THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001551
Lower Court Case No. 2008-CP-23-5739

Andrew P. Ballard.....Respondent,

v.

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

Of Whom Rick Thoennes, III, is the.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 30, 2008, this matter was commenced by a minority shareholder, Respondent Andrew P. Ballard ("Ballard"), who alleged numerous allegations against the other shareholders related to the ownership and control of Warpath Development, Inc. (the "Company"). An amended complaint was filed on August 25, 2009. (R. pp. 163-179). The defendants filed an amended answer and counterclaims on September 17, 2009. (R. pp. 180-196).

The case was initially tried by a jury on March 15, 2010. During the trial, all legal causes of action and counterclaims were dismissed, leaving only Ballard's equitable claims to be determined. The jury was dismissed, and the trial proceeded by bench trial, which concluded on March 17, 2010. On May 4, 2010, the trial court issued an order finding Appellant Rick Thoennes, III, ("Thoennes") and the other defendant shareholders liable for shareholder oppression, ordering them to buy out Ballard's shares in the Company, and calling for a future hearing to determine the value of Ballard's shares (the "2010 Order"). The 2010 Order was appealed by the defendants before the contemplated valuation hearing took place.

During the pendency of that appeal, Thoennes filed a voluntary petition for Chapter 7 bankruptcy relief on December 2, 2011 in the United States Bankruptcy Court for the District of

South Carolina (the "Bankruptcy Action"). (R. pp. 513-572). On March 26, 2012, Thoennes was granted a discharge under 11 U.S.C. § 727, and the Bankruptcy Action was closed on March 28, 2013. (R. pp. 17-21).

On August 29, 2012, the South Carolina Supreme Court affirmed the trial court's order and remanded the case for further proceedings. (R. pp. 110-125). On August 6, 2013, the trial court held a hearing to determine the fair market value of Ballard's shares (the "Valuation Hearing"). (R. p. 22). On October 3, 2013, the trial court issued an order finding the fair market value of Ballard's shares to be $3,589,297, and this order was appealed by the defendants (the "2013 Order"). *See id.*

During the pendency of the second appeal, the trial court issued a rule to show cause on March 27, 2014 against the defendants. On April 23, 2014, a hearing was held on its rule to show cause and, that same day, the trial court issued two orders, one appointing a receiver (the "Receiver Order") and a separate charging order (the "Charging Order"). (R. pp. 42-60).

On November 17, 2014, Ballard filed an adversary proceeding in the bankruptcy court against Thoennes seeking to determine whether his judgment against Thoennes was discharged in bankruptcy. (R. pp. 573-582). On September 3, 2015, the bankruptcy court found Ballard's judgment discharged except as to any claims that arose after the date of Thoennes's discharge. (R. pp. 89-90). On October 28, 2015, the Adversary Proceeding was dismissed without prejudice by consent. (R. pp. 92-94).

On July 15, 2015, the South Carolina Court of Appeals affirmed as modified the trial court's 2013 Order and reduced the fair value of Ballard's shares in the Company to $3,125,000. (R. pp. 95, 126-141). On September 21, 2016, Ballard filed a motion in the state court, seeking a determination of the portion of the judgment amount against Thoennes that is attributable to

alleged post-discharge oppressive conduct. (R. pp. 241-244). On January 27, 2017, the trial court heard arguments from counsel regarding Ballard's motion and subsequently issued an order on April 18, 2017 finding none of the judgment against Thoennes was discharged (the "Order"). (R. pp. 96-103). On April 28, 2017, Thoennes filed a motion to alter and/or amend the Order. (R. pp. 250-259). On July 14, 2017, the trial court denied Thoennes's motion without a hearing, and Thoennes served the instant notice of appeal that same day. (R. pp. 104-105, 590-593).

STATEMENT OF FACTS

On May 4, 2010, the trial court entered an order finding that Thoennes and the other defendants had acted oppressively toward Ballard. (R. pp. 1-16). The 2010 Order ordered one remedy for Ballard - the purchase of Ballard's shares at their fair market value by the defendants. *Id.* at 13. To determine the value of those shares, the Circuit Court ordered an appraisal by a valuation expert and directed the parties to consult on a date to reconvene once the valuation expert finished his valuation of Ballard's shares. *Id.* at 14.

The Valuation Hearing ordered by the 2010 Order did not take place until August 6, 2013 due to intervening appeals. During the intervening delay of three years, Thoennes filed for Chapter 7 bankruptcy relief. (R. pp. 513-572). Thoennes filed the Bankruptcy Action, in part, because of Ballard's judgment against him. (R. pp. 588-589, ¶¶ 1-2). Thoennes identified Ballard as a creditor of his estate and identified the Ballard judgment as an unliquidated claim. (R. p. 529). Ballard received notice of the Bankruptcy Action, the applicable deadlines, and Thoennes's discharge. (R. p. 67). Ballard chose not to file a motion for relief from the automatic stay, a proof of claim, a motion to conduct an examination of Thoennes pursuant to Fed. R. Bankr. P. 2004, or otherwise participate in Thoennes's bankruptcy case while it was pending. *Id.* On March 26, 2012, Thoennes

was granted discharge under 11 U.S.C. § 727 and the Bankruptcy Action was closed on March 28, 2013. (R. pp. 17-21).

At the Valuation Hearing, evidence and testimony was taken relevant to a valuation of Ballard's shares pursuant to the 2010 Order. (R. pp. 260-387). No notice was given that any further determinations would be made. (R. p. 266, line 8 – p. 267, line 4; p. 301, lines 12-14) (Court: "This is a bit of a hybrid hearing. It's an evaluation [sic] on a corporation and I am going to hear from Dr. Woodside."); (*see also* R. p. 213) ("A hearing was had before the Court on August 6, 2013 to hear evidence in support of the valuation of Warpath Development, Inc. … and the 20,000 shares held by Plaintiff…").

On October 3, 2013, the trial court issued an order finding the fair market value of Ballard's shares to be $3,589,297 based on the evidence taken at the Valuation Hearing (the "2013 Order"). (R. pp. 22-29). The 2013 Order again made clear that the purpose of the Valuation Hearing was to value Ballard's shares pursuant to the 2010 Order. *See id.*, at 22 ("This matter is before the Court for the determination of the fair value of the plaintiff's ownership interest in Warpath Development, Inc., for purposes of the judicially forced buyout ordered by the Court in its Order of May 4, 2010…Based upon the evidence presented by both parties…at the hearing held on August 6, 2013."). The 2013 Order is explicitly clear that the 2010 Order was the reason for the Valuation Hearing and the purpose of the Valuation Hearing was to determine the value of Ballard's shares. (R. pp. 23-24) ("The 2010 Order provided that the value for Mr. Ballard's stock would be determined at a subsequent hearing. Before that hearing occurred, however, the defendants' appealed…The matter was then remanded for the valuation hearing."). At the Valuation Hearing, Thoennes was not called to testify by either party. (R. pp. 260-387). He was asked no questions related to the valuation of Warpath Development, Inc. (the "Company"), any

continued involvement in the Company, or for any other purpose. *See id.* His name was not mentioned by either party. *See id.* No document was introduced into evidence of any act taken by Thoennes with regard to the Company following his Chapter 7 discharge. *See id.*

The defendants appealed the 2013 Order. While that appeal was pending, Ballard attempted to execute the judgment against the defendants' assets, and the defendants filed a motion seeking a stay of execution pending appeal on January 9, 2014. (R. pp. 234-240). On March 27, 2014, the Court entered an order denying the motion for a stay. (R. pp. 30-35). In its March 27, 2014 order, the Court described the Valuation Hearing as follows: "[o]n remand, this Court held an evidentiary hearing to determine the fair value of the plaintiff's shares." *Id.* at 30. No other purpose for the hearing was described. *See id.*

After denial of the stay, a Rule to Show Cause was filed on March 27, 2014 and a hearing was held on April 23, 2014. Thoennes was excused from the April 23rd hearing because of his bankruptcy. (R. pp. 42, 55). Following the hearing, the trial court issued two orders: (i) an order appointing a receiver - the "Receiver Order," and (ii) a charging order requiring certain entities to transfer the defendants' distributions to the appointed receiver – the "Charging Order." (R. pp. 42-60). Included in both orders is the following statement, "While the findings of fact contained in this Order apply to all defendants, the relief granted herein is not entered against Rick Thoennes, III." (R. pp. 42, 55). The Receiver Order and Charging Order also contained the following statement:

> On remand, this Court held an evidentiary hearing in August of 2013 to determine the fair value of the plaintiff's shares. At the valuation hearing, plaintiff presented 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 hearing.

(R. p. 44, ¶ 4; p. 56).

On November 17, 2014, Ballard filed an adversary proceeding in the Bankruptcy Court (the "Adversary Proceeding") seeking a determination of whether his judgment was excepted from Thoennes's Chapter 7 discharge. (R. pp. 573-582). The Bankruptcy Court noted that Thoennes filed for Chapter 7 relief on December 2, 2011 and identified Ballard as a creditor holding an unliquidated claim. (R. pp. 65-66). As observed by the Bankruptcy Court, "Ballard received notice of Thoennes' bankruptcy, the applicable deadlines, and Thoennes' discharge." *Id.*, at 66. Ballard chose not to "file a motion for relief from the automatic stay, a proof of claim, a motion to conduct an examination of Thoennes pursuant to Fed. R. Bankr. P. 2004, or otherwise participate in Thoennes' bankruptcy case while it was pending." *Id.*

Ballard raised four grounds in support of his argument that the judgment was not discharged in bankruptcy and the court rejected all of his arguments but one. (R. pp. 68-69, 89-90). According to the bankruptcy court, Thoennes was discharged from "all debts that arose before the date of the order for relief" and "[b]ecause §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."[1] *Id.*, at 90. Ballard argued that some portion of the judgment was not discharged based on the statements of the trial court in the Charging and Receiver Orders. (R. pp. 89-90). The bankruptcy court found that an issue of material fact existed as to whether any portion of the final judgment consisted of "a claim that arose after the date of the order for relief," relying solely on the trial court's statement in the Receiver and Charging Orders that oppression continued to the date of the Valuation Hearing. *Id.* at 90. The bankruptcy court refrained from apportioning the judgment, however, finding "the state courts are likely in a better position" make that determination. *Id.*

[1] The Bankruptcy Court defined the "Final Judgment" as the judgment amount determined by the South Carolina Court of Appeals on July 15, 2014. (R. p. 68).

On September 21, 2016, Ballard filed a motion in the circuit court seeking a determination of the portion of the judgment amount against Thoennes that is attributable to alleged post-discharge oppressive conduct. (R. pp. 42, 55). On January 27, 2017, the trial court heard arguments from counsel regarding Ballard's motion (the "Apportionment Hearing"). (R. pp. 432-511). At the Apportionment Hearing, no witnesses were called to testify, and no evidence was offered of any post-discharge oppressive conduct by Thoennes. *See id.* At the hearing, counsel for Thoennes noted that Thoennes tendered his shares in the Company to the bankruptcy estate. (R. p. 490, lines 5-10). Counsel for Thoennes also invited Ballard to point to one single oppressive act taken by Thoennes following the 2011 discharge. (R. p. 491, lines 4-13). None was identified. Instead, counsel for Ballard argued that the statements contained in the Receiver and Charging Orders were "the law of the case." (R. pp. 498, lines 18-25).

On April 18, 2017, the trial court entered an order allowing the enforcement of the full amount of the judgment against Thoennes (the "Order"). (R. pp. 96-103). According to the Order, because the Receiver and Charging Orders indicate that the trial court found evidence of post-discharge oppression at the Valuation Hearing and because those orders were not appealed, they are the "law of the case." *Id.* at 99.

On April 27, 2017, Thoennes filed a motion to alter and/or amend the Order. (R. pp. 250-259). On July 14, 2017, the trial court denied Thoennes's motion without a hearing, and Thoennes filed the instant appeal on July 14, 2017. (R. pp. 104-105, 590-593).

STANDARD OF REVIEW

This matter is an action in equity. On appeal, the court may "review factual findings and legal conclusions in an equitable action de novo." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (2011). The appellate court "has jurisdiction to find facts in

accordance with its own view of the preponderance of the evidence." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 624 (2001). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654 (2011). Furthermore, the appellate court is not bound by the trial court's legal determinations. *Swindler v. Swindler*, 355 S.C. 245, 249, 584 S.E.2d 438, 440 (Ct. App. 2003) (citing *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000)).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE WAS SUFFICIENT EVIDENCE OF POST-DISCHARGE OPPRESSION ATTRIBUTABLE TO APPELLANT

According to the Order, the Court's finding that some of Ballard's claims arose after discharge is based upon "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.'" (R. pp. 98-99). This language originates from two orders issued by the Court on April 23, 2014, the Charging Order and the Receiver Order. (R. pp. 44, 56). Notably, the orders mention only oppressive conduct by the "defendants" generally. *Id.* However, neither order describes any conduct individually attributable to Thoennes, and both orders explicitly state that their relief "is not entered against defendant Rick Thoennes III." (R. pp. 42, 55).

To the extent that this finding of fact applies to Thoennes, such a finding is clearly erroneous as the record contains no post-discharge oppression attributable to Thoennes. As the Valuation Hearing transcript reveals, Thoennes was not offered by either party as a witness at the August 6, 2013 hearing, and no witness offered any testimony about his actions following the filing of his bankruptcy petition. (R. pp. 260-387). Thoennes is rarely mentioned by any witness,

and the only time his name is referenced relates to his signature on two letters seeking financing, both of which preceded the filling of his petition for bankruptcy. (R. pp. 283-286). At the Apportionment Hearing on January 27, 2017, counsel for Thoennes challenged opposing counsel to name one instance of Thoennes's post-discharge oppression, a challenge which went unanswered. (R. p. 491, lines 4 – 13; p. 492, lines 6-8).

Similarly, the trial court could not point to any act by Thoennes that constituted post-discharge oppression. During the Apportionment Hearing, the following exchange occurred:

> MR. FAYSSOUX: ... Even if you – even if you had a complete merits hearing on it, Your Honor, and we started back right now, that's essentially what we have to do, is you have to have a new trial on what type of conduct my client ---
>
> THE COURT: He owned it.
>
> MR. FAYSSOUX: Sir?
>
> THE COURT: He owned it. He owned the shares in the company.
>
> MR. FAYSSOUX: Well, he ---
>
> THE COURT: Look, I don't mean to imply anything other than just using old adage, but when you lie down with dogs, you get up with fleas. You can't just come back later and say, "No, I didn't have it."

(R. p. 492, line 22 – p. 494, line 11).

To the contrary, Thoennes's mere continued ownership of shares in the Company cannot constitute oppression sufficient to overcome the bankruptcy discharge. Namely, the statute at issue, S.C. Code Ann. § 33-14-300(2), clearly requires an action that constitutes oppression. *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 600, 541 S.E.2d 257, 265 (2001) ("Unlike the North Carolina statute...section 33–14–300 does not place the focus upon the 'rights or interests' of the complaining shareholder but, rather, specifically places the focus upon the **actions** of the majority, i.e., whether they 'have acted, are acting, or will act in a manner that is illegal,

fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder.'") (emphasis in original). Even if mere ownership could be considered an "action" under Section 33-14-300, Thoennes's ownership of shares began in 2007, long before the order of discharge issued in March 26, 2012. Accordingly, any "right to payment" relating to Thoennes's ownership of shares arose long before the Bankruptcy Action and was thus discharged on March 26, 2012. *See infra*, at 18-19.

The only evidence in the record conclusively establishes that Thoennes did not participate in any post-discharge oppression. In his affidavit, Thoennes averred that he believed that his filing for bankruptcy "forever ended" his involvement with Warpath. (R. p. 588, ¶ 2). His "sole involvement with Warpath since 2011" consisted of his signing a settlement agreement giving Ballard his shares of Warpath stock and he "thought they were already gone." *Id.* Since the filing of his bankruptcy petition in December 2011, Thoennes "has not been asked by any principal or owner of Warpath to participate in any way with the regards to the company" and he "sincerely believed this matter was resolved." (R. p. 589, ¶ 3). As the bankruptcy petition reflects, Thoennes indeed attempted to surrender his shares, listing his 20% interest in the Company as a non-exempt asset. (R. pp. 522, 525, 549). Accordingly, the only specific evidence of Thoennes's post-discharge conduct conclusively establishes that Thoennes took no actions with respect to Warpath because he believed his involvement with that entity had ended forever.

Further, the trial court's finding that Thoennes engaged in post-discharge oppression violates due process. At a minimum, due process requires that a party be notified of the purpose of a hearing prior to the hearing. As stated by every party involved and the trial court, the purpose of the Valuation Hearing was to value Ballard's shares, not to adjudicate post-discharge oppression. *See supra*, at 4-5. "An elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). "Proper notice...must be reasonably calculated to convey information concerning a deprivation." *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146 (4th Cir. 2014) (internal quotations omitted); *City of W. Covina v. Perkins*, 525 U.S. 234, 240, 119 S. Ct. 678, 681, 142 L. Ed. 2d 636 (1999) ("A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful.")

Here, no notice was provided to Thoennes that any determination would be made about continued oppressive conduct at the Valuation Hearing. (R. p. 13) ("In order to provide for the purchase of Ballard's shares the Court must determine the fair value...the Court will consult with the parties to set a date for a valuation proceeding."). Instead, the purpose of the hearing was to determine the value of Ballard's shares. (R. p. 213) ("A hearing was had before the Court on August 6, 2013 to hear evidence in support of the valuation of Warpath Development, Inc. ... and the 20,000 shares held by Plaintiff."). This purpose was explicitly stated in the order generated by the Valuation Hearing, the 2013 Order. (R. p. 22) ("This matter is before the Court for the determination of the fair value of the plaintiff's ownership interest in Warpath Development, Inc."). It is noteworthy that the 2013 Order, the order stemming from the Valuation Hearing, states nothing about continued oppressive conduct. *See id.* Instead, that "finding" is made nine months after the Valuation Hearing and six months after the 2013 Order in two orders that were entered to effectuate the judgment, not make determinations concerning it. (R. pp. 44, 56). Due process requires at a minimum that Thoennes have been notified prior to the Valuation Hearing that the trial court would hear and consider evidence of post-judgment oppression and that it intended to

determine that issue. Had that notice been provided, Thoennes would have testified and presented the evidence contained in his affidavit showing he had no involved with the Company after the judgment.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT ITS PREVIOUS FACTUAL FINDINGS OF POST-DISCHARGE OPPRESSION WERE BINDING UPON APPELLANT AS THE LAW OF THE CASE

The trial court erred when it held that its previous findings that Thoennes engaged in oppressive conduct following the 2010 Order were binding upon Thoennes as the law of the case. The sole basis for the Order's finding was the same statement found in both the Receiver Order and the Charging Order stating that "the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the [Valuation Hearing]." (R. pp. 44, 56, 98-99). The Order posits that because neither of the orders were appealed, this finding became the law of the case, which Thoennes may not challenge. This holding is erroneous because neither order established the law of the case.

First, the Receiver and Charging Orders did not become the law of the case because they did not involve a final decision upon the merits. An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid–State Distribs. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). An order which "decides nothing about the merits of the case…does not establish the law of the case." *Ballenger v. Brown*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). "Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." *Id.*; *see also*

Lucius v. DuBose, 114 S.C. 375, 103 S.E. 759 (1920) (stating rule that preliminary findings on interlocutory motions bind neither the parties nor the court at the trial on the merits).

With respect to the Receiver Order, its scope was limited and made no decision upon the merits. Our courts have determined that an order appointing a receiver does not constitute the law of the case. *See Vasiliades v. Vasiliades*, 231 S.C. 366, 375, 98 S.E.2d 810, 815 (1957) (finding that an order appointing a receiver is "related to [a] provisional remed[y] pending the action and do[es] not constitute a decision upon the merits."); *Graham v. Babb*, 2013-UP-037, 2013 WL 8481960, at *2 (S.C. Ct. App. filed Feb. 6, 2013) ("The order appointing an independent party as a receiver was a temporary order; it was not the law of the case.").

The merits of the case had already been decided four years before by the 2010 Order finding the defendants' liable for shareholder oppression, thus no matters relating to the merits were left to be decided by the Receiver Order nearly four years later. Rather, the only issues before the trial court related to the appointment of a receiver who was charged with assembling and preserving the defendants' assets during the pendency of the appeal of the 2013 Order, which are issues that are collateral and unrelated to any party's causes of action or defenses. Accordingly, the Receiver Order did not become the law of the case because it was a provisional remedy that "decide[d] nothing about the merits of the case." *Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380.

Likewise, the Charging Order did not become the law of the case because it decided nothing about the merits of the case. The only issue decided by the trial court in the Charging Order was the trial court's statutory authority to appoint a receiver to receive the defendants' future distributions from certain limited liability companies. Similar to the appointment of a receiver, the Charging Order dealt only with the facilitation of preserving the defendants' assets for satisfaction

of the judgment pending the appeal, which has nothing to do with any party's causes of action or defenses. *See Mid–State Distribs.*, 310 S.C. at 334, 426 S.E.2d at 780.

Second, the trial court's factual finding did not become the law of the case because it was not essential to the holding of either order. "The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication." *Weil*, 299 S.C. at 89, 382 S.E.2d at 473. Adhering to this principle, South Carolina courts have refused to hold parties bound by language in a lower court order that was not necessary to the decision of the issues presented. *See id.* (refusing to apply the "doctrine of the law of the case" to language found to be "mere dicta, an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof."); *see also White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 123, 609 S.E.2d 811, 815 n.1 (Ct. App. 2005).

Here, the trial court's factual finding relating to post-discharge oppression was not relevant to any conclusion of law found in the Receiver and Charging Orders. As discussed in both orders, the trial court's orders were based upon two statutes. The first, S.C. Code Ann. § 15-65-10, provides that the trial court may appoint a receiver after judgment "to carry the judgment into effect" and "to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment." The second, S.C. Code Ann. § 33-44-504(a), enables the trial court to direct that any distributions due to a judgment debtor from a limited liability company be directed to an appointed receiver. Notably, neither statute contains any language requiring the existence of post-trial conduct breaching any legal duty or contract. *See id.* Accordingly, the trial court's factual finding of post-discharge oppression was neither required nor relevant to the legal conclusions required for the appointment of a receiver or the disposition

of certain asserts pursuant to a charging order. Therefore, the referenced finding of fact was unnecessary dicta and, therefore, should not be binding upon Thoennes.

Finally, the doctrine of the law of the case does not apply because Thoennes could not have appealed the orders. Under South Carolina law, "[t]he doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. U. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). The doctrine applies to "matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

The law of the case doctrine does not apply where the subject order is not immediately appealable. *See Price v. Peachtree Elec. Services, Inc.*, 405 S.C. 455, 457, 748 S.E.2d 229, 230 (2013) (finding that because "the order of the appellate panel was not immediately appealable...the Court of Appeals properly found [the party's] failure to file an immediate appeal from the order did not render the findings of fact and conclusions of law therein the law of the case."); *see also Griffis v. Cherry Hill Estates, LLC*, Op. No. 2015-UP-167, 2015 WL 1517412, at *2 (S.C. Ct. App. filed Apr. 1, 2015) ("As this order was not immediately appealable, it could not establish the law of the case.").

Here, neither order was immediately appealable because Thoennes was not affected by the orders. Rule 201(b) of the *South Carolina Appellate Court Rules* provides, "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 590-91 (Ct. App. 2001). "A party cannot appeal from a decision which does not affect his or

her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Id.*

The Receiver Order and the Charging Order both state, "[T]he relief granted herein is not entered against defendant Rick Thoennes, III." (R. pp. 42, 55). The Receiver and Charging Orders did not deny Thoennes III "some personal or property right" and did not "impos[e] on [him] any burden or obligation" – instead, he was exempted from the orders and the relief granted by the orders. Thoennes III could not appeal the order no matter how "erroneous or prejudicial" unless he was aggrieved by it, which he was not. *Beaufort*, 551 S.E.2d at 589.

Furthermore, even if he was sufficiently "aggrieved" by the orders, Thoennes could not have brought an appeal based upon a solitary erroneous finding of fact that was not essential to the court's holding. As many appellate courts in other jurisdictions have held, an erroneous finding of fact is not appealable unless it is necessary to support the ruling. *See, e.g., Tungsten Holdings, Inc. v. Olson*, 310 Mont. 374, 380, 50 P.3d 1086, 1091 (2002) ("As we have held on numerous occasions, we will not reverse the district court for erroneous factual findings unless the error prejudices an affected party and the erroneous finding is necessary to support the district court's ruling."); *Specter v. Specter*, 85 N.M. 112, 114, 509 P.2d 879, 881 (1973) ("[E]rroneous findings of fact unnecessary to support the judgment of the court are not grounds for reversal").

In the instant case, the trial court's factual finding relating to post-discharge oppression was not relevant to any conclusion of law. As discussed *supra*, at 14-15, a factual finding relating to post-discharge oppression was neither required nor relevant to either the trial court's ruling appointing a receiver or diverting the defendants' distributions in certain entities to the appointed receiver. Therefore, Thoennes could not have appealed either order based upon a solitary erroneous finding of fact that was not essential to the court's holding.

III. THE TRIAL COURT ERRED IN RULING THAT THE JUDGMENT WAS NOT DISCHARGED IN BANKRUPTCY DUE TO ALLEGED POST-DISCHARGE OPPRESSION

At the conclusion of an individual debtor's bankruptcy proceedings under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, the debtor ordinarily receives a discharge which, with few exceptions, "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b). The purpose of a bankruptcy discharge is to provide the "honest but unfortunate debtor" with a fresh start and a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244–45, 54 S.Ct. 695, 78 L.Ed. 1230 (1934).

The term "debt" is broadly defined in the Bankruptcy Code as "liability on a claim." 11 U.S.C. § 101(12). A "claim," as used in the definition of a "debt," is defined as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). By using the "broadest possible definition," the Bankruptcy Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case," thereby providing the debtor the "broadest possible relief." *In re Dubois*, 834 F.3d 522, 529 (4th Cir. 2016).

For the purposes of the Bankruptcy Code, Ballard's "claim" was a "debt" that was discharged. Prior to the initiation of the Bankruptcy Action, Ballard possessed an "unliquidated" "right to payment" under state law, which satisfies the 11 U.S.C. § 101(5) definition of a "claim." *See id.* ("When the Bankruptcy Code uses the word claim...it is usually referring to a right to

payment recognized under state law"). Specifically, Ballard's right to payment under state law was all but reduced to a liquidated sum by the 2010 Order, which required the defendants' "purchase of Ballard's shares at their fair value" after the conclusion of a subsequent "valuation proceeding." (R. p. 13, ¶ 16). Ballard's claim was properly identified as an unsecured nonpriority claim in Thoennes's voluntary petition for bankruptcy relief filed December 2, 2011. (R. p. 529).

It is undisputed that Ballard received notice of the Bankruptcy Action. (R. p. 66). After receiving notice of Thoennes's bankruptcy, Ballard could have filed a proof of claim against Thoennes's bankruptcy estate and sought an estimation of the claim's value for the purpose of its allowance under 11 U.S.C. § 502(c), which is "designed to avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions." *In re Ford*, 967 F.2d 1047, 1053 (5th Cir. 1992). Instead, Ballard made no attempt to "file a motion for relief from the automatic stay, a proof of claim, a motion to conduct an examination of Thoennes pursuant to Fed. R. Bankr. P. 2004, or otherwise participate in Thoennes' bankruptcy case while it was pending." (R. p. 66). With no applicable exception to discharge under 11 U.S.C. § 523, the debt relating to Ballard's claim was, therefore, discharged by the Bankruptcy Court on March 26, 2012. (R. pp. 17-19).

None of Ballard's claim survived the order of discharge, and new allegations of post-discharge oppression cannot reverse its effect. Despite years of appeals and subsequent proceedings, the genesis of Ballard's claim has never changed as his right to payment arose prior to the Bankruptcy Action. "[T]o determine when a claim arises for bankruptcy purposes, reference is to be made to federal bankruptcy law rather than to state law." *Butler v. NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995); *see Grady v. A.H. Robins Co.*, 839 F.2d 198, 201–03 (4th Cir. 1988). Under federal bankruptcy law within the Fourth Circuit, "'a right to payment' arises at the

'time when acts giving rise to the alleged liability were performed.'" *In re A.H. Robins, Co.*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (quoting *In re Johns–Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986)), *aff'd sub nom Grady*, 839 F.2d 198.

In its September 3, 2015 order, the bankruptcy court posed the following question: "Is any portion of the obligation set forth in the Final Judgment a claim that arose **after** the date of the order for relief?" (R. p. 90) (emphasis in original). Pursuant to the *Grady* test, the answer is a resounding no. As is clear from the 2010 Order, all acts giving rise to the alleged liability were performed prior to the March 15, 2010 trial. The 2010 Order states that, "the totality of circumstances demonstrates that the individual defendants acted oppressively toward Ballard as the minority shareholder," and, as a result, "that the proper equitable remedy is to provide for the purchase of Ballard's shares are their fair value by the defendants." (R. p. 13). Since May 4, 2010, there has been no binding decision on the merits relating any separate acts giving rise to liability other than those described in the 2010 Order. Therefore, Ballard's "right to payment" clearly arose prior to the institution of the Bankruptcy Action, and no part of the obligation set forth in the 2013 Order arose after the date of discharge.

Furthermore, the relief afforded for Ballard's claim has never changed. In 2010, the trial court held that Ballard was entitled to a judicially ordered buy-out of his shares. No subsequent order by any state or federal court has found that Ballard has established any other cause of action or is entitled to any separate category of relief beyond the judicially ordered buy-out. This conclusion is confirmed by the 2013 Order, which expressly limits its scope to "the determination of fair value of the plaintiff's ownership interest in Warpath Development, Inc., for purposes of the judicially forced buyout ordered by the Court in its Order of May 4, 2010." (R. p. 22). The 2013 Order mentions no additional theories of recovery or awards of relief, and it is devoid of any

mention of oppressive conduct that occurred after the entry of the 2010 Order. Rather, it merely sets the value of Ballard's shares, which was the sole matter left for adjudication by the 2010 Order.

The fact that the value of Ballard's shares was left undetermined by the 2010 Order does not exempt Ballard's claim from the order of discharge. An unliquidated right to payment is a claim for bankruptcy purposes and, as such, is subject to the order of discharge. *See* 2 Lawrence P. King et al., *Collier on Bankruptcy* ¶ 101.05[6], at 101–36.3 (15th ed. rev. 1998) ("Under the Code the fact that the tort claim may be unliquidated or disputed does not mean that it is not a claim."); *id.*, ¶ 101.05[1], at 101–26–27 ("Neither the contingency of the debt nor the immaturity of the obligation affects whether a right to payment is a claim."); *see also In re Johns–Manville Corp.*, 57 B.R. at 687–88 ("Damages which are considered unmatured, unliquidated and contingent, clearly fall within the definition of a claim.... At this juncture Carpenter and Kowalski's claims are contingent and unliquidated because there has been no determination yet in the state court actions on their possible liability.").

Even if Thoennes had engaged in post-discharge oppression, such behavior would not resurrect Ballard's claim from discharge. Any ruling to the contrary would serve to defeat the core purpose of bankruptcy, which is provide the debtor a fresh start "unhampered by the pressure and discouragement of preexisting debt." *In re Belk*, 509 B.R. 513, 518 (Bankr. W.D.N.C. 2014). Whether the alleged conduct continued post-discharge or not, it cannot change the fact that Ballard's right to payment arose before the Bankruptcy Action.

The Order contains no applicable authority sufficient to undermine the fundamental principle of bankruptcy that an honest debtor should be given a fresh start unhindered by pre-

existing debt. The Order cites two federal cases which are distinguishable and not binding upon this Court.

In *Holcombe v. US Airways, Inc.*, 369 Fed. Appx. 424, 429 (4th Cir. 2010) (unpublished), the plaintiff suit against an airline alleging multiple violations of the Americans with Disabilities Act (the "ADA"). Though the plaintiff "presented her claim as a single, unitary, 'continuing violation' claim which accrued pre-confirmation and has persisted into the post-confirmation period," her theory was rejected by the Fourth Circuit due to her "failure to file a proof of claim after received notice" of the airline's bankruptcy proceedings. *Id.* at 429. Rather, the court allowed her to pursue any claims "arising from allegedly discriminatory acts" that occurred after the date of discharge. *Id.* at 428 (emphasis added).

Similarly, *O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000), also involves claims under the ADA. An employee alleged that the County failed to reasonably accommodate her disability on "three separate episodes"—twice prior to confirmation of the County's Chapter 9 plan and once after the plan was confirmed. *Id.* at 873. While the *O'Loghlin* court allowed the plaintiff's third post-discharge cause of action to continue, it rejected the plaintiff's attempted invocation of the "continuing violation doctrine" to revive her two causes of action that arose pre-discharge.

Both *Holcombe* and *O'Loghlin* are distinguishable from the instant case. First, both of these cases deal with the ADA, which substantially differs from Ballard's statutory claims under South Carolina law. Significantly, the plaintiffs in *Holcombe* and *O'Loghlin* alleged multiple, discrete causes of action that arose before and after discharge. Under the ADA, "[e]ach incident of discrimination and each retaliatory employment action constitutes a separate actionable 'unlawful employment practice.'" *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 122

S.Ct. 2061, 153 L.Ed.2d 106 (2002). Thus, the *Holcombe* and *O'Loghlin* plaintiffs could have brought separate lawsuits for independent relief upon each violation. On the other hand, Ballard could not have sued the defendants based upon each oppressive or unfairly prejudicial act for separate relief. Rather, Ballard possesses only a single cause of action which arose prior to the Bankruptcy Action to which to which he is entitled no other relief than what was afforded to him under the 2010 Order. Finally, an ADA-style "continuing violation" theory has never been accepted by any South Carolina court. For example, in *Harrison v. Bevilacqua*, 354 S.C. 129 (2003), the South Carolina Supreme Court soundly rejected the "continuing tort doctrine" under which the statute of limitations does not begin to until after negligent conduct of a continuing nature ceases. Accordingly, there is simply no compelling reason that this Court should adopt a ruling that would discourage creditors from purposefully refusing to participate in the bankruptcy process in hopes of a post-bankruptcy windfall.

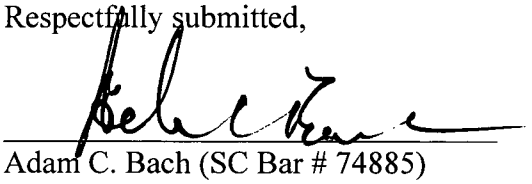
In conclusion, the Bankruptcy Court made a binding determination that all claims arising before Thoennes's discharge are barred. The trial court cannot overrule that determination. No binding determination on the merits has ever determined that any part of the judgment against Thoennes arose after discharge. At a minimum, this Court should remand the case for a determination of whether there was any oppressive conduct by Thoennes between the date of discharge, December 2011, and the Valuation Hearing in August 2013, consistent with the Bankruptcy Court's order.

CONCLUSION

For the reasons stated above, this Court should reverse the order of the lower court issued April 18, 2017 allowing enforcement of the full amount of the judgment against Appellant Rick Thoennes, III.

January 30, 2018

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001551
Lower Court Case No. 2008-CP-23-5739

Andrew P. Ballard.....Respondent,

v.

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

Of Whom Rick Thoennes, III, is the.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final brief complies with Rule 211(b), SCACR

January 30, 2018

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