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 REPLY BRIEF OF APPELLANT

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I. THERE IS NO EVIDENCE IN THE RECORD OF POST-DISCHARGE OPPRESSION ATTRIBUTABLE TO APPELLANT

Respondent Andrew Ballard's ("Ballard") assertion that the trial court's order is supported by any evidence of post-discharge oppression attributable to Appellant Rick Thoennes, III ("Thoennes") is without merit. Despite listing seven examples of purported post-discharge oppression by Thoennes, none of the examples is specific to Thoennes, describes any act that is oppressive, or establishes that Thoennes undertook any action following the March 26, 2012 discharge order entered by the bankruptcy court.

First, Ballard contends that "specific evidence" is cited by the trial court's order allowing the enforcement of the full amount of the judgment against Thoennes issued April 18, 2017 (the "Order"). (R. p. 99, n.2). To the contrary, the evidence cited by the Order is far from specific. The Order states that Ballard presented evidence of "joint conduct" by "all of the defendants" during the August 6, 2013 valuation hearing. *Id.* In support of that conclusion, the Order first cites a conclusory statement from Ballard's counsel who argued that it was his client's position that "the wrongful conduct has continued since 2011 through the presen[t]." *Id.*; (*see* R. p. 281, lines 21-22). Moreover, Ballard's testimony never mentions Thoennes specifically but instead refers only to "the defendants" as a group. (R. pp. 277-282). Other than the conclusory statement offered by his attorney, the referenced testimony does not describe a single act performed by Thoennes after the date of discharge. *See id.*

Next, the Order cites as "corroborat[ing]" evidence a passage from Dr. Woodside's testimony specifying which documents the expert used to perform his evaluation. (R. pp. 326-327, 335-337). Dr. Woodside merely states that he obtained most of his information from "the defendants" because Ballard "wasn't privy to a lot of information." (R. p. 335, lines 17-20). Similar

to Ballard's testimony, Dr. Woodside neither mentions Thoennes by name nor does he describe any act performed by Thoennes after discharge.

Second, Ballard argues that Thoennes "did not distance himself from the Corporation and continued to own the shares," citing a discussion between the trial court and counsel for Thoennes at the apportionment hearing on January 27, 2017. (R. pp. 492-497). For the reasons discussed in Thoennes's initial brief, *see* App. Initial Brief, at 9-10, his mere continued ownership of shares in the Company cannot constitute oppression because S.C. Code Ann. § 33-14-300(2) clearly requires an action that constitutes oppression. *See Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 600, 541 S.E.2d 257, 265 (2001). Furthermore, Thoennes's ownership of shares began in 2007, long before the bankruptcy discharge on March 26, 2012, therefore any claim asserted by Ballard with respect to Thoennes's ownership of shares arose prior to bankruptcy and was discharged pursuant to the order of the bankruptcy court. *See* App. Initial Brief, at 9-10, 19-20.

Third, Ballard alleges that a memorandum dated May 31, 2013 constitutes evidence of Thoennes's post-discharge oppression. The memorandum reads, "In the instant matter, defendants' oppression of Andy Ballard has continued to the present time." (R. p. 204). This single sentence is found in the argument section of Ballard's memorandum concerning the proper share valuation date and contains no citation to any affidavit or sworn testimony. *See id.* Unsupported arguments of counsel are not evidence, thus this memorandum cannot constitute evidence of post-discharge oppression.

Fourth, Ballard contends that testimony elicited from Defendant Tim Roberson ("Roberson") at the August 6, 2013 valuation hearing constitutes evidence of post-discharge oppression by Thoennes. Roberson testified that "[s]ince 2007 and since the end of...this trial in 2010," Roberson "went through three different equity parties to secure funding." (R. p. 306, lines

20-21; p. 307, lines 20-23). Because an "intermediary" was owed "some money" from Defendant Rick Thoennes ("Thoennes Sr.") and Thoennes, the intermediary got involved in the search. *See id.* Apart from mentioning that Thoennes owed money to the intermediary, Roberson's testimony does not describe a single act performed by Thoennes or whether any of these events occurred before or after March 26, 2012 discharge order.

Fifth, Ballard contends that testimony elicited from Thoennes Sr. regarding his attempts to seek financing constitutes evidence of post-discharge oppression by Thoennes. Thoennes Sr. testified, "From the very beginning Tim and I and Rick 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." (R. p. 316, lines 7-12). Whether Thoennes participated in the financing search after his bankruptcy discharge cannot be clearly established by this testimony. While the first sentence references "Tim and I and Rick," the second sentence contains no mention of Thoennes but specifically references Roberson. The only clear fact derived from this testimony is that Thoennes initially attempted to secure financing with the other defendants in 2007, which is five years prior to his bankruptcy discharge, but it does not answer whether Thoennes attempted to secure financing after the date of discharge on March 26, 2012.

Ballard also raises a similarly vague section of Thoennes Sr.'s testimony found on the next page of the transcript. (R. p. 317, lines 1-13). After a long discussion of his difficulties securing financing during the economic downturn, the following exchange occurs:

> A: Financing has been very difficult at best ever since the recession took down the financing and it has never returned for that particular segment. It's coming back for housing and developments but very slow.
>
> Q: Have your efforts been ongoing?

A: Yes.

Q: And continued to today?

A: Yes, weekly. Some weeks daily, but weekly.

Q: In addition to assisting the financing, what other activities have you assisted with on the project?

A: I helped secure their permits along with Tim and Rick and secured the engineering necessary to secure those permits.

Id. It is unclear whether "your efforts" refers to Thoennes Sr.'s individual efforts or any efforts by any combination of the three defendants. Based upon the follow-up question and Thoennes Sr.'s reply to the question, it appears that both the questioner and Thoennes Sr. interpreted "your" as singular in nature, applying only to Thoennes Sr. and not Thoennes.

Sixth, Ballard contends that his affidavit dated January 26, 2017 constitutes evidence of Thoennes's post-discharge oppression. (R. pp. 584-586, ¶¶ 3-4, 9-10). Similar to the above examples, Thoennes is neither mentioned by name in the affidavit nor does it provide any information about a specific act performed by Thoennes after his bankruptcy discharge. Rather than mentioning any specific details, the affidavit broadly assigns blame upon the group known as "Roberson and the other Defendants."

Seventh, Ballard argues that a settlement agreement signed in 2014 demonstrates post-discharge oppression because it shows that Thoennes still owned shares in the Company. As explained above and in Thoennes's initial brief, his passive ownership of shares is not an oppressive action as required by the statute and any such claim was discharged in bankruptcy because it arose prior to discharge. *See supra*, at 2; *see also* App. Initial Brief, at 9-10.

Lost in Ballard's discussion is how any of the few acts described are oppressive. Ballard points only to vague references of continued ownership of shares, attempts to secure financing for

the company, and the method by which his expert obtained information. In contrast to Ballard's ambiguous and nonspecific allegations, the only specific evidence in the record conclusively establishes that Thoennes did not engage in any post-discharge oppression. As more thoroughly discussed in Thoennes's initial brief, Thoennes's affidavit provides that his sole involvement with the Company since his bankruptcy discharge was signing over his shares to Ballard, which he had attempted to surrender in bankruptcy and thought were "already gone." *See* App. Initial Brief, at 10-11; (*see also* R. pp. 588-589, ¶¶ 2-3; pp. 522, 525, 549).

II. THE ISSUES RAISED BY APPELLANT ARE PROPERLY BEFORE THIS COURT

Ballard mistakenly asserts that Thoennes's arguments concerning due process and the law of the case doctrine are procedurally barred because they were not raised prior to the trial court's ruling. Ballard's argument misstates the requirements of Rule 59, SCRCP. Rule 59 merely requires that an "issue" be raised prior to a ruling, not a specific argument. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party must file such a motion when an *issue or argument* has been raised...") (emphasis added); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot use a motion to reconsider...to present an *issue* that could have been raised prior to judgment but was not so raised.") (emphasis added).

The record contains numerous examples where Thoennes's counsel raised both the due process and law of the case arguments prior to the Order. With respect to Thoennes's due process arguments, the issue was first raised multiple times at the apportionment hearing on January 27, 2017. (R. p. 481, lines 6-14; p. 482, lines 20-24) ("If I look at the first tab of your order on Tab 1, it clearly says, 'This matter is before the Court to determine fair value of the plaintiff's ownership.' That's it. It's the only reason you're there in 2013."); (R p. 483, lines 13-18; p. 485, line 25 – p. 486, line 1; p. 488, lines 14-17) ("[Y]ou weren't even asked to make a finding of that."). Next,

these issues were also raised in Thoennes's memorandum in opposition to Ballard's motion for apportionment where Thoennes argued that he lacked notice of any potential adjudication of his post-discharge activities, a finding that was not requested by any party. (R. pp. 246-247) ("As the record will reflect, a subsequent Order Appointing a Receiver, which had nothing to do with any parties' post bankruptcy activity, suggests for the very first time that this Court made a finding at the valuation hearing that 'shareholder oppression had continued unchanged and unabated.'"); (*see also* R. p. 247) ("...the Court was never asked to make such a determination...").

Similarly, Thoennes's arguments on the law of the case were raised at the same hearing on January 27, 2017 hearing. (R. p. 483, lines 19-21; p. 484, lines 5-10) ("Judge, you never found that. You never even addressed that...There's no legal order itself in that hearing."); (R. p. 486, lines 2-4) ("There was never a finding of it. It was either mistakenly or artfully put in a different order that had nothing to do with that."); (R. p. 488, lines 9-13) ("It was just a valuation for the liability that you found in 2010. It had nothing to do with anything that might've happened in 2011 or 2012 or going forward, nothing."); (R. p. 492, lines 11-14). Thoennes's law of the case arguments were also raised in the same memorandum filed after the hearing. (R. p. 246) ("The subject 2013 valuation order never made a finding of fact that Rick Thoennes, III, or any defendant for that matter, engaged in continuous shareholder oppression.").

South Carolina has never required that a party repeat its arguments in a Rule 59 motion verbatim, nor would there be any point in doing so. All that is required is that the issues were raised prior to judgment, which was done in this case.

III. THE RECEIVER AND CHARGING ORDERS WERE NOT BINDING UPON APPELLANT AS THE LAW OF THE CASE

Ballard erroneously asserts that the law of the case doctrine applies because Thoennes could have appealed two orders under S.C. Code Ann. § 14-3-330 that were issued April 23, 2014,

one appointing a receiver (the "Receiver Order") and a separate charging order (the "Charging Order"). Whether an interlocutory order may be appealed pursuant to a statute is irrelevant to the doctrine of the law of the case. Rather, the relevant inquiry concerns whether the subject order "finally determines a substantial right." *Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (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.* 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).

Even if an order's appealability were relevant to the doctrine of the law of the case, Thoennes could not have appealed the specific determinations made in the Receiver Order and Charging Order. Orders appointing a receiver are appealable pursuant to S.C. Code Ann. § 14-3-330(4) but only with respect to the "granting, modifying, continuing, or refusing the appointment of a receiver." It is well-established law in this state that the findings of fact supporting an order appointing a receiver are not binding on the judge who issued the order or on any subsequent judge except as to the specific right to a receiver or injunctive relief and such orders not appealable except as they relate to the ordered injunctive relief. *See, e.g., Montgomery v. Robinson*, 93 S.C. 247, 76 S.E. 188 (1912) (finding that the order of one circuit court judge on issues pertaining to an injunction and from which no appeal was taken are not binding on another circuit judge except with respect to the plaintiff's right to an injunction because "conclusions of a judge on motions for preliminary or temporary injunctions are not binding on the court"); *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). Here, the Receiver and Charging Orders

made no final determinations as to whether Thoennes committed post-discharge oppression. Rather, the orders determined whether Ballard was entitled to the appointment of a receiver and the oversight and disposition of certain monetary assets. Because these orders decided "nothing about the merits of the case" with respect to Thoennes, they did not establish the law of the case. *Ballenger*, 313 S.C. at 477.

Holding otherwise would mean that losing litigants would have to appeal every temporary restraining order or preliminary injunction simply because the court's findings would constitute the law of the case simply because such injunctive relief is appealable under S.C. Code Ann. § 14-3-330. This is plainly contrary to South Carolina law that factual findings made with respect to injunctive relief are not the law of the case even though the order itself may be appealable.

IV. THE TRIAL COURT FAILED TO FOLLOW THE ORDER OF THE BANKRUPTCY COURT

Ballard mistakenly contends that Thoennes's appeal constitutes a collateral attack on the order issued by the bankruptcy court. Rather than attacking the bankruptcy court's order, Thoennes is seeking its enforcement. As clearly stated in Thoennes's initial brief, the bankruptcy court made a binding determination that all claims arising before Thoennes's discharge are barred, and the trial court cannot overrule that determination. *See* App. Initial Brief, at 23.

The issue that Ballard failed to address is whether the trial court properly complied with the bankruptcy court's binding order. As the bankruptcy court conclusively determined, at least some portion of Ballard's claim against Thoennes arose prior to the date of discharge and thus was discharged. However, the bankruptcy court left one issue of fact for the trial court's adjudication: "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). For the reasons extensively analyzed in Thoennes's brief, the trial court's answer should have been a resounding no based upon the

evidence in the record. *See* App. Initial Brief, at 18-23. Instead, the Order improperly relied on dicta from two unrelated orders, both entered before the bankruptcy court's order, to ignore the bankruptcy court's determination that some or all of the judgment is discharged.

CONCLUSION

For the reasons stated herein and in Appellant Rick Thoennes, III's initial brief, 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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CERTIFICATE OF COUNSEL

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

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