

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-23-5739

Appellate Case No.: 2017-000690

Andrew P. (Andy) Ballard, Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes, III,
and Warpath Development, Inc., is Petitioners,

Of Whom Tim Robertson is Appellant.

APPELLANT'S INITIAL BRIEF

Joshua L. Howard (SC Bar No.: 70260)
WOMBLE CARLYLE SANDRIDGE & RICE LLP
550 South Main Street, Suite 400
Greenville, SC 29601
864-255- 5406
Attorneys for Appellant, Tim Roberson

Other Counsel of Record:

Wallace K. Lightsey
William M. Wilson, III
Wade Stackhouse Kolb, III
Amos Workman
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Tele: 864-242-8200
Fax: 864-235-8900
Email: wlightsey@wyche.com
Attorneys for Respondent Andrew P. (Andy) Ballard

RECEIVED

SEP 22 2017

SC Court of Appeals

James W. Fayssoux, Sr., Esq.
209 E. Washington Street
Greenville, SC 29601

Attorney for Petitioners Rick Thoennes and Rick Thoennes, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	5
STATEMENT OF THE CASE.....	5
1. Standard of Review.....	7
2. The trial court erred in failing to set aside its October 2, 2013 Order Judgment pursuant to Rule 60(b)(5) SCRPC.....	8
3. The trial court erred in granting Respondent’s motion to modify the Order Appointing Receiver.....	11
4. The trial court erred in transferring Appellant’s interest in TRG, LLC, Greenville Gateway Developers, LLC and Sozo7, LLC to the Receiver.....	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>Blanchard v St. Paul Fire & Marine Ins. Co.</u> 341 F2d 351 (5th Cir. 1965).....	8
<u>Brenco v. S.C. Dep't of Transp.</u> , 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).....	7

Statutes

S.C. Code Ann § 33-44-504.....	12
--------------------------------	----

Other Authorities

SCRCP Rule 60	7
SCRCP Rule 60(b).....	8
SCRCP Rule 60(b)(5).....	5, 8, 9, 11

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in failing to set aside its October 2, 2013 Order and Judgment pursuant to Rule 60(b)(5) SCRPC because the judgment is no longer equitable?
2. Did the trial court err in granting Mr. Ballard's to modify the Order Appointing Receiver and directing the receiver to no longer pay living expenses to the Defendants?
3. Did the trial court err in transferring Appellant's interests in TRG, LLC, Greenville Gateway Developers, LLC and Sozo7, LLC to the Receiver?

STATEMENT OF THE CASE

The present matters on appeal came before the trial court for hearing on January 27, 2017. (January 27, 2017 Transcript is incorporated herein by reference.) Following denial of Petitioners Writ of Certiorari to the Supreme Court of South Carolina, the judgment in this matter was final. Each of these matters involves activity and actions post-judgment.

As is well-documented, this matter involves an equitable judgment of oppression and a subsequent order for Respondent to return his shares upon payment of the court ordered value. As testified in prior hearings, Appellant has not been in an economic position to complete the court-ordered buyout. (August 6, 2013 Transcript.) Despite this inability, up until the end of 2016, Appellant has nonetheless made a continuous effort to attempt to develop the Warpath Marina. (Id.; 1/12/17 - Roberson Aff. ¶ 3.) One of those efforts was to offer the shares of Appellant and Petitioners to Mr. Ballard in exchange for a release and satisfaction. Mr. Ballard would thereafter be in a position to complete the development. An agreement to such an exchange was reached on August 8, 2014. (Id.)

Following this agreement, it is undisputed in the record that Mr. Ballard was permitted a

period of time per the agreement to open discussions with Duke Energy, the leaseholder. (Id. at ¶ 4.) At all times throughout this litigation, Appellant has maintained an open, productive and positive relationship with Duke Energy. (Id. at ¶ 5.) Duke Energy understood the situation and remained patient with the progress.

It appears from documentation, Mr. Ballard and his representatives met with Duke Energy on September 3, 2014. (Id. at ¶ 6.) Per the agreement, Appellant was not a part of the meeting or permitted communications with Duke Energy. Subsequent written communications were apparently had on September 9, 2017. (Id.) Following such communications, Duke Energy responded to Respondent's representative on September 30, 2017 setting forth the conditions upon which Duke Energy would engage with Mr. Ballard. (1/12/17 - Roberson Aff. ¶¶ 5 and 7.) For reasons unknown, Respondent declined to engage further with Duke Energy, broke off communications and terminated the August 8, 2014 agreement. (Id. ¶ 8.)

Unfortunately, following Mr. Ballard's communications, the entire relationship between Warpath and Duke Energy changed. (Id. ¶ 10.) By way of example, following Respondent's rejection of Duke Energy's conditions and subsequent disengagement, Duke Energy asked that Warpath agree to terminate the lease. At no time had that request been made prior. (Id. ¶ 11.) Given the desire to see the development through, Appellant decline Duke Energy's request and began further efforts to fund and develop Warpath. (Id. ¶ 12).

In 2015, Appellant was able to engage with a new financial and development partner. Mr. Ballard was notified of these developments. At that time, Duke Energy was also notified and was provided with a development plan in December 2015. Appellant as well sought and/or received the approvals necessary from community and governmental partners (all of which had previously approved), began the process of renewing and/or reacquiring all necessary lapsed

permits and entered into agreements to reacquire property necessary for wastewater treatment.

(1/12/17 - Roberson Aff. ¶ 13.)

Unfortunately, given the changed relationship with Duke Energy, they were unwilling to participate in the development plans. (Id. ¶ 14.) On January 4, 2016, Warpath received notice of the lease default with a 60-day period to cure. (Id. ¶ 15.) Despite Appellant's best efforts to communicate with Duke Energy, a unilateral lease termination was issued on March 4, 2016. (Id. ¶ 16.) Appellant thereafter continued attempts throughout 2016 to reengage with Duke Energy. (Id. ¶ 17.) Given that Duke Energy was unwilling to engage in further discussions and realizing that Appellant could not remedy the damage caused by the shift in the Duke Energy relationship with Warpath and the impending motions by Respondent before the trial court, Appellant was left with no choice but to seek the requested Rule 60, SCRCR, relief.

A hearing was held on January 27, 2017 before the trial court on Appellant's motion for Rule 60 relief, Respondent's motion to modify the terms of receivership and the receiver's motion to transfer Appellant's LLC interests. On February 17, 2017, the court issued orders denying Appellant's motion and granting the motions of Respondent and receiver. This appeal was thereafter timely taken.

STANDARD OF REVIEW

This appeal is as to an order of the trial court sitting equity and also involves questions of law. 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).

ARGUMENT

1. **The trial court erred in failing to set aside its October 2, 2013 Order and Judgment pursuant to Rule 60(b)(5) SCRCF because prospective application of the judgment is no longer equitable.**

In considering this matter and the subsequent application of the court's judgment, the trial court sits in equity. Appellant would submit that until the trial court's order is fulfilled and equity is served, for the benefit of those affected, including the innocent corporation (which according the Respondent is merely a nominal party), the trial court is responsible to retain jurisdiction and see that equity is served. In this matter, for reasons outside of the control of Appellant, despite the best efforts of the Appellant to develop the property, Duke Energy unilaterally terminated the lease thereby stripping Warpath of its primary asset. The result being that the shares of Warpath are virtually worthless.

Appellant's Rule 60(b)(5) motion is based on the fact that the continuing application of the court's judgment is no longer equitable. "Rule 60(b) is to be liberally construed to carry out purpose of avoiding the result of an erroneous judgment." Blanchard v St. Paul Fire & Marine Ins. Co. 341 F2d 351 (5th Cir. 1965). The intention of the court's judgment was the exchange of the shares Warpath at a particular value. At this point, Appellant will receive shares bearing no value in exchange for the court ordered value. Such a result is inequitable.

The court erred in denying Appellant's motion to set aside the court's October 2, 2013 order in the following respects:

- a. Based on the record before the court as set forth herein, Appellant has presented facts and arguments sufficient to support a grant of Appellant's motion to set aside the court's October 2, 2013 judgment. Respondent's principal factual argument adopted

b. by the court is that Appellant was responsible for securing funding, failed to do so and is therefore at fault for the lease termination. This fails logic. First, the project had been pending for over 8 years as of early 2016. As Appellant testified, Duke Energy and Warpath had maintained a positive and productive relationship. Duke Energy was well aware of the status of the project. As Appellant testified in affidavit, the efforts to fund were not time limited and were continuous right up until the point that Duke Energy made the unilateral and wrongful decision to terminate the lease. Until Respondent was involved in the negotiations and relationship, Duke Energy had never before threatened to terminate the lease. It was not until after Respondent's engagement with Duke Energy and subsequent rejection of their conditions did Duke Energy begin to withdraw. Appellant's efforts thereafter were rebuffed.

At the hearing, after the trial court attempted to dismiss Appellant's motion as moot, the trial court heard a few minutes of argument, took no testimony or requested any testimony and denied the motion on the spot. Appellant is now on the receiving end of an inequitable order. The value Appellant expects to receive and court's order contemplates Appellant will receive in the form of the shares upon fulfillment has been completely stripped from the company by the unilateral decision of Duke Energy. It is inequitable for the Appellant to bear the burden of continuing to meet the court's October 2, 2013 to purchase shares with no present or future value in return. For these reasons, the court erred in finding that Appellant failed to meet its burden and denying Appellant's motion.

c. Alternatively, the court erred in holding that Rule 60(b)(5) is inapplicable. Respondent claims the court's October 2, 2013 order is a judgment of money

- d. damages. This is plainly false. The court's order clearly is an equitable decree: pay a sum of money in exchange for the return of Respondent's shares of Warpath, *i.e.* a like-for-like exchange. Equitable decrees by their nature are continuous and prospective.

The court's citation to Appellant's efforts to assert rights on appeal as a cause of Appellant's damage is improper. As has been testified previously, Appellant has not refused to buyout Respondent. Appellant had been unable to do so economically. (August 3, 2013 Transcript.) On appeal, Appellant sought legal and equitable relief of orders he believed to be wrong and inequitable. Nevertheless, even if Appellant was able to pay and had escrowed the buyout during the pendency of the appeal, the result would be same. The appeal did not conclude until after Duke Energy unilaterally terminated the lease. Appellant would nevertheless take the same position. For these reasons, the court erred in denying Appellant's motion to set aside the judgment.

- e. Alternatively, the court erred in finding Appellant's motion untimely. First, the matter was on appeal and trial court did not possess jurisdiction. Second, neither the court nor the Respondent could cite to any case law setting out a specific time frame. That is because there is no time frame. Third, Appellant did not want this result. Appellant did not want Duke Energy to terminate the lease. Respondent made it very clear that he did not want any part in the future of the development when he rejected Duke Energy's conditions. Without dispute, Appellant made continuous efforts to reengage Duke Energy up until he had no choice but to seek the requested relief. A

- f. failure to make every effort prior to making this motion would likely as well be held over Appellant's head and it would be akin to a failure to mitigate. The trial court's order finding Appellant's motion untimely is in error and without a basis in fact, law or equity.

For these reasons, the court's order denying Appellant's relief requested pursuant to Rule 60(b)(5) should be reversed.

2. The trial court erred in granting Respondent's motion to modify the Order Appointing Receiver and directing the receiver to no longer pay living expenses to the Defendants.

Once again, the court is sitting in equity. In equity, the court is to ensure that equity is carried out to all parties. At the January 27, 2017 hearing (January 27, 2017 Transcript), Appellant opposed the Respondent's request that the court modify the Order of Receivership to deny he and wife living expenses. As argued, Appellant objected as he asserted that to deny the payment of any and all living expenses while the Respondent collected his buyout would be inequitable. (January 27, 2017 Transcript).

As testified by affidavit, Appellant is 72 years old. (1/27/17 – Roberson Aff. ¶ 2.) Appellant's wife, Beverly, is in poor health. (Id. ¶ 4.) At the time of the hearing, Mr. Roberson could not attend because his wife was presently in the hospital having surgery. (January 27 Transcript.) Outside of the assets being levied by Respondent, Appellant has no income but for a Social Security payment that is insufficient to cover their expenses. (1/27/17 – Roberson ¶¶ 5-8.) Appellant requested in equity that the court deny Respondent's request to modify the Order of Receivership to stop payments of living expenses. The court immediately launched into "what

about this other property? He's got – they're talking about over \$5 million in property. Liquidate and give it over. Where's the – where's the \$50,000 a month going in rent?" Appellant thereafter explained that any value was tied up in LLC membership interests that could not be simply liquidated. (January 27 Transcript.) The court continued "Well, I don't want to make the destitute, but he's sitting on a lot of assets. And for him to claim that he's just – can't buy toothpaste is a little bit disingenuous." (Id.) What the court failed to understand is that absent sharing some of the distributional interests in the LLCs, the Appellant and his wife had no other income but a Social Security payment. The court subsequently denied Appellant's request and granted Respondent's motion as requested. In so doing, the court failed to consider the equitable effects of that order. For reasons set forth above, the Appellant requests that the court review the court's order and reverse the decision on the modification to deny Appellant and his wife reasonable living expenses.

3. The trial court erred in transferring Appellant's interests in TRG, LLC, Greenville Gateway Developers, LLC and Sozo7, LLC to the Receiver.

Appellant appeals the trial court's decision to grant receiver's motion to transfer Appellant's interest in TRG, LLC, Greenville Gateway Developers, LLC and Sozo7, LLC to the possession and control of the Receiver. The trial court granted receiver's motion on the basis that S.C. Code Ann § 33-44-504 permits the result. For these reasons, the trial court's order was in error and should be reversed.

A member in an LLC has two basic rights: (1) control rights through voting and (2) economic/distributional rights. S.C. Code Ann. § 33-44-504 only provides a judgment creditor the right to charge against or lien the distributional/economic interest of the debtor in an LLC.

Id. A charging order does not permit the debtor or receiver for the debtor to receive the entire membership interest. A charging order does not allow a court to issue an order transferring a debtors' voting or control rights to a third-party. There is no statutory or common law remedy that permits a creditor to be transferred a debtor's control rights in an LLC. However, that is the order issued by the trial court in this matter which is in error. For this reason, the trial court's order transferring Appellant's control rights to the receiver is an error of law and must be reversed.

CONCLUSION

For the reasons stated herein, Appellant submits that the trial court's orders denying Appellant's motion to set aside the judgment pursuant to Rule 60(b)(5), Respondent's motion to modify the order of receivership and Receiver's motion to compel should be reversed or reversed and modified as set forth herein.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE LLP



Joshua L. Howard (SC Bar No.: 70260)
WOMBLE CARLYLE SANDRIDGE & RICE LLP
550 South Main Street, Suite 400
Greenville, SC 29601
864-255- 5406
Attorneys for Appellant, Tim Roberson

This 20th day of September, 2017
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-23-5739

Appellate Case No.: 2017-000690

Andrew P. (Andy) Ballard, Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes, III,
and Warpath Development, Inc., is Petitioners,

Of Whom Tim Robertson is Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the APPELLANT’S INITIAL BRIEF by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, address as follows:

Wallace K. Lightsey
William M. Wilson, III
Wade Stackhouse Kolb, III
Amos Workman
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
864-242-8200
Attorneys for Respondent

James W. Fayssoux, Sr., Esq.
209 E. Washington Street
Greenville, SC 29601
Attorney for Petitioners Rick Thoennes and Rick Thoennes, III

Counsel’s Signature Block on Next Page

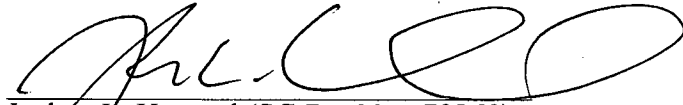
RECEIVED

SEP 22 2017

SC Court of Appeals

Respectfully Submitted,

WOMBLE CARLYLE SANDRIDGE & RICE LLP

A handwritten signature in black ink, appearing to read 'J. Howard', written over a horizontal line.

Joshua L. Howard (SC Bar No.: 70260)
WOMBLE CARLYLE SANDRIDGE & RICE LLP
550 South Main Street, Suite 400
Greenville, SC 29601
864-255- 5406

Attorneys for Appellants/Petitioners

This 20th day of September, 2017
Greenville, South Carolina



550 South Main Street
Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

Joshua L. Howard
Direct Dial: (864) 255-5406
E-mail: jhoward@wcsr.com

September 20, 2017

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Andrew P. (Andy) Ballard v. Rick Thoennes, Rick Thoennes, III and Warpath
Development, Inc.

C.A. No.: 2008-CP-23-05739
Appellate Case No. 2017-000690

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the **Appellant's Initial Brief and Designation of Matter To Be Included in the Record on Appeal** for the above referenced matter.

By copy of this letter we are serving all counsel of record with a copy of the same.

Thank you in advance for your attention to this request.

With kind regards, I remain

Sincerely yours,

Joshua L. Howard

JLH/cpt
Enclosure (as stated)

cc:
Wallace Lightsey, Esq.
William M. Wilson, III, Esq.
Wade Stackhouse Kolb, III, Esq.

Amos Workman, Esq.
James W. Fayssoux, Sr. Esq.

RECEIVED

SEP 22 2017

SC Court of Appeals

After

WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP

Post Office Box 10208
Greenville, SC 29603

NEOPOST

PRIORITY MAIL

09/20/2017

US POSTAGE \$007.20⁰⁰



ZIP 29601
041L11255004

FIRST CLASS MAIL

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A LIMITED LIABILITY
PARTNERSHIP

Post Office Box 10208
Greenville, SC 29603

RECEIVED

SEP 22 2017

SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201