THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001551

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

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc., ... Defendants,

Of whom Rick Thoennes III is .... Appellant.

INITIAL BRIEF OF RESPONDENT

William M. Wilson III (S.C. Bar Id. No. 15808)
Wallace K. Lightsey (S.C. Bar Id. No. 6476)
WYCHE P.A.
44 East Camperdown Way
Greenville, SC 29601
(864) 242-8200

Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. DID JUDGE MILLER ERR IN FINDING THAT SOME PORTION OF THE 2013 JUDGMENT IS ATTRIBUTABLE TO OPPRESSION BY THOENNES OCCURRING AFTER THE BANKRUPTCY DISCHARGE?

2. DID JUDGE MILLER ERR IN FINDING THAT HIS PREVIOUS FACTUAL FINDING IN TWO PRIOR ORDERS THAT OPPRESSION OCCURRED AFTER THE BANKRUPTCY DISCHARGE WAS THE LAW OF THE CASE?

3. DID JUDGE MILLER ERR IN ADOPTING THE DETERMINATION OF THE BANKRUPTCY COURT, ENTERED WITH THE EXPLICIT CONSENT OF THOENNES, THAT ANY PORTION OF THE JUDGMENT ATTRIBUTABLE TO POST-DISCHARGE CONDUCT WAS NOT DISCHARGED BY THE DISCHARGE ORDER?

STATEMENT OF THE CASE

This suit was filed on July 30, 2008, by Respondent Andrew P. (Andy) Ballard ("Ballard"), a minority shareholder of defendant Warpath Development, Inc. (a company formed to develop a marina and related properties on Lake Keowee, South Carolina) (the "Corporation"), against the majority shareholders, including Appellant Rick Thoennes III ("Thoennes"),[1] for minority shareholder oppression. Ballard's claims were tried in the Circuit Court before Judge Edward W. Miller from March 15 to 17, 2010. On May 4, 2010, Judge Miller entered an Order finding that that Thoennes and the other individual defendants oppressed Ballard and were required to buy out Ballard's shares in the Corporation for an amount to be determined at a subsequent hearing ("2010 Initial Order"). Before the hearing occurred, Thoennes appealed to the South Carolina Supreme

[1] The majority shareholders against whom the claims were asserted were the Appellant, Rick Thoennes III (referred to herein as "Thoennes" or "Thoennes III"); his father, Rick Thoennes (referred to herein as "Thoennes Sr."); and Tim Roberson (referred to herein as "Roberson"). All three shareholders are the "defendants" in the underlying action and are noted as defendants in the caption of this action.

Court from the interlocutory, though appealable, 2010 Initial Order. During the pendency of this appeal, Thoennes filed for Chapter 7 bankruptcy relief and was granted discharge on March 26, 2012 (which discharged debts prior to the filing date of December 2, 2011, but not after December 2, 2011). Nevertheless, Thoennes continued to pursue his appeal while his bankruptcy proceeding was pending, arguing in the appeal that the 2010 Initial Order should be reversed. *See Ballard v. Roberson*, 399 S.C. 588, 590, 733 S.E.2d 107, 108 (2012) ("On appeal, Appellants [including Thoennes] argue that the facts do not support the court's holdings.").

Ballard prevailed on this appeal, *id.*, and upon remand Judge Miller held a hearing on August 6, 2013, in which he took evidence in order to value the shares for a buyout. Ballard submitted a pre-hearing memorandum dated May 31, 2013 ("2013 Prehearing Memorandum") to Judge Miller and copied Thoennes's counsel that same day per its cover letter ("2013 Prehearing Memorandum Cover Letter"), thereby giving notice to Thoennes that post-discharge oppression would be an issue at the hearing. This memorandum specifically contended that the time of the hearing should be the time used for the valuation due to Thoennes's oppression continuing through the present time:

> In the instant matter, **defendants' oppression of Andy Ballard has continued to the present time**. He has not been provided any information concerning the company's affairs or activities (other than what counsel demanded in formal discovery); nor has he been included in any directors' meetings or discussions or decisions made by the board of directors (to which he was elected in 2009). Accordingly, the timing of his stock value should be the present. *See Hendley v. Lee*, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (finding the "most equitable valuation date" for purposes of a buyout was the time of the trial, when "evidence was received as to the worth of the company").

Prehearing Memorandum at 8 (emphasis added).

Although Thoennes did not testify at the hearing, he was a party to the proceedings and was represented by counsel at the hearing, namely Joshua Howard, Esq. *See* Certificate as to Production of Transcript of Record at 1 (indicating that Thoennes was represented); Tr. of Aug. 6, 2013 Hearing at 1 (same). At the hearing, Ballard testified to, and presented documentary evidence of, joint conduct by all of the defendants, including Thoennes, of continued oppression, including their continued exclusion of Ballard from any participation in or knowledge of the management and planning for Warpath, their continued keeping from Ballard any information concerning plans or discussions for financing the project, and that "the wrongful conduct has continued since 2011 through the presen[t]." Tr. of Aug. 6, 2013 Hearing at 18:21 – 23:1 & Ex. 9 (quote by Mr. Lightsey summarizing the evidence transcribed at pages 18-22). This testimony went unrefuted. Ballard further testified that he had not had control over the project for five years and that defendants did not seek any input from him. *Id.* at 40:13 – 41:20.

Testimony from the court-appointed expert Perry Woodside corroborated the evidence presented by Ballard that Thoennes continued to be involved with the Corporation after the bankruptcy discharge. *Id.* at 76-78. Specifically, he confirmed that the forecasts he used for valuation were developed in late 2012, *id.* at 76:3-9; that they were provided by the "management," which was the same as the "defendants," *id.* at 76:14-17; and that he was unable to obtain any information from Ballard because Ballard "wasn't privy to a lot of information so I couldn't get it [from] him directly," *id.* at 76:17-20; *see also id.* at 78:15-18 (testifying that his valuation relied upon information "from the defendants"); *id.* at 81:19-23 (testifying that he was given the financial information by

"the defendants"); and that the defendants would prefer a lower valuation for purposes of the hearing, *id.* at 76:21-77:14.

Additionally, Mr. Howard as Thoennes's counsel specifically elicited testimony from defendants Roberson and Thoennes Sr. (the father of Appellant Thoennes) concerning actions occurring between the 2010 Initial Order and the valuation hearing date, and the resulting testimony implicated Appellant Thoennes's continued involvement in the activities of the Corporation. Mr. Howard asked Roberson to describe all of his efforts after the 2010 Initial Judgment to compete the development, *id.* at 47:20 – 49:8, and the resulting testimony included a reference to an investor getting involved in the fall of 2012 as a result of owing money to Appellant Thoennes, *id.* at 48:22; see also *id.* at 32:5-6 (revealing that this investors' involvement was the fall of 2012). Importantly, Appellant Thoennes's father, Rick Thoennes Sr., specifically testified that Appellant Thoennes was involved in attempting to secure financing from May 2007 all the way through the present day of the hearing:

> RICK THOENNES SR.: From the very beginning Tim [Roberson] and I **and Rick [Thoennes III]** worked together in securing financing. Initially, our bank was Greenville First and Tim's relationship with Palmetto Bank so those were the two directions we went to in May of 2007 **and then from that time on even until today we've been trying to secure financing**.

Id. at 57:7-12 (emphasis added). He subsequently reiterated that these efforts were "**ongoing**"; occurred on a "**weekly**" basis (and sometimes "**daily**" basis); and that they "**continued to today.**" *Id.* at 58:5-8 (emphasis added). This testimony was unrefuted. Thus, testimony at this hearing reflected upon Thoennes's ongoing involvement with the Corporation through the date of the hearing, in direct contradiction to his arguments in this appeal that he had nothing to do with the company after he filed for bankruptcy.

Judge Miller ultimately entered an order on October 3, 2013, requiring Thoennes and the other defendants to purchase Ballard's shares in the Corporation for $3,589,297 within 90 days ("2013 Final Judgment"), and Thoennes again appealed.[2] On July 15, 2015, the Court of Appeals issued an unpublished *per curiam* opinion, in which it weighed the evidence and reduced the judgment amount to $3,125,000. *Ballard v. Roberson*, Op. No. 2015-UP-364 (July 15, 2015). The Court of Appeals specifically affirmed the Circuit Court's entry of a money judgment against the defendants, the imposition of joint and several liability, and the 90-day period to carry through with the buyout. *Id.* Defendants moved for rehearing on July 30, 2015, and on August 26, 2015, the Court of Appeals issued a substitute opinion and denied defendants' request for rehearing. *Ballard v. Roberson*, Op. No. 2015-UP-364 (Aug. 26, 2015).[3] On September 8, 2016, the Supreme Court of South Carolina denied Thoennes's petition for a writ of certiorari, and therefore the judgment amount of $3,125,000 is now final.

While the case was on Thoennes's second appeal, Ballard pursued enforcement of the 2013 Final Judgment through supplemental proceedings against each of the three defendants. On March 27, 2014, the Circuit Court issued a Rule to Show Cause and then held a hearing on April 23, 2014. *See* Rule to Show Cause; Tr. of Rule to Show Cause Hearing. Although Thoennes had petitioned for bankruptcy in December 2011, he never raised this issue at any time during the first appeal of 2010-12, the valuation hearing of August 6, 2013, and/or the initiation of the second appeal in 2013. It was not until supplemental proceedings in 2014 that Thoennes first objected to the enforcement of the

[2] It is noteworthy that Thoennes initiated this appeal after his bankruptcy discharge.
[3] The substitute opinion changed nothing of substance from the original opinion, but merely added some clarifying language.

2013 Final Judgment against him on the basis that his debts were discharged in bankruptcy on December 2, 2011 (after the 2010 Initial Judgment but prior to the 2013 Final Judgment). *See, e.g.,* Order Appointing Receiver at 1 n.1.

Following the hearing on the Rule to Show Cause, on April 23, 2014, Judge Miller issued an Order Appointing Receiver and a Charging Order in which he made specific factual findings against Thoennes that he owned or controlled assets "at risk of being wasted, secreted, or diverted while the defendants' appeal is pending," Order Appointing Receiver at 3 ¶ 9 & Charging Order at 3, and that his oppressive conduct had continued "unchanged and unabated" up to the time of the valuation hearing on August 6, 2013, Order Appointing Receiver at 3 ¶ 4 & Charging Order at 2. Because Thoennes contended that the claims against him had been discharged in bankruptcy and because Ballard opposed that contention, the orders both specifically provided that the relief granted in them would not be entered against Thoennes until the parties resolved the dispute by agreement or court order. Order Appointing Receiver at 1 n.1 & Charging Order at 1 n.1. **Even so, both orders also expressly stated that the factual findings, including those above, *did* apply to Thoennes**. *Id.* Thoennes did not appeal these orders or findings, although the Orders were immediately appealable. S.C. Code § 14-3-330(3)-(4).

On November 17, 2014, Ballard brought an adversary proceeding in the Bankruptcy Court to resolve the question of whether the oppression claims against Thoennes had been discharged. *See* Complaint to Determine Dischargeability of a Debt. On October 28, 2015, the bankruptcy court entered an Order—with consent of both Thoennes and Ballard ("Consent Bankruptcy Order")—ruling that any portion of the

2013 Final Judgment that was attributable to oppression by Thoennes on or after December 2, 2011, was not discharged by its prior discharge order. *See* Consent Bankruptcy Order ¶ 5; *see also* Bankruptcy Order of Sept. 3, 2015. The Consent Bankruptcy Order further directed that it was more appropriate for the state court to determine whether all or any portion of the 2013 Final Judgment was attributable to post-discharge oppression, and it dismissed the adversary proceeding without prejudice so that Ballard could seek such a determination from the Circuit Court. *Id.* ¶¶ 6-7.

Ballard then sought a ruling from the Circuit Court that all or a portion of the 2013 Final Judgment was attributable to oppression that occurred on or after December 2, 2011. *See* Motion to Determine the Portion of the Judgment Amount filed September 21, 2016. The Circuit Court held a hearing on January 27, 2017. *See* Tr. of Jan. 27, 2017 Hearing. The Court received affidavits from Thoennes and Ballard with respect to the hearing. Although Ballard's affidavit was offered in defense of a separate motion made by Roberson, it includes relevant testimony in the record with respect to the issue of post-discharge oppression by Thoennes, including testimony that negotiations continued with all defendants through 2014 and beyond; that defendants, including Thoennes, continued to drag their feet and not to progress with the development of the marina; and that an agreement between Ballard and Thoennes in 2014 included a representation by Thoennes that he continued to own shares in the Corporation. *See* Ballard Aff. filed Jan. 26, 2017.[4]

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[4] This testimony included:

> The 2014 settlement agreement came about as a result of years of negotiating with the Defendants to either buy me out at a fair price or let me take Warpath back over and carry out the development myself. If Roberson and the other defendants had not dragged things out for seven years in their efforts to rob me of the value of my ownership interest in

In his subsequent Order Allowing Enforcement of Full Amount of Judgment Against Rick Thoennes III entered April 18, 2017 ("Order Enforcing Judgment"), Judge Miller found that Thoennes's oppression of Ballard continued unabated through the valuation hearing on August 6, 2013, and therefore that Thoennes was liable for the entirety of the 2013 Final Judgment amount of $3,125,000, as it was fully attributable to

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> Warpath, I am convinced that I would have been able to maintain Duke Power's support for the project and to carry out the development of the marina.
>
> However, because of the lengthy delays caused solely by the Defendants, when Mr. Lightsey and I met with Duke Power in early September, 2014, it was evident that the representatives of Duke Power attending the meeting were already fed up with Mr. Roberson and the other Defendants and skeptical of whether the project could be completed in a timely manner.
>
> . . . .
>
> There is no question that the reason Duke Power eventually terminated the lease was the failure of Mr. Roberson and the other Defendants to make any significant progress with the development of the property. For Mr. Roberson to claim that this was "out of his control" is absurd. The sole reason for the termination of the lease is the Defendants' failure to develop the property as they contracted to do when I entered into my agreement with them to transfer a controlling ownership of Warpath to them.
>
> If the Defendants had not persisted in stringing out this lawsuit for six years before entering into the settlement agreement with me in August 2014, I would have had the opportunity to work something out with Duke Power before it became so frustrated over the Defendants' failure to move the project forward over a period of seven years after the lease agreement was signed. Further, if the Defendants had simply done what they agreed to do in their initial contract with me, Duke Power would never have terminated the lease and the marina would now be a reality worth over $30 million. The Defendants' efforts to rob me and failure to carry out their own agreements are what have ruined Warpath.

Ballard Aff. ¶¶ 3, 4, 9, 10. The affidavit included the "2014 Settlement Agreement" executed by Thoennes and representing that that Thoennes held 20,000 shares in escrow that "have not been assigned, transferred, conveyed, or otherwise encumbered." *Id.* Ex. A ¶ 1.d.i-ii.

oppression occurring on or after the Petition date. *See* Order Enforcing Judgment at 6. It is this Order Enforcing Judgment from which Thoennes now appeals.

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) (emphasis added); *accord Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). 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." *Pinckney, supra*, 344 S.C. at 387, 544 S.E.2d at 623; *accord Ballard, supra*, 399 S.C. at 593, 733 S.E.2d at 109; *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). Appellant's burden is particularly heavy here, because Judge Miller has special expertise in corporate matters like this case from serving as one of three Business Court Judges in South Carolina. *Ballard, supra*, 399 S.C. at 592 n.3, 733 S.E.2d at 109 n.3.

Further, while this Court may find facts in accordance with its own view of the evidence (subject to the above standards), the corporate dissolution statute that is the basis for the remedy ordered by the Circuit Court grants the trial judge broad discretion in fashioning equitable relief to fit the unique circumstances of the corporation and facts of the case. S.C. Code § 33-14-310(d); *see* 2 F. O'NEAL & R. THOMPSON, O'NEAL AND

THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 7.20, at 7-132 & n.1 (rev. 2d ed. 2005) (recognizing S.C. statute as one that gives extraordinary discretion to the trial judge in fashioning a remedy for oppression). Thus, the appellants have the burden of convincing this Court that Judge Miller—who observed all the witnesses and saw all the evidence firsthand—abused his discretion or committed error of law in his weighing of the evidence to determine that all or some portion of his 2013 Final Judgment is attributable to post-discharge oppression.

ARGUMENT

Summary of Argument

This litigation has been pending since 2008. By the time this Court renders its decision, the case will be more than a decade old. During those ten years, appellant has availed himself of two trials, three appeals, and numerous motions for reconsideration. He has lost at every stage, and yet now after dragging the process out for ten years, he asks this Court to wipe the slate clean and absolve him of all liability on the basis of a discharge in bankruptcy **that occurred *prior* to the applicable 2013 Final Judgment**. However, his oppressive conduct against Ballard that formed the basis for this final judgment continued *after* the discharge, and the bankruptcy court specifically ruled that its discharge did not apply to oppression that continued after the December 2, 2011, date of discharge, **in an order entered with Thoennes's consent**. To rule otherwise would be to sanction continued oppression simply because it first began prior to the discharge. The bankruptcy court expressly recognized Ballard's right to have the 2013 Final Judgment enforced against Thoennes with respect to any such post-discharge oppression and that the Circuit Court was in a better position determine whether any or all of the

2013 Final Judgment was attributable to post-discharge oppression. The Circuit Court did make this determination and specifically ruled that the entire 2013 Final Judgment was attributable to post-discharge oppression. Ballard respectfully requests this Court to affirm this ruling and thereby not sanction continued oppression occurring after the discharge and prior to the 2013 Final Judgment.

I. **JUDGE MILLER DID NOT ERR IN FINDING THAT SOME PORTION OF THE 2013 JUDGMENT IS ATTRIBUTABLE TO OPPRESSION BY THOENNES OCCURRING AFTER THE BANKRUPTCY DISCHARGE.**

Thoennes's first issue on appeal contends that this finding "is clearly erroneous as the record contains no post-discharge oppression attributable to Thoennes." Initial Br. of Appellant at 9. In the Order Enforcing Judgment, Judge Miller sought to determine whether any amount of the 2013 Final Judgment was attributable to oppression by Thoennes that occurred after discharge on December 2, 2011. If so, then in accordance with the Consent Bankruptcy Order, all or part of the 2013 Final Judgment must be enforced against Thoennes.

Judge Miller specifically found that "Ballard presented undisputed evidence at the August 6, 2013, valuation hearing that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the hearing." Order Enforcing Judgment at 3-4 (internal quotations omitted). His basis for this finding was twofold. First, it was the law of the case because the finding already had been made on the Order Appointing Receiver and the Charging Order. These appealable orders had not been appealed and therefore these findings were binding upon Thoennes.

Second, apart from the finding being law of the case, Judge Miller pointed to specific evidence in the record that supported the finding. Thus, he independently found that there was evidence in the record that supported this conclusion:

> In addition, the Court **reaffirms this finding of fact based on the evidence presented by Ballard at the August 6, 2013, hearing**, which was not refuted or even challenged at that time by the defendants, including Thoennes III.[2]
>
> . . . .
>
> Fn 2: In particular, Ballard testified to, and presented documentary evidence of, joint conduct by all of the defendants, including Thoennes III, that continued their exclusion of Ballard from any participation in or knowledge of the management and planning for Warpath, that kept from Ballard any information concerning plans or discussions for financing the project, and that "the wrongful conduct has continued since 2011 through the presen[t]." Transcript of Record, p.22, lines 21-22 (Aug. 6, 2013) (statement by Mr. Lightsey summarizing the evidence transcribed at pages 20-22). Testimony from the court-appointed expert corroborated the evidence presented by Ballard. See, e.g., id. at 67-68, 76-78 (testimony of Perry Woodside).

Order Enforcing Judgment at 4 & n.2 (emphasis added). This evidence cited by Judge Miller in his order plainly demonstrates a finding that there was oppression by Thoennes following the discharge. And this evidence of oppression mirrored the evidence of oppression in the original trial, which largely focused upon Ballard being excluded from participation in or knowledge of the management and planning for the Corporation and excluded from discussions for financing the project. As summarized by the Supreme Court on the first appeal:

> Moreover, Ballard has not been allowed to meaningfully participate in the development for lack of communication. Appellants admit they have not directly kept him updated on the progress of the permits although Ballard has attempted to stay informed on the status of the permits by maintaining contact with Duke, the engineers, and the Department of Health and Environmental Control. While Appellants contend they elected him as a director in an attempt to include him again, Thoennes admitted at trial that

> they have not had a directors' meeting since Ballard's election nor have they sent him any updates on financing.

Ballard v. Roberson, 399 S.C. 588, 597, 733 S.E.2d 107, 111 (2012).

Finally, Judge Miller also noted that Thoennes did not distance himself from the Corporation and continued to own the shares. Tr. of Jan. 27, 2017 Hearing at 61-66. For all of these reasons, Judge Miller found sufficient evidence in the record to support a finding of post-discharge oppression.

Third, this Court may itself review the record before Judge Miller when the Order Enforcing Judgment was entered on April 18, 2017, and affirm "upon any ground(s) appearing in the Record on Appeal." *S.C. Dep't of Labor, Licensing, & Regulation v. Chastain*, 392 S.C. 259, 262, 708 S.E.2d 818, 820 (Ct. App. 2011). This record, as set forth in the Statement of the Case above, shows that there was ample evidence that Thoennes's oppression continued beyond the discharge on December 2, 2011. Of course there is the evidence explicitly recognized by Judge Miller noted above. Additional evidence in the record includes (i) Ballard's pre-hearing memorandum placing Thoennes on notice that his post-discharge oppression continued to the hearing date and would be an issue at the hearing, (Statement of the Case at 2); (ii) Ballard's unrefuted testimony at the August 6, 2013, hearing, and documentary evidence, that Thoennes continued his oppression through the hearing date, (*id.* at 3); (iii) testimony elicited at the hearing by Thoennes's counsel from defendant Roberson concerning actions up to the hearing date that implicated Appellant Thoennes's continued involvement in the activities of the Corporation, (*id.* at 4); (iv) unrefuted testimony from Thoennes Sr. referring specifically to Appellant Thoennes's ongoing involvement (weekly and sometimes daily) in an attempt to secure financing that continued all the way to the day of the hearing, (*id.* at 4);

(v) the January 26, 2017, Ballard Affidavit testifying to Thoennes's continued involvement and oppression following the discharge (*id.* at 7 & n.3); and (vi) the 2014 Settlement Agreement signed by Thoennes showing that he still owned his shares in the Corporation, (*id.* at 7 n.3). Accordingly, the evidence in the Record demonstrates that there was evidence of post-discharge oppression supporting Judge Miller's ruling.

Fourth, Thoennes essentially bases his argument on the following four faulty premises: (1) Thoennes was not a witness at the hearing; (2) no witness testified to his separate and individual actions, apart from joint conduct with the other defendants, following the bankruptcy discharge of December 2, 2011; (3) the only time his name is mentioned is in regard to signing two letters that predated his bankruptcy discharge; and (4) neither Judge Miller nor Ballard's counsel responded to a challenge to identify a post-discharge act of oppression. All four of these arguments fail as discussed below.

First, it is irrelevant whether or not Thoennes testified at the August 6, 2013, hearing, as other evidence can establish his continued oppression. He was a party to that proceeding, was represented there by counsel, and is bound by the findings and judgment entered against him and affirmed on appeal.

Second, it is inaccurate for Thoennes to contend that no witness testified to his actions following the bankruptcy discharge of December 2, 2011. As indicated above, there are several witnesses who testified to his actions between December 2, 2011, and August 8, 2013, including his own father. (Statement of the Case at 4.)

Third, it is incorrect that the only time his name was mentioned was in regard to signing two letters that predated his bankruptcy discharge. As indicated above, his father offered unrefuted testimony of Appellant Thoennes's ongoing involvement (weekly and

sometimes daily) in attempting to secure financing that continued all the way to the day of the hearing.

And fourth, Judge Miller and Ballard's counsel did respond to a challenge to identify a post-discharge act of oppression. As reflected in the Order Enforcing Judgment, there is citation to the record of evidence of continued oppression following the discharge. Order Enforcing Judgment at 4 n. 2. Mr. Lightsey also outlined at the hearing the evidence that was presented. Tr. of January 27, 2017 Hearing at 58-59. Accordingly, Thoennes's arguments are to no avail.

Thoennes also relies upon his affidavit presented at the January 27, 2017 hearing, but this affidavit does not vitiate or overcome the fact that there was ample evidence in the record before the court that supports a finding of continued post-discharge oppression. The fact that there might be competing evidence does not undermine Judge Miller's ruling. It was Judge Miller's role to make credibility determinations and resolve any conflicts of fact that may exist between Thoennes's affidavit and any competing evidence or testimony, and he did so in favor of Ballard. Given the lengthy history of this case, and the substantial evidence of thievery and deceit on the part of Thoennes, against not only Ballard but also others, *see United States v. Thoennes*, No. 6:11-cr-02053-HFF-1, Docket Entry 14 (D.S.C. Sept. 1, 2011) (Judgment in a Criminal Case for bank fraud), Judge Miller surely cannot be faulted for giving little weight to Thoennes's self-serving statements.

Finally, Thoennes's argument of a due process violation must fail. As an initial matter, this issue was not raised with the trial court and therefore cannot be first raised on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well

settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Regardless, Ballard's pre-hearing memorandum served prior to the valuation hearing placed Thoennes on notice that post-discharge oppression would be an issue at the hearing. *See* Statement of Case, supra, at 2. Thoennes was represented by counsel at the hearing and had an opportunity to respond to the evidence at the hearing, and he had notice of the issue when raised by Ballard's motion to enforce the judgment against Thoennes with respect to post-discharge oppression. In any event, he did have notice of it at the January 27, 2017, hearing when the court considered the issue and received evidence. Accordingly, there was no due process violation.

For the above reasons, this Court should affirm the Order Enforcing Judgment.

II. JUDGE MILLER DID NOT ERR IN FINDING THAT HIS PREVIOUS FACTUAL FINDING IN TWO PRIOR ORDERS THAT OPPRESSION OCCURRED AFTER THE BANKRUPTCY DISCHARGE WAS THE LAW OF THE CASE.

Thoennes argues that the prior findings by the Circuit Court are not the law of the case. As an initial matter, this issue was not raised with the trial court and therefore cannot be first raised on appeal. *Pye*, 369 S.C. at 564, 633 S.E.2d at 510. In addition, although it was raised in his motion to reconsider, an argument that could have been raised before the trial court ruled cannot be raised for the first time in a post-order motion for reconsideration of that ruling. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Regardless, his argument fails on the merits.

In light of the fact that this case has been pending for a decade and is now on its third appeal, it is hardly surprising that law of the case should be an issue. Now seeking

his **twelfth bite at the apple**,[5] Appellant argues that Judge Miller erred in applying the law of the case doctrine to a finding of fact set forth in the Order Appointing Receiver and the Charging Order. Because Thoennes did not appeal those orders, this finding of fact is binding as the law of the case. As the Supreme Court recently noted, if a party has a right to appeal a ruling of the trial court, "an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal." *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (summarizing *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). In addition, a finding of fact can become law of the case. *See S.C. Dep't of Labor, Licensing, & Regulation v. Chastain*, 392 S.C. 259, 264, 708 S.E.2d 818, 821 (Ct. App. 2011) ("The Board does not appeal that finding by the ALC. An unappealed ruling is the law of the case."); *see also Estate of Gill ex rel. Grant v. Clemson Univ. Found.*, 397 S.C. 419, 429, 725 S.E.2d 516, 522 (Ct. App. 2012) ("[T]he Estate did not challenge the special referee's finding that the IRA was a non-testamentary gift; therefore, this is law of the case."). The law of the case doctrine therefore applies here to the finding of fact at issue where Thoennes failed to appeal either the Order Appointing Receiver or the Charging Order.

Thoennes's position is based upon three faulty arguments, discussed in turn below.

First, he argues that these orders are not the law of the case because they did not involve a final decision on the merits. However, the orders at issue were immediately

[5] (1) 2010 Initial Order, (2) motion for reconsideration of same, (3) 2012 decision of the Supreme Court, (4) motion for reconsideration of same, (5) 2013 Final Judgment, (6) motion for reconsideration of the same, (6) 2015 decision of the Court of Appeals, (7) motion for reconsideration of the same, (8) second motion for reconsideration of the same, (9) petition for writ of certiorari from the Supreme Court, (10) 2017 Order Enforcing Judgment, (11) motion for reconsideration of the same, (12) this appeal.

appealable under S.C. Code § 14-3-330(3) (allowing appeal of "[a] final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment") and/or section 14-3-330(4) (allowing appeal of "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver."). In addition, even if interlocutory, these orders could have been appealed and consolidated with the then-pending appeal of Thoennes and the other defendants. It is settled in South Carolina that "most interlocutory orders concerning ... the appointment of receivers are directly appealable by statute." 15 S.C. JURIS. *Appeal & Error*, § 22, at 45 (citing S.C. Code § 14-3-330(4)); *see also id.* § 16(a), at 30 (right to appeal "interlocutory orders granting, continuing, modifying, or refusing the appointment of a receiver" is an exception to the final judgment rule); *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470 (1913) (entertaining immediate appeal from the denial of a motion to appoint receiver). It is also well established that an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the appellate court and a ruling on appeal will avoid unnecessary litigation. *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995). Under this doctrine, since his appeal from the final judgment was already pending before the Court of Appeals, Thoennes could have taken an appeal from the findings of the Charging Order and Order Appointing Receiver and presented them to the Court of Appeals along with the pending appeal. His failure to do so precludes him from challenging those findings now when he could have appealed them years ago. This is the whole purpose of the law of the case doctrine.

Further, the cases upon which Thoennes relies do not stand for the cited proposition and are distinguishable. Thoennes cites to *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993), but this case did not involve the law of the case doctrine at all. Instead, it simply held that "the denial of a motion to dismiss under Rule 12(b)(2), SCRCP, is interlocutory and not directly appealable." *Id.* The orders at issue are not motions to dismiss, and so this case has no application.

Thoennes also cites to *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994), for the proposition that an order that "decides nothing about the merits of the case … does not establish the law of the case." However, this quoted passage is an amalgamation of the court's declarations that "[a] denial of a motion for summary judgment decides nothing about the merits of the case" and that "[t]he denial of summary judgment does not establish the law of the case." *Id.* The *Ballenger* court further concluded that "an order denying a motion for summary judgment is not appealable." *Id.* at 478, 443 S.E.2d at 380. Thus, it immediately becomes clear that *Ballenger* has no application to the present orders, which were not orders denying summary judgment and which were appealable.

Thoennes also cites to *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989), for the proposition that an interlocutory order is not binding as the law of the case and can be corrected before a final order on the merits. This case, however, involved a denial of a motion for summary judgment and, like *Ballenger*, is inapplicable.

Thoennes also cites to *Vasiliades v. Vasiliades*, 231 S.C. 366, 375, 98 S.E.2d 810, 815 (1957), and to *Graham v. Babb*, No. 2013-UP-037, 2013 WL 8481960, at *2 (S.C.

Ct. App. Feb. 6, 2013), for the proposition that an order appointing a receiver does not constitute law of the case. This conclusion is erroneous. *Vasiliades* does not even mention the law of the case doctrine, and it involved "provisional remedies pending the action." *Vasiliades* at 375, 98 S.E.2d at 815. Similarly *Graham* involved a "temporary order" of appointment prior to judgment. *Graham*, 2013 WL 8481960 at *2. Thus, these cases involved **provisional, temporary appointments of a receiver prior to judgment, not the appointment of a receiver following judgment**. Thus, these cases have no application.

Second, Thoennes also contends that the finding of fact at issue—that Thoennes's oppression continued post-discharge—was not essential to either the Order Appointing Receiver or the Charging Order because it failed to support any conclusion of law. Thoennes relies upon both *Weil* and *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 124, 609 S.E.2d 811, 815 (Ct. App. 2005). But *Weil*, as noted above, is inapplicable to this case. And *White's Mill Colony* simply stands for the proposition that a certain isolated conclusion in an order that is inconsistent with the remainder of the order and that is not essential to the ultimate ruling cannot be construed as constituting the law of the case. Here, the finding of fact at issue was not logically inconsistent with the remainder of the order, and so *White's Mill Colony* does not apply. In addition, it was essential to the ruling in both orders because it demonstrated that Thoennes's oppression extended beyond the discharge date and therefore Thoennes was eligible to be subject to an Order Appointing Receiver and a Charging Order. The continued oppression also shows the necessity of the orders.

In addition, a finding of fact need not necessarily be essential or necessary to become law of the case, as it also can become law of the case if it is "**explicitly decided.**" *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 524, 769 S.E.2d 453, 463 (Ct. App. 2015) ("The law of the case doctrine applies to issues explicitly decided and issues necessarily decided in the former case."). Here, the finding at issue was explicitly set forth in the order, and so it can become law of the case independently from whether it was necessary or essential.

But even if such a finding must be essential as claimed by Thoennes, it satisfies this requirement. As noted in footnote 1 of both the Order Appointing Receiver and the Charging Order, the factual findings of the orders were applied to Thoennes, but the relief would not be enforced against him until the issue of whether the 2013 Final Judgment had been discharged in bankruptcy could be determined. This finding of fact that Thoennes's oppression continued post-discharge was directly related to the issue of whether Thoennes might have any liability at all to be enforced by the Order Appointing Receiver of the Charging Order. If his oppression had not continued after discharge, then there would be no apparent basis of liability that could be enforced against Thoennes by the two orders. In addition, the finding of fact that oppression was ongoing by all defendants (including Thoennes), especially when combined with the finding of fact that the defendants' assets (including Thoennes's assets) were "at risk of being wasted, secreted, or diverted while the defendants' appeal is pending," proves to be an essential fact supporting the need for the appointment of a Receiver.

Third, Thoennes argues that the factual finding is not law of the case because the orders were not appealable. But as noted above, the orders were immediately appealable

under S.C. Code § 14-3-330(3) (allowing appeal of "[a] final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment") and/or section 14-3-330(4) (allowing appeal of "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver."). Thoennes further contends that he could not have appealed the orders because they did not affect his interests, but the orders specifically provided that the findings of fact applied to him and clearly contemplated that they would be applied to him if it were determined that the bankruptcy did not discharge his liability here, and so he was affected by the orders.

In effect, Thoennes is asking this Court to render an opinion that would reward litigants for not appealing findings made expressly against them—even though immediately appealable, and even though another appeal by that litigant was pending at the very time and could easily have been consolidated in the interest of judicial economy—in order to engage in gamesmanship and protract litigation, in this case to the extent of a decade of litigation and twelve bites at the apple. In these circumstances, law of the case precludes such gamesmanship.

III. JUDGE MILLER DID NOT ERR IN ADOPTING THE DETERMINATION OF THE BANKRUPTCY COURT, ENTERED WITH THE EXPLICIT CONSENT OF THOENNES, THAT ANY PORTION OF THE JUDGMENT ATTRIBUTABLE TO POST-DISCHARGE CONDUCT WAS NOT DISCHARGED BY THE DISCHARGE ORDER.

Thoennes's third argument is that the entirety of the 2013 Final Judgment was discharged by the Bankruptcy Court's discharge as of December 2, 2011, as a matter of bankruptcy law. This argument is fatally flawed because it already has been decided by

the Bankruptcy Court. These same arguments were made to the Bankruptcy Court and were rejected. *See* Consent Bankruptcy Order. The order succinctly provided: "Any portion of the State Court Judgment Amount that is attributable to oppression by Thoennes occurring on or after December 2, 2011, is not discharged by the Discharge Order." *Id.* ¶ 5; *see also* Bankruptcy Order of Sept. 3, 2105. Thus, this argument is barred by the doctrines of res judicata and collateral estoppel, as recognized by our Court of Appeals in the context of a bankruptcy ruling:

> Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit. Furthermore, **in the context of bankruptcy matters**, the elements required for collateral estoppel to apply are: (1) the same issue; (2) was actually litigated; (3) determined by a valid and final judgment; and (4) such determination was essential to the prior judgment.
>
> [A] final judgment for purposes of res judicata must finally dispose of some matter which under the substantive law to be applied and the procedural law of the forum can be, and has been, finally disposed of. . . .
>
> . . . . A judgment or order in a bankruptcy litigation . . . is entitled to the same respect that would be afforded to any other judgment or order of the district court. As a general proposition, then, the finality doctrines apply in bankruptcy cases in the same fashion in which they apply elsewhere.
>
> **[J]udgments of the bankruptcy courts are normally immune to collateral attack. They can be relied upon by state courts. And when the judgment is final and valid, it is given appropriate effect as res judicata or as a collateral estoppel in subsequent proceedings in the state courts, where it is there entitled to full faith and credit.**

McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 279–81, 482 S.E.2d 564, 566–67 (Ct. App. 1997) (emphasis added) (internal quotations and citations omitted) (alterations in original).

Here, the Bankruptcy Court definitively determined that the discharge does not apply as a matter of bankruptcy law to the 2013 Final Judgment to the extent it arose

from oppression occurring post-discharge. This decision satisfies the above criteria for application of collateral estoppel and res judicata. The present appeal involves the same parties and the same issue that was actually litigated in the bankruptcy court, with the bankruptcy court's determination being essential to its prior judgment. Accordingly, Thoennes may not relitigate this issue here.

Also, the bankruptcy court made clear that the resolution of this issue "must be answered not through summary judgment, but through an analysis of disputed facts," Consent Bankruptcy Order at 29, and that the state court was the proper forum for such resolution. Yet Thoennes essentially asks this Court to rule in his favor on the basis of the application of bankruptcy law. Again, the bankruptcy court has already ruled upon the application of bankruptcy law, and so Thoennes's argument fails.

Also, the Consent Bankruptcy Court order was entered with the consent of Thoennes, and the general rule is that a consent order is "binding and conclusive and cannot be attacked by the parties either on direct appeal or in a collateral proceeding." *Lanier v. Lanier*, 364 S.C. 211, 216, 612 S.E.2d 456, 459 (Ct. App. 2005).

Finally, apart from the above, the Bankruptcy Court's ruling is supported by the reasoning expressed in the Bankruptcy Court's Order of Sept. 3, 2015.[6] For these reasons, Thoennes's argument fails.

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[6] The court reasoned:

> While Thoennes' discharge is applicable to the Final Judgment, that discharge has its limits. *See O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) (finding the creditor's claims against the Chapter 9 debtor for its predischarge violations of the ADA were barred by the discharge, but the post-discharge claims that arose from additional "illegal conduct occurring after discharge" were not barred by the discharge); *see also Holcombe v. U.S. Airways, Inc.*, 369 Fed.Appx. 424, 428 (4th Cir.

2010) (finding plaintiffs discrimination claims against the Chapter 11 debtor arising from discriminatory acts that occurred after confirmation of the plan were not discharged, and rejecting plaintiff's "continuing violation" theory that her pre-confirmation claims persisted into the post-confirmation period).

Section 727 of the Bankruptcy Code states in relevant part:

> a discharge under subsection (a) of this section discharges the debtor from ***all debts that arose before the date of the order for relief*** under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C. § 727(b) (emphasis added). Thoennes' Chapter 7 petition was filed on December 2, 2011. Because § 727(b) discharges debts that arose before the date of the order for relief, any portion of the Final Judgment that arose before that date is within the scope of the discharge.

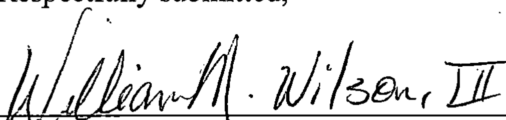
The Final Judgment required Thoennes and the other defendants to buy out Ballard's interest in Warpath for a certain price, which was established as a lump sum value. The Court later noted there was "undisputed evidence that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the [August 6, 2013 valuation] hearing." Therefore, the conduct resulting in the Final Judgment was not abated post-petition. These facts are sufficient to create a dispute of fact on this issue: *Is any portion of the obligation set forth in the Final Judgment a claim that arose **after** the date of the order for relief?*

This question must be answered not through summary judgment, but through an analysis of disputed facts. The state courts have litigated this dispute since 2008. The state courts heard the evidence and applied state law, resulting in the Trial Court Order and the Final Judgment. Consequently, the state courts are likely in a better position to make this determination in an efficient manner and may be the only forum that is appropriate. See [*In re*] *Pujdak*, 462 B.R. [560,] 574–75 [(Bankr. D.S.C. 2011)]. How the Final Judgment could be divided, if appropriate, and where such a determination should take place are issues for another day. However, at this point it is clear that this portion of Thoennes' motion for summary judgment must be denied.

CONCLUSION

It is time to bring this decade-old case to an end. Judge Miller's decisions were well within his discretion and are supported by the record evidence and the law. Accordingly, Ballard respectfully requests this Court to affirm the Order Enforcing Judgment.

Respectfully submitted,



William M. Wilson III (S.C. Bar Id. No. 15808)
Wallace K. Lightsey (S.C. Bar Id. No. 6476)
Wyche P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Facsimile: 864-235-8900
E-Mail: bwilson@wyche.com

Date: November 29, 2017

Attorneys for Respondent

In re Thoennes, 536 B.R. 680, 699–700 (Bankr. D.S.C. 2015)

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
NOV 29 2017
SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001551

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

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
And Warpath Development, Inc., ... Defendants,

Of whom Rick Thoennes III is ....Appellant.

Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing INITIAL BRIEF OF RESPONDENT and RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL and CERTIFICATE OF SERVICE on opposing counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

Adam Bach
Eller Tonnsen Bach
1306 S Church St, Greenville, SC 29605

William M. Wilson III
William M. Wilson III (S.C. Bar Id. No.15808)
Wyche P.A.
Attorneys for Respondent

Date: November 29, 2017