THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Circuit Judge

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SC Court of Appeals

Appellate Case No. 2016-001170

WILLIAM B. HASKIN, JR., APPELLANT,

VS.

SAMUEL W. RHODES, JR., RHODES INVESTMENTS, INC.,
RHODES CONSULTING, LLC, AND TRACEY M. BOZZELLI, RESPONDENTS.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

A. The Circuit Court erred in misapplying the equitable cause of action for an accounting.

As the Respondents point out in their initial brief, Judge Young found that "an accounting had been done for each of the entities and that none of the entities currently own any assets". (*See* Order of Judgment dated February 5, 2016, R. p. 3.) The lower Court and Respondents failed to properly address the equitable cause of action of accounting. Haskin is entitled to the equitable remedy of accounting because of the large disparity between his capital account and that of Rhodes with regard to 2802 Middle Street, LLC, 2624 Myrtle, LLC and Station 22 of Charleston, LLC. The cause of action for accounting requires "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." *Hist. Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (citing 1 Am. Jur. 2d *Accounts and Accounting* § 52 (2005); *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (2010)). This Court should conduct a *de novo* review and find facts in accordance with its own view of the preponderance of the evidence because the Circuit Court failed to consider the reliable, substantive evidence of CPA Richard Livingston's testimony, the partnership tax returns, and Rhodes and Tracey Bozzelli's prenuptial agreement. Based on that review, of all of the evidence adduced at trial, this Court should conclude that Haskin advanced Rhodes's share of the carrying costs of the projects at issue, and that Rhodes is liable for the necessary adjustment of their respective capital accounts.

B. The Circuit Court erred by ignoring the Prenuptial Agreement of Defendants Samuel Rhodes, Jr. and his wife Tracey Bozzelli.

Respondents' contention that the pertinent schedule 714(h) to the Prenuptial Agreement

merely reflects what Rhodes thought was the fair market value of the three projects and the amount of debt on these projects is untenable. Rhodes admits in a written document that he is liable for half of the debt on 2624 Myrtle Avenue and 2802 Middle Street. The lower court and Respondents ignore the fact that Rhodes disclosed in the Prenuptial Agreement that he (1) personally owned fifty percent of the properties located at 2802 Middle Street, 2624 Myrtle Avenue, and 1723 Middle Street in Sullivan's Island, South Carolina, and (2) was obligated for fifty percent of the debt on those properties. (R. p. 714 at (h).) In the agreement, Rhodes listed the fair market value of each property with an asterisk above each amount as well as the amount of debt on the property. (R. p. 714 at (h).) There was a special notation that Rhodes was responsible for 50% of the debt on these properties which totaled Three Million, Three Hundred and Ninety Thousand Dollars ($3,390,000). Id. Rhodes reveals that he was also responsible for over Two Million dollars in debt on two other projects in which Mr. Haskin was not involved. Id. Rhodes entered into the Prenuptial Agreement freely and voluntarily under oath after having received advice from his attorney.

Respondents admit that Rhodes and Haskin each owned a fifty percent (50%) interest in the net asset value of the subject entities but then attempt to obfuscate the undeniable conclusion that this fact demands, which is that Rhodes is responsible for fifty percent (50%) of any losses of those entities in addition to being entitled to fifty percent (50%) of any profits. Respondents contend that Mr. Livingston's testimony that losses were allocated on the tax returns to the member who actually contributed and lost money supports their theory. In fact, Mr. Livingston testified that the uncontroverted tax returns and K-1s for these entities demonstrate that Rhodes held an ownership, or "capital" interest of fifty percent in each company, which is what Mr.

Rhodes told his future wife in his Prenuptial Agreement, namely, that Mr. Rhodes was a 50/50 partner owning one half (1/2) the value of the assets and liable for one half of the debt. (R. p. 350, ln. 19 – p. 351, ln 13; p. 353, ln 4 – p. 354, ln. 4; *see also* pp. 703 – 718 Prenuptial Agreement.) None of Mr. Rhodes' capital percentages in any of these entities was ever diluted and his ownership remained the same for the entities throughout their existence. (R. p. 351, ln. 11 – 25; p. 352, ln. 1 – 25.) "Mr. Rhodes and Mr. Haskin each had a 50 percent ownership in the net asset value of these entities throughout the time they existed." Id. at 35:23-25. If the parties had not agreed to share profits and losses equally, Mr. Rhodes would have been diluted. Mr. Rhodes was never diluted. (R. p. 351, ln. 21 – p. 352, ln. 25.) Judge Young erred in concluding at trial against clear and irrefutable evidence that Rhodes had been diluted which was inaccurate and constitutes reversible error. (R. p. 100; *See* also Supplemental Order dated April 29, 2016, R. p. 15.)

Respondents belabor the fact that on paper Rhodes Investments, Inc. was the member of the limited liability companies at issue. Rhodes Investments, Inc. is a sham, nonexistent corporation which Rhodes bypassed in conducting business.[1] Rhodes contends he was personally never a member of the limited liability companies, but, in fact, Rhodes conducted all of his business personally and ignored Rhodes Investments, Inc., including never paying himself a salary, personally receiving distributions due to Rhodes Investments and never depositing them in the corporation's bank account, and paying corporate expenses out of his personal bank

[1] Haskin makes an extensive argument about the fact that Rhodes Investments, Inc. is a sham corporation in his Motion to Alter and/or Amend Order filed February 10, 2016 which argument he preserved and incorporated in the Initial Brief of Appellant filed October 3, 2016. Despite Respondents' claims that Haskin did not appeal the fraudulent conveyance claim, Haskin also incorporated his fraudulent conveyance argument from the Motion to Alter/Amend in his Initial Brief. See FN. 1.

account. (R. p. 146.) Further, Respondents mischaracterize and misrepresent Mr. Livingston's testimony as to the significance of the operating agreements. Respondents contend that "[h]e acknowledged that the Operating Agreements set forth the duties and responsibility of the members..." Mr. Livingston simply acknowledged the fact that written operating agreements exist, not that that they set forth any allocation of responsibilities. (R. p. 395, ln. 2 – p. 396, ln. 1.) He did acknowledge that, in general, an operating agreement sets forth the duties and responsibilities of the members of a given limited liability company, but never testified that the operating agreements did that in this case. (R. p. 393, ln. 22 – p. 394, ln. 5.)

Respondents further mischaracterize his testimony by claiming that "Livingston testified that Section 3.3 of the Operating Agreement was consistent with Rhodes' version of the agreement that he was not responsible for losses." Mr. Livingston never testified to that and when pressed for the significance of Section 3.3 and whether it was consistent with Rhodes' version of events, he pointed out that there were no signed operating agreements for the entities at issue in this case. (R. p. 395, ln. 2 - p. 396, ln. 1.) Respondents claim that Livingston agreed that that signed operating agreement for 2624 Bayonne and the unsigned operating agreements for 2624 Myrtle and 2802 Middle were consistent with Rhodes' position that Rhodes was not required to make capital contributions. The lower Court erroneously adopted Respondents' arguments regarding the signed and unsigned operating agreements without regard for the actual facts, ascribing an operating agreement of 2624 Bayonne, LLC to 2802 Middle Street, LLC and 2624 Myrtle, LLC. Respondents and the lower Court err by ignoring the fact that Appellant's expert, Richard Livingston, CPA also testified that the three operating agreements contemplate Rhodes having a capital interest, contributions, distributions against that capital and a preferred

return. (R. p. 405, ln. 13 – ln. 22.) Livingston further testified that he "didn't see anything in this where it says Rhodes Investments, Inc. is just involved in this for whatever profit is generated." Id. Finally, the lower court erred in finding that the provisions of the unsigned operating agreements were relevant to whether Rhodes was responsible for half of the losses. There is no evidence that any of the parties actually looked at the unsigned operating agreements for these entities.

Respondents also mischaracterize Mr. Haskin's testimony by emphasizing that Mr. Haskin first made demand on Mr. Rhodes for payment of his share of the losses on November 3, 2011 by email even though he was incurring losses since 2006. (R. p. 299, ln. 20.) Respondents ignore Mr. Haskin's testimony wherein he states the reason for the November 3, 2011 email being the first time he made demand on Mr. Rhodes for repayment of his share of the losses. Mr. Haskin testified that he and Mr. Rhodes had an agreement to settle up when the properties were sold, not at the end of each year. (R. p. 299, ln. 22 - p. 300, ln. 22.) Respondents try to discredit Haskin's testimony by claiming that he never provided Rhodes an accounting of what the losses were when in fact he discussed the amounts due with Rhodes at a meeting on November 9, 2011 and in a follow up November 10, 2011 email. (R. p. 458.) Haskin offered to provide as much detail as Rhodes thought necessary.

There is no credible evidence that Haskin agreed to absorb all of the losses on these projects. Both Haskin and Rhodes were members in the various limited liability companies and Rhodes has attempted to grant himself immunity from exposure to the downside of these ventures. Mr. Livingston testified that "that's the whole point of a partnership: We're sharing the risk." (R. p. 388, ln. 17 - p. 389, ln. 3.) He elaborated and made it clear that Rhodes' claim of no

responsibility for losses is illogical and not credible given the facts because the tax returns clearly demonstrate that Rhodes was a full partner with a capital interest, a profits interest and a loss interest in the limited liability companies. (R. p. 388, ln. 17 - p. 389, ln. 3.)

Rhodes admits in his deposition and at trial that an oral agreement existed whereby Haskin would secure the necessary financing to purchase the desired parcel, obtain a construction loan, and fund any shortfall during construction. (R. p. 321, ln. 4 – ln. 11; p. 248, ln. 11; p. 249, ln. 25.) Rhodes also agrees that there was a verbal agreement between him and Haskin as to their joint venture. (R. p. 332, ln. 18 – p. 333, ln. 16; p. 231, ln. 20 – ln. 24; p. 233, ln. 24; p. 234, ln. 4; p. 238, ln. 1 – ln. 11; p. 243, ln. 18 – ln. 24.) The various projects were customarily titled in the name of an LLC at the suggestion of Michael Gratz, the parties' business tax preparer, located in Florida. Haskin received his fifty percent ownership interest for acquiring the financing and handling the financial aspects of the projects. (R. p. 309, ln. 13 - p. 310, ln. 4.) Rhodes received a fifty percent ownership in the business for agreeing to build the house and oversee construction until it was completed. (R. p. 310, ln. 5 – ln. 8.) Respondents contend that the evidence shows a contractor typically charged twenty percent (20%) of the cost of construction as a fee but the only evidence of that is Rhodes' own self- serving uncorroborated testimony. Rhodes testified he did not receive a penny for constructing the homes. (R. p. 321, ln. 12 – ln. 15.) The reason is that Rhodes was never due any money for constructing the homes in question. (R. p. 310, ln. 9 – ln. 13.) Rhodes would share in the profits if there were profits and losses if there were losses. (R. p. 310, ln. 14 – ln. 19.) The fifty percent interest was in exchange for his sweat equity. (R. p. 369, ln. 19 - p. 370, ln.18.) The value of that interest is the fair market value of the house minus half the debt as reflected in Rhodes and Tracey Bozzelli's

prenuptial agreement. (R. p. 387, ln. 7 - p. 388, ln. 5.) There is no evidence that Rhodes missed any other job to work on houses with Haskin. Rhodes worked for free and Haskin put up the money in these projects. Haskin lost money and Rhodes lost nothing.

Rhodes contends he never agreed to a 50/50 arrangement in which he was responsible for losses as well as gains. However, the Prenuptial Agreement, which Rhodes signed, contradicts and discredits that claim. Mr. Rhodes admits that the parties had an oral agreement and takes inconsistent positions with regard to the operating agreements. When it is convenient, he chooses to rely on the 2624 Bayonne operating agreement, even though he readily admits the parties' agreement was an oral agreement. Rhodes tries to discredit his own Prenuptial Agreement by making the claim that he does not personally own the assets listed in schedule 714(h) and has no responsibility for the liabilities associated with those assets when he told his future wife exactly the opposite in a sworn statement. Respondents' claim that Mr. Haskin did not rely on the Prenuptial Agreement is irrelevant. The Prenuptial Agreement provides Mr. Rhodes' own view of his responsibilities with regard to the assets and liabilities of the properties listed in schedule 13(h) and is an admission that he considers himself a partner responsible for half of the debts and obligations of the limited liability companies. This evidence was ignored by the lower court.

C. The Circuit Court erred by failing to consider uncontroverted evidence of the partnership tax returns and contradicted its own findings in concluding that Rhodes did not agree to share in and/or was not liable for losses as well as profits.

The tax returns support the conclusion that Haskin and Rhodes had an oral agreement that they would share profits and losses of their various projects. The Circuit Court's Order of Judgment disregards uncontroverted evidence of partnership tax returns and schedule K-1s for

2624 Myrtle, LLC, 2802 Middle Street, LLC, and Station 22 of Charleston, LLC, which reflect that Haskin and Rhodes both contributed to losses, and had agreed that they would share profits and losses equally. (Order of Judgment dated February 5, 2016, R. pp. 3-14.) Each entity had its own partnership tax return for all relevant years. Haskin and Rhodes operated between themselves as joint venturers based on their oral agreement to share profits and losses equally. The tax returns of these entities clearly demonstrate that Rhodes was a full partner or member responsible for capital losses and entitled to profits when they existed. Rhodes now claims to having only held a profits interest in these entities, but such claims not only have no support in the evidence in this case, but are flatly contradicted by the tax returns and Prenuptial Agreement. (R. p. 388, ln. 17 - p. 389, ln. 3.)

The Circuit Court's Order found that both Haskin and Rhodes made capital contributions, which both parties claimed as losses on their *individual* tax returns. (Order of Judgment, R. p. 6.) The Circuit Court also found that Rhodes Investments, Inc. contributed to the capital of 2802 Middle Street between 2007 and 2011 in the amount $14,277. (Order of Judgment, R. p. 6.) Despite these findings, the Circuit Court went on to make a contradictory finding that "[n]either Rhodes Investments or Rhodes ever agreed with Haskin [] to contribute towards losses." (Order of Judgment, R. p. 8.) Although ignored by the Circuit Court, the evidence in the record makes clear that Rhodes did, in fact, make contributions to losses in the form of carrying costs on the projects. (R. p. 395, ln. 2 – ln. 21.)

Respondents correctly state that "[e]ven though Haskin and Rhodes each had fifty (50%) interest in the net asset value of the companies, losses were allocated on the tax returns in accordance with each members contribution." However, Respondents leave out the key fact that

the allocation was done for tax purposes based on who actually funded the loss. As the tax returns make clear, Rhodes contributed approximately $54,000 to the projects at issue over a period of a few years for carrying costs such as utilities, insurance, repairs, and other costs. (R. p. 379, ln. 24 – p. 383, ln. 18.) These carrying costs were the losses that the Haskin-Rhodes partnership was forced to fund and which Haskin personally advanced. The fact that Haskin advanced the funds to cover these losses does not relieve Rhodes of his liability as a member of the various limited liability companies, holding a capital interest, a profits interest, as well as a loss interest of fifty percent (50%). Respondents cite to no authority to refute Livingston's testimony about what the tax returns show and neither did Respondents' expert Ellie Thomas.

The Circuit Court's Order of Judgment erroneously finds that "the first time that Haskins [sic] took the position that Rhodes Investments or Rhodes owed him for half of his losses on 2802 Middle, 2624 Myrtle and Station 22 was on November 3, 2011, as shown by an email from Haskin to Rhodes." (Order of Judgment, R. p. 8.) The Circuit Court's Order ignores the fact that Rhodes contributed to the losses of the companies for years prior to the demand email of November 3, 2011. The Circuit Court also disregards Haskin's testimony about meetings he had with Rhodes about their agreement with regard to these carrying costs and funding until the properties sold. Haskin testified that, before the beginning of each of these projects, he and Rhodes had a meeting at Haskin's office located at 2913 Middle Street at which Haskin agreed to fund the carrying costs of these projects – debt service, maintenance, taxes, insurance, utilities and related costs – including Rhodes' portion, until the properties sold and that Rhodes agreed to repay Haskin his one-half share of the losses to Haskin upon the sale or disposition of the respective properties. (R. p. 275, ln. 4 – ln. 21; p. 277, ln. 11 – ln. 23; p. 279, ln. 16 – ln. 23; p.

282, ln. 3 – ln. 17; p. 283, ln. 7 – ln. 12.) The parties' *modus operandi* was to settle up on projects as they were sold. (R. p. 275, ln. 4 – ln. 21; p. 277, ln. 11 – ln. 23; p. 279, ln. 16 – ln. 23; p. 282, ln. 3 – ln. 17; p. 283, ln. 7 – ln. 12.)

The Circuit Court's Order of Judgment erroneously set forth that "[c]apital contributions made by Rhodes Investments to 2624 Myrtle and 2802 Middle were made at times when Haskins [sic] was out of town and not available to make contributions." (Order of Judgment, R. pp. 6 – 7.) Rhodes testified that he was not sure whether Haskin was out of town or not when he made these contributions. In his deposition, Rhodes testified that he contributed capital because Haskin was out of town and that "we had to do something before we lost the house". (R. p. 226, ln. 21 - p. 227, ln. 19.) *Later in his deposition, Rhodes testified that he did not know why he contributed capital to these projects and surmised that Haskin may have been out of town, but that that he was not sure.* (R. p. 251, ln. 22 – p. 252, ln. 2.) (emphasis added).) Rhodes testified at trial that he had a conversation with Haskin about putting money in to pay the bills. (R. p. 313, ln. 5 – ln. 9.) Haskin testified that Rhodes contributed capital arbitrarily. (R. p. 283, ln. 1 – ln. 4.) The Circuit Court made no finding as to the amount Rhodes contributed to 2624 Myrtle or 2802 Middle during this time period. The only evidence in the record supporting Rhodes' version of events is Rhodes' own self-serving testimony. Rhodes never objected to any of the funding of these losses or advancement of funding on his behalf. (R. p. 277, ln. 24 – p. 278, ln. 4; p. 286, ln. 14 – p. 287, ln. 4.)

Respondents try to utilize the fact that Rhodes never signed any loans for the various projects as proof that he considered himself a member with only a profits interest in the various companies. This fact simply follows what both sides agree on which is that there was an oral

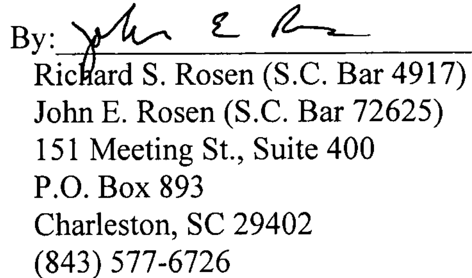
agreement by which Rhodes would construct the homes and Haskin would secure the necessary financing to purchase the desired parcel, obtain a construction loan, and fund any shortfall during construction and after all loan draws were exhausted out of his own pocket until the house was sold.

CONCLUSION

For the reasons stated, this Court should reverse and vacate the Circuit Court's prior Orders and find that Samuel Rhodes, Jr., is liable for one-half of the losses suffered on the 2624 Myrtle, LLC, and 2802 Middle Street, LLC projects and one-third of the losses on Station 22 of Charleston, LLC, or alternatively, remand this case to the trial court for further consideration.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC



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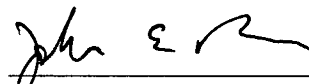
CERTIFICATE OF COUNSEL

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



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