fraud against Ballard.

In addition, the individual appellants had to admit that the Thoennesses had engaged in seriously questionable conduct by taking money that one client paid them to build a house and using the funds to pay other bills the Thoennesses owed unrelated to the house – thus leaving their client in the lurch. Transcript p. 223, line 1-p. 224, line 13; Transcript p. 503, line 19-p. 504, line 2.

No reasonable Judge could credit the testimony of the individual appellants, and Judge Miller correctly did not do so.

Under *Kiriakides*, whether the appellants "have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial" to the shareholder,

S.C. Code § 33-14-300(2)(ii), is decided on a "case-by-case analysis" that "varies with the circumstances presented in a particular case" and that takes into account "the totality of the circumstances." In addition, the appellants have the "burden of convincing [this Court that] the trial judge committed error in his findings," and this Court does not "disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387-388, 544 S.E.2d 620, 623 (2001)

Judge Miller engaged in exactly the inquiry required by *Kiriakides*. He weighed the specific facts of this case. Many of his determinations turn on credibility determinations, and the credibility of the individual appellants was seriously in question. The appellants have not carried their burden of showing convincingly that Judge Miller committed error in his findings and ruling.

ESCROW OF STOCK RECEIVED FROM WARPATH

South Carolina Code Section 33-6-210 (e) provides, in very straightforward language, that a "corporation must place in escrow shares issued for a contract for future services or benefits or for a promissory note." The clear and unambiguous language of the statute provides that shares issued for a contract for future services or benefits **must** be placed in escrow. The use of the word "must" is unequivocal. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Thus, in this case, Judge Miller correctly ruled that, because Warpath issued the 60,000 shares to the individual appellants in exchange for future services to be provided by Roberson, Thoennes, and Thoennes III, the 60,000 shares **must** be placed in escrow.

Judge Miller reached this correct conclusion after hearing all the evidence, including the testimony of the three individual appellants and reviewing the plain language of the Contract itself. The construction of a clear and unambiguous contract is a question of law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E .2d 390, 392 (1987). Here, the Contract clearly provides that Ballard received "$1,000,000 in exchange for 20,000 shares of Ballard's 40,000 shares" and that the individual appellants "will receive from the corporation additional shares." Plaintiff's Exhibit 1 ¶ 1.

The details of the actual transaction confirm what the Contract sets out: the individual appellants received 60,000 shares from Warpath in exchange for their promises for future services to Warpath set out in the Contract. Thoennes and Thoennes III provided no cash investment at all. Transcript p. 245, line 25-p. 246, line 4; Transcript p. 286, lines 6-7. The $1,000,000 provided by Roberson was paid to Ballard individually, and not to Warpath, and thus was paid to buy 20,000 shares owned by Ballard – not the 60,000 shares received by the individual appellants from Warpath. Transcript p. 117, lines 6-10; Transcript p. 242, lines 9-16; Transcript p. 286, lines 3-4; Transcript p. 538, lines 13-17. Thus, Roberson also provided no cash payment for the shares he received for Warpath.

In other words, the individual appellants did not pay Warpath cash for the 60,000 shares they received from the corporation. Transcript p. 538, lines 13-17. Instead, the Contract clearly provided that each individual defendant would earn his 20,000 share

portion of the 60,000 shares issued by doing some task in the future. Transcript p. 552, lines 2-15; Transcript p. 562, lines 3-11, 14-17; Plaintiff's Exhibit 1 ¶ 6; Plaintiff's Exhibit 1 ¶ 5. Specifically, the Contract provided: "Roberson agrees to provide the necessary capital to obtain long term financing on the project," Plaintiff's Exhibit 1 ¶ 6. Thoennes and Thoennes III agreed to execute an agreement with Warpath defining their duties, including, but not limited to, "development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate." Plaintiff's Exhibit 1 ¶ 5; Transcript p. 218, lines 6-9; Transcript p. 219, line 23-p. 220, line 10.

Judge Miller correctly concluded that the plain language of the Contract clearly and unambiguously provides that the 60,000 shares were to be issued in exchange for future services to be performed by the individual appellants. And, if the language of the Contract were not plain on its face, the individual appellants further testified at trial that they would each have to earn their shares by providing these specific services to the corporation at some time in the future. *See, e.g.*, Transcript p. 523, line 25 – p. 524, line 5. For example, Thoennes admitted in response to the direct examination by his own counsel:

> Q. Okay. Now you've got some other obligations that are identified in that agreement, I believe, in paragraph 5 that we identified earlier?
>
> A. Yes.
>
> Q. Okay. And I'll just go on and read them. These respective duties include but not limited to development work, execution of loan documents, assisting with proformas, assistance with obtaining permanent financing and such other services, services as may be appropriate. Is that what you understood to be the scope of what you owed, I suppose, that you were agreeing to among the four of you?

A. Yes. That's how I was going to earn my twenty thousand shares.

Transcript p. 552, lines 2-15.

Then, when he was pressed to explain how he and the other individual appellants would earn these shares by providing services in the future, Thoennes explained further:

Q. Mr. Thoennes, I think I heard you say when you started out your testimony that you were going to earn your twenty thousand shares by doing the development work, that's how you earn your twenty thousand shares, is that right?

A. Yes.

Q. And, I guess, your son is going to earn his twenty thousand shares by working on the development work too?

A. Yes.

. . .

Q. Right. Well, that must mean then you didn't buy those forty thousand shares when you paid Andy Ballard a million dollars. You've still got to earn them, right?

A. Sure.

Transcript p. 562, lines 3-11, 14-17.

Finally, the individual appellants admitted that they have not yet done the work they promised to do in exchange for these shares. Transcript p. 347, lines 7-9 (Q: "And have you done any development work with respect to Warpath?" A: "I have not."); Transcript p. 305, lines 1-16 (Roberson answers "Absolutely not" when asked whether he would provide an amount of capital that would obtain financing for the marina in the current market); Transcript 250, lines 4-7. Because the services required to be performed by the individual appellants still have not been provided and/or concluded, Judge Miller correctly ruled that the 60,000 shares **must** be placed in escrow, pursuant to S.C. Code § 33-6-210 (e), until such time as the services are rendered to the corporation. S.C. Code §

33-6-210 (e) ("The shares and distributions escrowed must remain in escrow until the services are performed, the note is paid, or the benefits are received").

In their brief, the appellants make a confusing argument regarding the consideration for the shares that were issued to the individual appellants by Warpath. Appellants Brief at 18-21. However, as set out above, the consideration for the stock is made expressly clear by the Contract and by the facts of the transaction itself: The consideration for Ballard's 20,000 shares was the $1,000,000 paid to Ballard personally, and the consideration for the 60,000 shares issued by Warpath were the promises of future services to Warpath made by the individual appellants in the Contract between themselves, Ballard, and Warpath itself. No one is arguing that these promises are not adequate consideration for the issuance of 60,000 shares by Warpath. The point is that the individual appellants have not carried out their promises, and therefore Section 33-6-210 (e) *requires* that these 60,000 shares be escrowed.

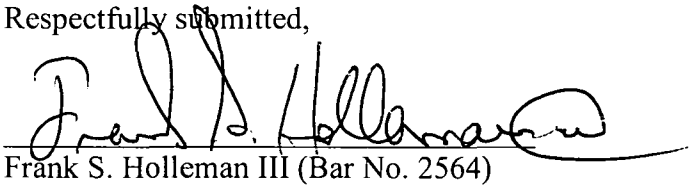
The appellants also try to avoid the clear language of the statute by suggesting that Ballard should have required the escrow of the stock. However, the obligation to escrow the stock did not arise until it was issued, and once the stock was issued, the individual appellants were in control of the corporation. Their counsel handled the closing of the Contract and the issuance of the 60,000 shares. Transcript p. 92, lines 11-16; Transcript p. 109, lines 13-19; Transcript p. 122, lines 4-7; Transcript p. 162, lines 18-20; Transcript p. 300, lines 10-18; Transcript p. 388, lines 17-25. Consequently, the individual appellants controlled Warpath when the escrow requirement arose, and they have no one to blame but themselves.

However, this argument is entirely beside the point. The statutory language is clear, no matter who failed to do what. "The *corporation* must place in escrow shares issued for a contract for future services or benefits." S.C. Code § 33-6-210 (e). Regardless who controls Warpath or when he or they controlled it, Warpath has an obligation to place these 60,000 shares in escrow. Judge Miller merely followed the clear mandate of the statute when he ordered Warpath and the individual appellants, who possess the stock and control Warpath, to escrow these 60,000 shares.

CONCLUSION

After observing the witnesses, determining their credibility, and weighing all the evidence, Judge Miller found that the appellants acted in a manner that is illegal, oppressive, or unfairly prejudicial to Ballard and ordered that they buy his shares, pursuant to S.C. Code §§ 33-14-300(2) (ii) and 33-14-310(d) (4). Based on the clear statutory mandate, Judge Miller also ordered the appellants to escrow the stock the individual appellants received from Warpath, as required by S.C. Code § 33-6-210 (e). The appellants have not carried their burden of showing in a convincing manner that Judge Miller erred. Instead, the overwhelming evidence confirms Judge Miller's rulings.

Respectfully submitted,



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Date: February 3, 2011
Greenville, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

Andrew P. (Andy) Ballard, ... Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. ..... Appellants.

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TABLE OF AUTHORITIES

Cases

This matter is before the Court on appeal from the Greenville County Court of Common Pleas. Appellants filed their Initial Brief of Appellant on December 17, 2010. Respondent served its Initial Brief of Respondent on February 4, 2011. Appellants hereby submit the following Reply in support of their appeal:

A. The totality of circumstances cannot and do not support a finding of minority shareholder oppression

Respondent correctly provides in his response that in determining whether or not a finding of shareholder oppression is warranted, the court must view the facts in light of the totality of the circumstances. While the trial court was certainly in a position to view the presentation of the evidence, a review of the briefs of the Appellants and the Respondent reveals that while there is disagreement as to some of the facts and as to the perception of the facts, there is general agreement with most of the facts. The conflict rests on whether the set of factors recited by the trial court in its order evidence a general disagreement as to management and strategy among shareholders in a small company or, even assuming the accuracy of the matters set forth in the trial court's order, do the facts legally amount to minority shareholder oppression.

It is not sufficient that the trial court, Respondent and Respondent's counsel are of the opinion that Respondent and the Appellants do not need to remain as "partners" in Warpath Development, Inc. ("Warpath"). The court should not and cannot legally or equitably interfere in the private business dealings of the shareholders of Warpath without sufficient justification. In business, as in life, there are offenses that we must all endure that may anger or embarrass us, but do not amount to legally or equitably actionable grievances. Oppression is a severe and limited remedy for a severe grievance. See Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 603, 541 S.E.2d 257, 266 (2001). To hold otherwise would be to permit an

invested shareholder with "cold feet" to petition the court in equity to "cash in" his shares and liquidate at the expense of his partners and the corporation. In effect, the remaining partners would be ordered by the court to invest more in the corporation than was initially bargained for. To allow this result under any circumstance but the most severe circumstance far exceeds the boundaries dictated by law and proper judicial restraint.

As set forth in Appellant's Initial Brief, even assuming the truth of the factors set forth in the trial court's opinion, without revisiting the analysis, there is no correlation between the factors set out by the trial court in this matter with the factors giving rise to the findings of oppression in the Kiriakides matter. The Supreme Court of South Carolina was quite clear that Kiriakides established the "classic" case of minority shareholder oppression. The factors improperly used to justify a finding of oppression in this matter are nothing more than legitimate disagreements, non-events, and speculation.

B. In the alternative, if the Court is unable to agree that the facts and factors of the trial court's May 2, 2010 order, even assumed accurate, do not give rise to a claim of minority shareholder oppression, the trial court's decision is not built upon a sound set of factors supporting a finding of oppression.

As set forth in Appellant's Initial Brief, taking each factor separately, the trial court's order drafted and now defended by the Respondent is overreaching and contains inaccuracies and overstatements. Appellants brought these concerns to the attention of the trial court both before the order was final and upon subsequent Motion for Reconsideration. [R. at_____]. Respondent describes this effort by the Appellants as "second guessing". That assertion is without merit. This appeal requires an examination with fresh eyes. In reaching the conclusions, the Respondent's draft order adopted by the trial court chose to ignore and/or overstate evidence

and testimony. It is for this court to decide independently what amount of weight to accord to the evidence and the individual factors.

Examining numbers 1-10 of Respondent's brief under the heading "Oppression of the Minority Shareholder", Appellants reply as follows:

1. Appellants' desire for Respondent to no longer remain a shareholder is not evidence of oppression.

As set forth in Appellants' Initial Brief, it is undisputed that in an email dated October 28, 2007, there was a question raised by Rick Thoennes, III ("Thoennes, III") as to whether he, Tim Roberson ("Roberson") and Rick Thoennes, Sr. ("Thoennes") wished to continue the development of Warpath Marina with Respondent as a partner in the development. The evidence further shows that this evidence was never acted upon and there was never any agreement among themselves that they did not want to continue with Respondent as a partner. In deposition and/or trial testimony, they each expressed that there was a time that they each desired not to remain in business with Respondent. The evidence is clear that they were angry and upset at Respondent at that time.[1] Certainly there is not a business partner in this world who has not at one time or another felt that he could get along better without one or more of his partners. Disagreements, hurt feelings, and embarrassment in business are inevitable. However, it was testified that this anger and initial reaction were fleeting and, as set forth in Appellants' Initial Brief, Respondent

[1] Since the dismissal of the counterclaims, Respondent has taken the position that Appellants are estopped from expressing their beliefs that Respondent misled them simply because they chose not to pursue counterclaims. This is faulty. Just because a choice was made not to pursue a legal remedy, does not mean that the fact or expression of a fact or belief cannot be stated. The question is relevance. In this case, this objection was made and Judge Miller elected to allow the testimony of Rick Thoennes III and Rick Thoennes, Sr. after the dismissal. Respondent has not cross-appealed that decision. Further, Respondent introduced the testimony cited herein and in Appellant' s Initial Brief in his case-in-chief. Respondent cannot now object to testimony obtained in a deposition that he introduced in his case. Ultimately, a litigant or potential litigant always has a choice to pursue or not pursue a legal remedy. The choice not to pursue a legal remedy does not mean that the facts or beliefs giving rise to the claim are non-existent.

admitted that no actions were taken to oust him from Warpath. The internal anger and desires of these Appellants does not give rise to a claim for oppression.

2. Authorization and issuance of additional stock of Warpath is not evidence of oppression.

In Respondent's Initial Brief, Respondent seeks to demonize the fact that shareholders in a company may want to increase their return on investment ("ROI"). The point made in Appellants' Initial Brief is that there has been no proof that there was any nefarious motivation in trying to increase the number of authorized shares of Warpath. Besides, an increase in the ROI is a benefit to all shareholders including Respondent. Respondent has continually desired to single himself out from the group. There is no testimony or any evidence that any action taken or contemplated by the shareholders or board of directors of Warpath would affect him disproportionately. Respondent shared an equal ownership position to both Thoennes III and Thoennes. All three shared an individual ownership position that was less than Roberson. This is commonplace. If new shares were issued, then their ownership positions would decrease proportionately. If as a result the ROI increased, they would share proportionately in the increase of the ROI. That would have been a positive. The desire to provide the corporation flexibility to trade in stock as well as cash is no evidence of oppression.

3. Respondent not being re-elected to the Warpath Development, Inc.'s board of directors is not evidence of oppression.

There is no dispute that Respondent was not re-elected a director at the first shareholder's meeting in May 2008. There is a dispute as to why he was not re-elected. However, regardless of why, this factor in and of itself does not amount to a claim for oppression. Respondent did not express any concern with his failure to be re-elected until his amended complaint and has,

otherwise, not suffered in any way from the fact that he was not re-elected a director. Moreover, a board meeting was noticed in the fall of 2009 and he was re-elected a director a little over a year later. However, Respondent, wanting to see impropriety in every action of the Appellants, regardless of how it may benefit him, asserts this is also evidence of oppression.

4. Roberson affirmed in testimony his obligation to provide long-term capital

Appellants refer to the Initial Brief and the Record for the evidence supporting the business justification for authorizing additional shares. Respondent has not proffered and Court has not cited any evidence of impropriety in the decision to increase the number of authorized shares of Warpath. In support of the trial court's order, Respondent's Initial Brief asserts that "the individual appellants sought to get around Roberson's clear contractual obligation to provide the necessary capital." [Respondent's Initial Brief at 18.] However, as detailed on pages 11 and 12 of Appellants' Initial Brief, Roberson affirmed at trial that he had the contractual obligation to provide the necessary capital to obtain long term financing. Apparently, Respondent disagrees with Roberson. Respondent cannot ignore testimony in order to create issues to support the trial court's order. There is no evidence to suggest that the decision to increase the number of authorized share, which is a legal action undertaken by the shareholders, was in any way unjustified. As such, this is not evidence of oppression.

5. **If the number of issued shares of Warpath was increased from 100,000 to 1 million, then each shareholder's percentage holding would decrease proportionately. This proportionate decrease is not evidence of oppression.**

Once again, Respondent wants to single himself out from the group of which he holds an equal ownership percentage with 3 out of the 4 total shareholders. If his percentage of share ownership drops to 2% then so does the percentage of Thoennes and Thoennes III. In addition, Roberson's would drop to 4%. Once again, there is no evidence of disparate treatment on the part of the Appellants. Respondent tries to again state that increasing the number of authorized shares was an attempt to "end around" Roberson's contractual obligation to provide more capital. However, as set forth in item 4 above and in Appellants' Initial Brief, Roberson affirmed his obligation to contribute additional capital at trial. Appellants fail to grasp how Respondent has been harmed or mistreated. This is not evidence of oppression.

6. **Respondent closed himself off from free flowing information when he filed his lawsuit.**

Clearly recognizing the fallacy in the trial court's order, Respondent has shifted his assertion from the fact that he did not receive a free flow of information as a result of communications having to be directed through counsel due to his lawsuit, to now asserting that even if the lawsuit was not filed, the Appellants would have nevertheless excluded him. This is pure, unsubstantiated speculation. Respondent was entitled to any information that could be legally conveyed provided that he worked through counsel to obtain it. Having to work through counsel to get information is not evidence of oppression.

7. Respondent's re-election to the Board of Directors of Warpath was a benefit to Respondent and not evidence of oppression.

As stated above, apparently seeing the impropriety in every action, Respondent is willing to try to twist the extension of an "olive branch" and a benefit to him to evidence his claim of oppression. This, if nothing else, illustrates that Respondent has never wanted to be involved in Warpath long-term and has simply wanted to "flip" the project and "cash out" as quickly as possible, which has been his motivation from the moment he realized that Roberson had no plans to simply "flip" the development. This is not evidence of oppression.

8. The Warpath Marina only exists in concept, therefore it is "gross speculation" to suggest that Roberson intended on hiring family members in order to harm the interests of Respondent

Respondent clearly will take any opportunity to twist language to his benefit. Appellants have never denied that Roberson considered hiring family members to help him run the operations of the development. Frankly, Appellants fail to grasp how hiring family members would in any way be improper. Small businesses often thrive on the commitment and support of family members. However, as stated in Appellants' Initial Brief, it is "gross speculation" on the part of Respondent and the trial court to "imagine[] a future where Roberson's family profits richly off of Warpath, while he gets nothing."

Additionally, Roberson does not own a controlling interest in Warpath. Respondent's speculation also fails to take into account that Thoennes and Thoennes III also have a say in the future of Warpath. They are likewise motivated by future returns and it is inconceivable that they would stand for Roberson favoring family members to their financial detriment. The consideration of hiring family members is not evidence of oppression.

9. The failure to presently amend the articles of incorporation is not evidence of oppression

Respondent fails to grasp the legal distinction between authorizing the number of outstanding shares and issuing authorized shares. Warpath's shareholders agreed to increase the number of authorized shares from 100,000 to 1 million. However, the mechanical act of amending the articles of incorporation never occurred. In order to issue more shares, the articles of incorporation must be amended. However, no shares have been issued, therefore the lack of an amendment is inconsequential. The fact that the amendment to the articles has not yet occurred does not prevent its future occurrence. This is not evidence of oppression.

10. Appellants acting on advice of counsel to dismiss their counterclaims at trial is no evidence of oppression.

Once again, in an effort to hold together his claim of oppression in order to force his buy out, Respondent will take any opportunity, no matter how preposterous, to bolster his claim of oppression. Appellants will not restate their entire argument from their Initial Brief. However, Appellants will reiterate that there was evidence supporting and a good faith belief that Respondent misled them as to some aspects of the development. While Appellants, in addition to negligent misrepresentation, plead fraud in their counterclaims, at trial, by choice, Appellants at no point presented any evidence to support fraud or made any allegation in open court that Respondent misled them intentionally.[2] At the prompting of Respondent's counsel, 1 of the 3 Appellants decided that he would not speculate as to whether Respondent did or did not mislead them purposefully. Ultimately, since the Appellants had agreed to pursue their defense as a

[2] On page 27 of Respondent' s Initial Brief, Respondent appears to suggest that Appellants' assertion that fraud was not pursued is inaccurate. In actuality, a review of the citations to the transcript support Appellants' assertion. The phrases cited by the Respondent could equally support negligent misrepresentation, which was pursued. Fraud was only mentioned by the Respondent.

group and were not unanimous in their opinions as to Respondent's conduct, upon the advice of counsel, a decision was made to dismiss the counterclaims with prejudice and defend Respondent's equitable claims.

As set forth in Appellants' Initial Brief, there was evidence presented at trial that suggested that Respondent had pertinent information that was not conveyed and, before entering into the Stock Purchase Agreement [R. at ___.], he was aware of misapprehensions by the Appellants that were not corrected. There was a legitimate disagreement that was actually put to the test by the Respondent's on summary judgment. [Pl's Motion for Summary Judgment; Pl's Memo in Support of Summary Judgment; Def's Memo in Opposition to Pl's Motion for Summary Judgment.] This motion was ultimately denied by the trial court finding that questions of fact as to whether the allegations against the Respondent existed. [December 10, 2009 Order denying Motions for Summary Judgment] This finding, in and of itself should be conclusive. Respondent has simply looked for every opportunity, no matter how preposterous, to support his claim. This is merely another example. This is no evidence of oppression.

For all of these reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order should be reversed.

C. Trial court's order requiring the escrow of 60,000 shares is unsupported in the law and should be reversed.

Respondent makes clear that its premise in opposition to Appellant's Initial Brief is that the law requires the escrow of shares that are issued in exchange for a contract for future services. However, Respondent's contention is not at issue. When the Respondent received $1 million in exchange for 80,000 shares, a present value for the shares was conveyed. Therefore, even assuming Respondent's contention to be correct, there is no requirement to escrow shares.

Despite Respondent's assertion to the contrary, the trial court's finding is erroneous for all of the reasons set forth in Appellants' Initial Brief. In summary, the clear evidence is that Respondent received $1 million in exchange for 80,000 shares. Roberson paid the $1 million for all of the 80,000 shares. Once paid for, within legal bounds, Roberson could do anything he wanted with them. Per their agreement, Roberson chose to presently convey 40,000 shares to Thoennes and Thoennes III who would then earn their 40,000 from Roberson by doing development work. Respondent seeks to cast doubt on the evidence and arrangement by calling Appellants' assertion confusing. Respondent's assertion evidences that he fails to understand a classic business arrangement.

Respondent seeks to refer to the Agreement [R. at ___.] to support his assertion. However, the Agreement is unsupportive. The Agreement merely states that Respondent will receive $1 million and he will give up 20,000 of his own personal shares and the corporation will issue the remaining 60,000 shares. [R. at ____.] The Agreement also states, which as cited in Appellants' Initial Brief and confirmed by Respondent in testimony, that the agreement between the parties was that Appellants were to presently receive 80% of Warpath. [R. at _____.]

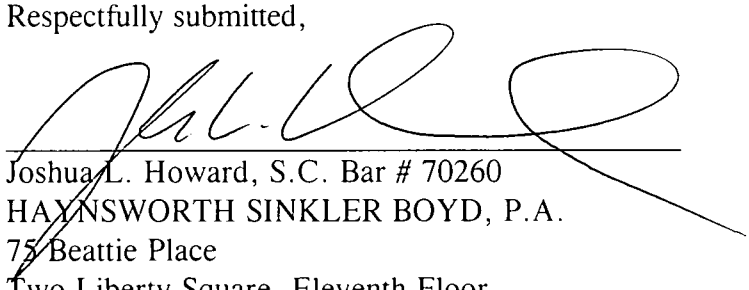
In this case, the actions speak louder than words. As set forth in Appellant's Initial Brief, Respondent was represented by counsel throughout the process. Respondent was the only member of the Board of Directors until the annual meeting was held in May 2008. If Respondent did not believe that he received $1 million for 80,000 shares then he should have escrowed 60,000 shares. This did not happen. It was not until trial that Respondent invented an *ad hoc* explanation for his inactions. Ultimately, his explanation is not supported by the Agreement, is against common sense, and is unsupported by his testimony and actions. For these

reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order to escrow the 60,000 shares is erroneous and should be reversed.

Conclusion

For these reasons and the reasons set forth in Appellants' Initial Brief, the trial court's order should be reversed and the matter should be remanded for entry of judgment in favor of the Appellants.

Respectfully submitted,



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