

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

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JAN 04 2018
SC Court of Appeals

Andrew P. (Andy) Ballard, Respondent,

v.

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

Of Whom Tim Roberson is Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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Attorney for Petitioners Rick Thoennes and Rick Thoennes, III

ARGUMENT IN REPLY

This matter comes before the court on Appellants Tim Roberson's appeal of the lower courts' order arising out of its January 27 2017 hearing. Respondent submitted its Initial Brief of Respondent on November 17, 2017. Appellant hereby submits the following in reply:

1. Standard of Review – Appellant agrees that Rule 60(b) motions are generally reviewed under an abuse a discretion standard. However, Appellant disagrees with Respondent's application of the standard of review to the trial court's decision on Appellant's Rule 60(b)(5) motion. First, Appellant was unable to locate any case law in South Carolina considering the appeal of a Rule 60(b)(5) motion. Appellant would submit that the court's findings and consideration of the effects of facts post-judgment in an equitable matter, which is presented in Appellant's Rule 60(b)(5) motion, are subject to the same *de novo* standard of review that all matters in equity are considered. Alternatively, even if the court were inclined to follow the general standard of review for Rule 60(b)(5), in this matter the court must parse out the trial court' decision and apply separate standards of review to the separate decisions of the trial court. Appellant would submit that as to the trial court's decision finding Rule 60(b)(5) legally inapplicable, such question of law shall be reviewed *de novo*. Appellant would submit that the trial court's finding that Appellant's motion was untimely; such a question of law shall be reviewed *de novo*.
2. Nevertheless, regardless of what standard of review applies, for the reasons set forth in Appellant's Initial Brief the result is the same. The trial court erred in denying Appellant's Rule 60(b)(5) motion and should be reversed. The court's judgment, which was properly challenged on appeal, was ultimately ruled to be an exchange of

property of like value, *i.e.* the exchange of cash for shares. As testified, the value of the shares was subsequently significantly negatively impacted by events directly involving the Respondent and outside of the control of the Appellant. As asserted, this result clearly renders the ongoing application of the judgement inequitable. The court's failure to properly consider the ongoing equities of its judgment is a clear abuse of discretion.

3. Appellant reasserts that the court's decision on Respondent's motion to modify the order of receivership and to transfer the possession of the LLC membership interests was in error and improper and should be reversed or set aside.

CONCLUSION

For the reasons set forth in the Initial Brief, in this Reply and in argument before the trial court, the court's orders denying Appellant's Rule 60(b)(5) motion, granting Respondent's motion to modify the order of receivership and granting receiver's motion to take possession of Appellant's LLC membership interests should be reversed.

Respectfully submitted,

WOMBLE BOND DICKINSON (US), LLP



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Attorneys for Appellant, Tim Roberson

This 2 day of January, 2018
Greenville, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellants complies with Rule 211(b),
SCACR.

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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 FINAL REPLY BRIEF by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, address as follows:

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Counsel’s Signature Block on Next Page

Respectfully Submitted,

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This 2 day of January, 2018
Greenville, South Carolina



January 2, 2018

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SC Court of Appeals

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 Reply Brief** that includes the Certificate of Counsel and Proof of Service 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)

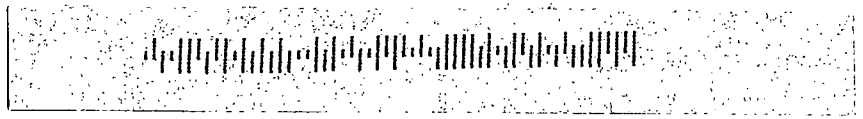
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