THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

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

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SC Court of Appeals

Luis Endara .... Appellant,

v.

AVSX Technologies, LLC,
Bobby Johnson, and Mary Kay Johnson .... Respondents.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

Whether the trial court correctly refused to charge the jury on partnership law in a case where the controlling issue was not partnership, but whether the plaintiff owned any part of a particular LLC.

STATEMENT OF THE CASE

A. Abbreviated summary.

This case involves a falling out between people in the workplace.

AVSX Technologies is a South Carolina Limited Liability Company. All agree AVSX was actively managed by two people: Luis Endara (the appellant), and Bobby Johnson (a respondent). (R.p.194, line 14 - p.195, line 4; p.277, lines 8-9). Everyone also agrees the company's official documents list its sole member as Mary Kay Johnson, Bobby's wife. (R.p.332, lines 20-24). This structure was intentional and done on purpose.

Luis received a letter in March of 2014 stating he had been fired from AVSX. (R.p.884). He later sued AVSX, Bobby, and Mary Kay claiming he co-owned the business, could not be fired, and seeking damages for being excluded from the enterprise.

During the trial, Luis repeatedly agreed the controlling issue was whether he was a member of the LLC. (R.p.640, line 21 - p.641, line 8; p.817, lines 11-18; p.826, lines 14-18). Despite these admissions he sought jury instructions on the South Carolina Uniform Partnership Act. (R.p.657, line 18 - p.658, line 6).

The trial court gave the jury a verdict form with special interrogatories, the first of which asked the jury whether Luis had proved he was a "member/owner" of AVSX. (R.p.850, line 15 - p.851, line 12). The jury answered "no." (R.p.855, line 18 - p.856, line 4). Luis filed post trial motions and noticed this appeal after those motions were denied.

B. Brief history of AVSX's formation and structure.

AVSX sells home security systems and technology. (R.p.238, lines 16-17). Its principal business partner is a company named Vector. (R.p.241, lines 9-10).

AVSX installs Vector's security systems and sells Vector's monitoring contracts. (R.p.241, lines 11-14). Luis explained "We sell you a security system. We take that contract and we give it to Vector, and Vector pays us a significant amount of money for it." (R.p.274, lines 4-6). Luis said the industry is "a very high-risk place" and "dog eat dog." (R.p.267, line 22; p.271, line 7).

Luis and Bobby were AVSX's key employees, but they did not own the company and they were keenly aware of this. AVSX's ownership structure had been built by design.

Luis and Bobby met when Bobby was working as a manager at a gym. (R.p.134, lines 5-9; p.267, lines 17-23). They started two security businesses together—Protection24 and Guardian Eagle—and they ran both businesses at the same time, selling different security systems through each company until they decided to "stick" with Vector's systems, which they sold through Guardian Eagle. (R.p.268, line 10 - p.271, line 4).

Neither Luis nor Bobby satisfied Vector's criteria for owning a "dealership," so they approached a third person, Julio Reis, to open the business for them. (R.p.211, lines 7-12). Julio was the sole member of Guardian Eagle. (R.p.210, lines 9-11). He received no salary and did not participate in management decisions, (R.p.210, lines 12-14; p.214, lines 2-4), but he readily acknowledged ultimate responsibility for the company passed to him as the owner. (R.p.225, lines 13-18). Guardian Eagle changed its name to AVSX in 2011. (R.p.923). Mary Kay became the legal owner around this same time. (R.p.243, lines 11-15).

C. Summary of the parties' arguments and the relevant rulings.

Luis' complaint stated ten (10) causes of action, but prior to trial he indicated the controlling question was whether he was a member of the LLC or a "W-2 employee." He affirmed this during trial. (R.p.550, line 23 - p.551, line 4; p.640, line 21 - p.641, line 8).

AVSX did not have a written operating agreement. (R.p.334, line 21 - p.335, line 2). Luis' theory of the case appeared to be two-fold. First, Luis claimed there was an unwritten operating agreement that he and Bobby were equal co-owners. (R.p.619, line 22 - p.620, line 5). Alternatively, he claimed he and Bobby were partners and that the LLC was an asset of the partnership. (R.p.620, lines 17-20). Luis argued legal ownership of the business was different than actual ownership, (R.p.533, lines 1-6), admitting Mary Kay owned the business 100% on paper but insisting he owned it too, just "not on paper." (R.p.332, line 20 - p.333, line 6).

Luis' chief evidence supporting his theory was course of dealing: Bobby and Luis were AVSX's two key employees and many people assumed they owned the company. Multiple witnesses testified AVSX ran as though Bobby and Luis were the folks in charge. (R.p.432, lines 14-21; p.444, lines 10-16; p.463, line 11-18; p.510, lines 10-17). Importantly, however, Luis repeatedly agreed his entitlement to relief in this lawsuit hinged on whether he was a "member" of the LLC. (R.p.817, lines 11-14; p.826, lines 14-18).

Respondents admitted Luis had been crucial to the company but argued the company's ownership structure was clear and had been done intentionally. Tax documents listed Mary Kay as the 100% owner. (R.p.338, line 17 - p.339, line 15); (R.p.1006). The company's application to the Department of Revenue listed Mary Kay as the sole owner.

(R.p.489, line 6 - p.490, line 20); (R.p.1018). Luis previously gave a deposition in an unrelated case and was asked in that deposition whether he owned AVSX. (R.p.364, line 14 - p.365, line 4); (R.p.1012). He responded "I am vice-president of AVSX. The actual, legal owner on paper is Mary Kay Johnson." (R.p.365, lines 2-3); (R.p.1012).

Luis did not list any ownership interest—in *any* company—on his financial disclosure in his 2012 divorce. (R.p.399, line 4 - p.400, line 15); (R.p.924). Also, AVSX paid Luis as a W-2 employee, (R.pp.1010-1011), and Luis has never received—in any of his four (4) alarm businesses—the tax document (a "K-1") the law requires of a shareholder. (R.p.341, lines 2-9; p.684, lines 7-20). Respondents emphasized all of this evidence in their closing argument, (R.p.777, line 5 - p.780, line 22), explaining Luis was happy making a nice salary and insulating himself from legal ownership until the relationship soured.

The only discussion of jury charges relating to partnership occurred late in the day on the third day of trial. The court asked Respondents' counsel whether he had reviewed Luis' proposed jury charges. (R.p.618, lines 15-17). Respondents' counsel replied he did not think any of the charges applied because they were all partnership statutes. (R.p.618, line 21 - p.619, line 10). Luis said he was alleging a partnership with Bobby, (R.p.619, lines 12-16), but the court responded by asking whether there was any dispute that the entity in question was an LLC. (R.p.619, line 22 - p.620, line 1). Luis claimed he pled wrongful dissolution of a partnership, (R.p.632, lines 11-12), at which point Respondents' counsel and the court asked Luis about his pre-trial concession that the controlling issue was whether Luis was a member of the LLC. (R.p.633, line 23 - p.634, line 4; p.640, line 21 - p.641, line 6). Luis affirmed that was the issue. (R.p.641, line 8). After a lengthy discussion, the court

explained the "whole issue" was Luis' allegation of membership in AVSX, that he was a 50/50 owner of AVSX, and that he had been wrongfully terminated. (R.p.657, lines 18-25). The court said "I don't think that any partnership statutes are applicable." (R.p.658, lines 1-2).

There was no further discussion of this issue, and on more than one occasion after this discussion, Luis agreed his entitlement to relief hinged on whether he was a member of the LLC. (R.p.817, lines 11-14; p.826, lines 14-18).

The court gave the jury a verdict form with three (3) special interrogatories. (R.p.850, line 11 - p.851, line 15). Luis' only objection to the verdict form related to unjust enrichment, which is not at issue in this appeal. (R.p.834, line 2 - 24).

Luis moved for a new trial, and his memo supporting his motion argued the partnership statutes should have been charged because he had "pled and presented his claim as a partner." (R.p.47). Luis said he had made a strategic decision at trial, pursuing a partnership claim "rather than" proceeding on a theory that Luis and Bobby's course of performance constituted an unwritten operating agreement for the LLC. *Id.*

The trial court denied this motion in a written order, noting Luis' indications that his right of recovery hinged on whether he was a member or a W-2 employee. (R.pp.8-9). The court also noted Luis had not objected to the court's jury charges. *Id.*

Luis filed a second post-trial motion following this ruling, claiming the trial court erroneously relied on pre-trial discussions that were not reflected in the trial record. (R.pp.55-56). The court denied this motion. (R.p.13). The trial record plainly illustrates Luis' affirmation of the off-the-record discussion. (R.p.640, line 21 - p.641, line 7).

ARGUMENT

There are two reasons this Court should affirm the trial court's judgment

First, jury charges on partnership law were irrelevant. This case involved deciding who owned an LLC, not a partnership. Luis agreed this was the controlling issue. Charges on partnerships were not warranted and would have been confusing.

Second, the trial court charged the jury on the controlling principles and gave the jury all of the pertinent information. It charged the jury about oral operating agreements and course of dealing. It charged the jury that the jury should decide everyone's credibility and determine whether Luis owned a stake in AVSX. Everything suggests the jury faithfully performed these tasks. This Court should affirm.

A. Jury charges on partnership law were irrelevant to ownership of this LLC.

The trial court is required to charge the current and correct law of South Carolina, but the court is not required to charge principles that are not relevant to the case in question. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). The trial court's decisions with respect to jury charges are reviewed under the abuse of discretions standard, requiring Luis to demonstrate an error of law or a factual conclusion without any evidentiary support. *Id.* at 389, 529 S.E.2d at 539.

Luis cannot satisfy this requirement. Luis' two theories of recovery were (a) an unwritten operating agreement that he and Bobby co-owned AVSX or (b) that AVSX was an asset of his and Bobby's pre-existing partnership. (R.p.619, line 22 - p.620, line 20). But the entity involved—AVSX Technologies—is plainly organized as a South Carolina Limited

Liability Company. This corporate entity's existence and identity is not disputed. As an LLC, the entity is governed by the Uniform Limited Liability Company Act of 1996, see S.C. Code Ann. §§ 33-44-101 to -1208, not the Uniform Partnership Act, see S.C. Code Ann. §§ 33-41-10 to -1330.

Whether Luis' claims would rise or fall was determined by the LLC Act, not the Partnership Act. Luis sought to prove AVSX had an unwritten operating agreement. The LLC Act contains the enabling legislation allowing unwritten operating agreements. S.C. Code Ann. § 33-44-103(a) (1998). Luis needed to do more than simply prove an unwritten operating agreement—a tall order given Luis' admission (in an e-mail) "We don't have an operating agreement," (R.p.1013)—Luis needed to prove he was a member of this LLC or that the unwritten operating agreement varied the LLC Act's standard provision explaining that although "managers" run a "manager-managed" LLC, managers are selected and removed exclusively by "members." See S.C. Code § 33-44-404(b) (2004). Again and again, the LLC Act provided the rules for the jury's decision.

This argument is bolstered by Luis' admissions that his right to recover hinged on whether he was a member of this LLC. (R.p.817, lines 11-14; p.826, lines 14-18). The trial court sent the jury a verdict form focused on this inquiry. (R.p.850, line 11 - p.851, line 15). Luis' only objection to that verdict form was the form's omission of an unjust enrichment claim, and Luis *agreed* that in order to recover under unjust enrichment, the jury would need to find he was a member. (R.p.826, lines 14-18; p.834, lines 14-24).

Respectfully, Luis has never articulated why jury charges about inferring the intent to form a partnership or the duties running between partners have any relevance to the

question whether Luis and Bobby had an unwritten agreement to "own" AVSX even though Mary Kay indisputably is the company's legal owner. Luis has never provided any authority supporting his argument that this sort of agreement would even be legally cognizable; "legal" ownership is actual ownership, and there is no such thing as owning a business for tax purposes only.

Again, in order to win Luis needed to convince the jury he was a member of this LLC or that he and Bobby had an unwritten agreement where they, as the LLC's two managers, had complete autonomy including the ability to direct the activities of the company's legal owner. Luis argued his case to the jury and the jury rejected it. Respectfully, partnership statutes have no relevance. The controlling issue was not partnership, but whether Luis owned any part of this LLC.

B. The trial court sufficiently charged the jury on the controlling principles, including the principles applicable to Appellant's theory of ownership.

To win reversal on jury charges, the appealing party must demonstrate both an abuse of discretion and prejudice. *Clark*, 339 at 390, 529 S.E.2d at 539. The appellate court will not reverse for errors that did not affect the case's outcome, and in assessing a challenge based on jury charges, the Court reviews the jury charges as a whole and considers those charges in light of the evidence and the issues from trial. *Frazier v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004).

Here again, Luis cannot meet the standard. The trial court gave the jury all of the pertinent information and allowed the jury to make its decision. The trial court charged the jury that Luis was claiming he was a member of AVSX and that he was wrongfully

disassociated from the company. (R.p.837, lines 4-7). The court charged the jury Luis was claiming a distributional interest from his membership. (R.p.837, lines 7-9). The court charged the jury that it was the exclusive judge of the facts and of credibility. (R.p.838, lines 19-20; p.841, lines 13-18). Nothing suggests the jury did not understand or appreciate its job of deciding between the parties' competing theories of the case.

The court charged the jury to determine who were the members and owners of AVSX. (R.p.844, lines 10-13). It charged that an LLC's operating agreement may be oral. (R.p.845, lines 5-12). It charged that an oral operating agreement may be proven by evidence like corporate documents, corporate filings, the parties' course of dealing, and course of performance. (R.p.845, lines 13-24). And the court charged the jury that an LLC must pay a disassociated member fair value if the member's disassociation did not result in the dissolution of the company's business. (R.p.847, lines 8-21). Luis has not explained why these principles left the jury with insufficient tools for answering what he agreed was the dispositive inquiry: whether he was a member in this LLC. The jury had what it needed.

Both sides had evidence supporting their claims. The record contains evidence Luis and Bobby ran the company as though it was their business, including approaching the people who agreed to serve as AVSX's legal owners.

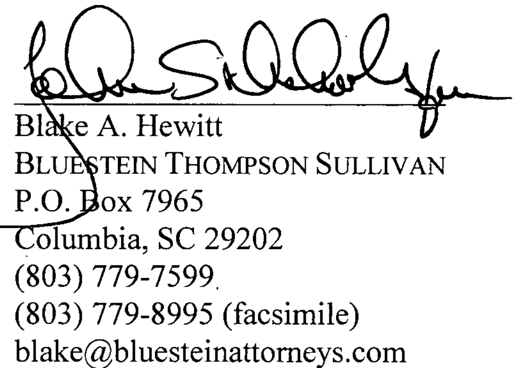
But candor also requires acknowledging substantial holes in Luis' claim. Luis and Bobby knew they were not the company's legal owners; indeed, they knew they needed someone else to be the owner from the start. Respondents also argued to the jury that Luis had a history of jumping between competitors in the alarm business, a practice made easier because he never owned any of these businesses. (R.p.774, line 19 - p.775, line 9).

The trial court gave the jury everything it needed to resolve the case, specifically charging the jury on the controlling principles as well as the principles applicable to Luis' theory of ownership. Luis has not explained how these charges were incomplete or misleading, and he has not explained why jury charges on partnership would lead to a different outcome.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,



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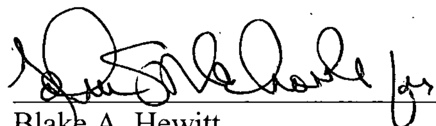
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

October 12, 2016



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