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. 2017-000690

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

v.

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

Of whom Tim Roberson is .....Appellant.

FINAL BRIEF OF RESPONDENT

Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson (S.C. Bar Id. No. 15808)
Wade S. Kolb (S.C. Bar Id. No. 100379)
Amos A. Workman (S.C. Bar Id. No. 6231)
WYCHE P.A.
44 East Camperdown Way
Greenville, SC 29601
(864) 242-8200

Attorneys for Respondent

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. 2017-000690

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

v.

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

Of whom Tim Roberson is .....Appellant.

FINAL BRIEF OF RESPONDENT

Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson (S.C. Bar Id. No. 15808)
Wade S. Kolb (S.C. Bar Id. No. 100379)
Amos A. Workman (S.C. Bar Id. No. 6231)
WYCHE P.A.
44 East Camperdown Way
Greenville, SC 29601
(864) 242-8200

Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 8

Argument 9

Summary of Argument 9

I. Judge Miller Did Not Commit Abuse of Discretion in Denying Appellant's Motion for Relief from the Judgment, when the Ground of the Motion Was a Change of Circumstances of Which Appellant's Own Wrongful Conduct Was the Cause. 10

II. Judge Miller Did Not Commit Abuse of Discretion in Denying Appellant's Request To Require the Receiver To Continue To Pay Appellant's Living Expenses after the Judgment Became Final. 18

III. Judge Miller Did Not Commit Abuse of Discretion in Transferring Appellant's LLC Interests to the Possession of the Receiver in Order To Prevent Appellant from Continuing To Thwart and Evade the Court's Receivership and Charging Orders. 21

Conclusion 23

TABLE OF AUTHORITIES

Cases Page

Auto-Owners Ins. Co. v. Rhodes,
405 S.C. 584, 748 S.E.2d 781 (2013) 11

Ballard v. Roberson,
399 S.C. 588, 733 S.E.2d 107 (2012) 3-4, 9, 12

Ballard v. Roberson,
Op. No. 2015-UP-364 (July 15, 2015) 6

Ballard v. Roberson,
Op. No. 2015-UP-364 (Aug. 26, 2015) 7, 20

BB & T v. Taylor,
369 S.C. 548, 633 S.E.2d 501 (2006) 8

Hinton v. S.C. Dept. of Probation, Parole & Pardon Services,
357 S.C. 327, 592 S.E.2d 335 (S.C. App. 2004) 22

Humble Oil & Refining Co. v. American Oil Co.,
405 F.2d 803 (8th Cir. 1969) 11

Kriti Ripley, LLC v. Emerald Investments, LLC,
404 S.C. 367, 746 S.E.2d 26 (2013) 8, 22

Midlands Util., Inc. v. S.C. Dept. of Health and Envtl. Control,
301 S.C. 224, 391 S.E.2d 535 (1989) 8

Money Store, Inc. v. Harriscorp Fin., Inc.,
885 F.2d 369 (7th Cir. 1989) 15

Moody v. Empire Life Ins. Co.,
849 F.2d 902 (5th Cir. 1988) 17

Regions Bank v. Wingard Properties, Inc.,
394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011) 17

Saro Inv. v. Ocean Holiday Psp.,
314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) 17

Ware v. Ware,
404 S.C. 1, 743 S.E.2d 817 (2013) 8

Statutes & Rules

Rule 60(b), SCRCP 8, 10-11, 16-18

Rule 60(b), Fed. R. Civ. P. 15

S.C. Code § 14-3-330 6

S.C. Code § 15-65-10 21

S.C. Code § 33-6-210 3

S.C. Code § 33-14-300 3

S.C. Code § 33-14-310 3

S.C. Code § 33-44-504 ..... 8, 21-22

Other Authorities

11 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 2863 (2012) 11, 16-17

12 S.C. JUR. *Equity* § 9 17

STATEMENT OF ISSUES ON APPEAL

1. Did Judge Miller abuse his discretion in denying appellant's motion to set aside the judgment against him on the ground of a change of circumstances of which appellant's own wrongful conduct was the cause?

2. Did Judge Miller abuse his discretion in refusing appellant's request that the receiver continue paying appellant's living expenses after the judgment became final and collectible?

3. Did Judge Miller abuse his discretion in transferring possession of appellant's LLC interests to the receiver in light of evidence that appellant was using his possession of those interests to thwart and evade the Court's receivership and charging orders?

STATEMENT OF THE CASE

This suit was filed in 2008 by a minority shareholder against the majority shareholders and the corporation. It has been pending for nearly a decade and has already been through one appeal to the South Carolina Supreme Court from an interlocutory, though appealable, order, and another appeal to the South Carolina Court of Appeals from the Circuit Court's final judgment, which was entered in 2013. It is now on its third appeal, from the Circuit Court's refusal to render its final judgment meaningless and the years of litigation an utter waste of time and judicial resources.

The respondent, Andy Ballard, is the founder of the corporate defendant, Warpath Development, Inc. ("Warpath"), and was its sole owner, officer, and director for a number of years. The company was formed to develop a marina and related properties (such as rental cabins, a hotel, restaurant, marina store, and the like) on Lake Keowee in

the Upstate of South Carolina, and through years of work by Mr. Ballard the company obtained a potentially perpetual lease from Duke Energy Carolinas, LLC ("Duke Energy") for the land at the site of the marina. (R. p. 565, ¶ 1) Warpath obtained all necessary permits to construct and develop the marina and related properties by the summer of 2010. (R. p. 169, lines 1-10)

Under a Stock Purchase Agreement dated May 29, 2007 (the "Agreement"), appellant Roberson purchased 20,000 shares of Warpath stock directly from Mr. Ballard for $1,000,000; and he and the other two individual defendants also received 20,000 shares each from the company in exchange for future services they agreed to provide to the company, as set forth in the Agreement. Ballard retained ownership of 20,000 shares. As consideration for the shares issued by the Company to appellant Roberson, the Agreement provided: "Roberson agrees to provide the necessary capital to obtain long term financing on the project." (R. p. 479, ¶ 6) Defendants Thoennes and Thoennes III have worked as developers; they agreed to execute an agreement with Warpath defining their duties, including, but not limited to, "development work, execution of loan documents, assistance with proformas, assistance with obtaining permanent financing and other such service as may be appropriate." (R. p. 479, ¶ 5; R. p. 133, lines 6-9; R. p. 134, line 23 – p. 135, line 10)

Over the course of the year following the execution of their contract, the parties' relationship deteriorated. By October of 2007, merely five months after signing the

Agreement with Mr. Ballard, the defendants began discussions among themselves of how to force Ballard out of the company, and then proceeded to try to do so.[1]

Ballard filed suit on July 30, 2008. *See* Complaint (R. pp. 68-74); *see also* Amended Complaint (R. pp. 77-93). Following two years of discovery, Circuit Court Judge Edward Miller tried the case nonjury, and on May 4, 2010, entered an Order finding that the defendants had acted in a manner that was illegal, oppressive, and unfairly prejudicial to Ballard within the meaning of S.C. Code § 33-14-300(2)(ii). (R. p. 12, ¶ 14) Roberson admitted during the 2010 trial that he had the money to meet his contractual obligation to provide sufficient capital to obtain long-term financing for the project, but had not done so because he had concluded that the economics of the deal were not as good for him as he had originally thought. (R. pp. 4-5, ¶¶ 21, 22, 23, 26; R. pp. 143-46)

Judge Miller ordered the defendants to purchase Ballard's shares at fair value pursuant to S.C. Code § 33-14-310(d)(4), and set up a procedure for determining the value at a subsequent hearing. The 2010 Order specifically provides that the defendants' liability for buying out Mr. Ballard's shares is "joint and several" and states that "[t]his remedy is the appropriate one given the conduct of the defendants as found above." (R. p. 13, ¶ 15) Judge Miller also found that defendants had not provided the agreed upon consideration to pay for the 60,000 shares issued to them by the company, and ordered under S.C. Code § 33-6-210 that those shares be held in escrow. (R. pp. 8-9, ¶¶ 1-5)

---

[1] *See, e.g.,* R. pp. 714-15. This fact was the subject of extensive testimonial and documentary evidence in the 2010 trial. Judge Miller's findings to this effect in his 2010 Order were affirmed by the Supreme Court in its 2012 decision. *Ballard v. Roberson*, 399 S.C. 588, 595-97, 733 S.E.2d 107, 110-12 (2012) ("*Ballard I*").

Before the valuation hearing could be held, the defendants took an immediate appeal of the 2010 Order. In the appeal, the defendants contested the finding of oppression and the escrow of shares, but they did not assert any error in the buyout remedy and did not take issue with Judge Miller's holding that they were jointly and severally liable for the buyout. (R. pp. 561-62). In August of 2012, the South Carolina Supreme Court affirmed the 2010 Order. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012) ("*Ballard I*").

Nearly a year later, on August 6, 2013, Judge Miller held an evidentiary hearing to determine a fair value of the corporation and of Ballard's ownership interest. At this hearing, Mr. Ballard gave unrefuted testimony that the oppressive conduct of the defendants had continued through the time of the hearing. (R. pp. 170-72; *see also* R. pp. 217-18, 226-29 (Woodside testimony)) The hearing also adduced undisputed evidence that Roberson had discussed development of the marina with a number of potential partners, but had not provided the funding necessary to secure long-term financing for such development, and in fact no significant development activity had occurred during the six years since the parties entered into their agreement. (R. p. 169, lines 8-15; R. p. 170, lines 7-12; R. p. 174 line 24 – p. 178 line 5; R. pp. 638-78; R. pp. 680-712) The defendants "threw themselves on the mercy of the court," claimed that they were impoverished, and asked Judge Miller to give them "several years" to buy out Mr. Ballard's interest. (R. p. 157, lines 19-21) This stance was in direct contradiction of the position they had taken months earlier, while the parties were attempting to schedule the valuation hearing, when appellant's counsel represented to Judge Miller and to Ballard's

counsel that the defendants had the financial means to go through with the buyout of Mr. Ballard's shares. (R. p. 158, lines 5-12; *see also* R. p. 290, lines 5-25)

On October 3, 2013, Judge Miller issued an Order of Judgment finding that a fair value of the company was $7,178,594. (R. p. 20) Judge Miller went on to hold that, because the defendants still had not provided the contractually agreed upon consideration for which they received the shares of stock held in escrow, those shares should not be counted in the valuation process. Not counting those shares, Ballard retained 20,000 of his original shares, and Roberson owned 20,000 purchased directly from Ballard in 2007. Accordingly, Judge Miller concluded that Ballard's ownership interest should be treated as 50% of the whole, and he entered a money judgment against the defendants, jointly and severally, for $3,589,297 (i.e., 50% of $7,178,594). He rejected defendants' request for a multi-year payout period, on the basis of the equitable maxim, "he who seeks equity must do equity," and gave defendants 90 days to tender payment for Ballard's shares. (R. p. 22; Supp. R. p. 1)

Defendants moved for reconsideration. On November 8, 2013, the Circuit Court issued a Form 4 Order denying the motion for reconsideration. Defendants then served a Notice of Appeal on December 20, 2013. In January of 2014, after the 90 days for defendants to buy out Ballard's shares had passed with no attempt by defendants to satisfy the Order, respondent's counsel began efforts to execute on the judgment. Defendants moved for a stay of execution without bond, which Judge Miller denied on March 27, 2014. (R. pp. 25-28) On April 23, 2014, after hearing evidence that defendants were transferring large amounts of money and other assets in defraud of

creditors, Judge Miller appointed a receiver to ascertain and secure the defendants' assets pending the appeal. (R. pp. 37-47; *see* R. pp. 279-345)

In this order and a charging order entered the same day, Judge Miller specifically found that the defendants owned or controlled assets "at risk of being wasted, secreted, or diverted while the defendants' appeal is pending." (R. p. 39, ¶ 9; *accord* R. p. 33) Judge Miller also entered findings in those orders to the effect that the defendants' oppressive conduct had continued "unchanged and unabated" up to the time of the damages hearing in August 2013. (R. p. 39, ¶ 4; *accord* R. p. 32) Defendants did not appeal those orders or findings, although the Orders were immediately appealable. S.C. Code § 14-3-330(4).

On July 15, 2015, the Court of Appeals issued an unpublished *per curiam* opinion, in which the court engaged in its own weighing of the evidence, determined that $6,250,000 represented a fair value for the company, and affirmed the Circuit Court's determination that Ballard's ownership should be treated as 50% of the whole. *Ballard v. Roberson*, Op. No. 2015-UP-364 (July 15, 2015) ("*Ballard II*"). 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, the 90-day period to carry through with the buyout, and the escrow of defendants' shares because of their failure to fulfill their contractual obligations to obtain financing for the project and to develop it. *Id.* at 7-8. The Court of Appeals also addressed the defendants' claim of being unable to pay the judgment, but observed that "the record contains little evidence regarding the financial status of the individual defendants, and in particular, contains no financial statements for any appellant. The record actually indicates the buyout did not occur

because the defendants chose not to complete it – not because it was impossible." *Id.* at 7-8 (emphasis added).

Defendants moved for rehearing on July 30, 2015, and on August 26, 2015, the Court of Appeals granted the motion, issued a substitute opinion, and denied defendants' request for rehearing. The substitute opinion changed nothing of substance from the original opinion, but merely added some clarifying language. *Ballard v. Roberson*, Op. No. 2015-UP-364 (Aug. 26, 2015).

On September 10, 2015, defendants filed a second motion for reconsideration that was virtually identical to their first motion for reconsideration. Rather than petition the Supreme Court for a writ of certiorari to review the August 26 decision of the Court of Appeals, defendants asked the Supreme Court to let them wait for the Court of Appeals to act on their second motion for reconsideration. On November 19, 2015, the Supreme Court held that the "second petition for rehearing [was] improper" but gave defendants 20 days to petition for certiorari, which they did on December 9, 2015. (Supp. R. p. 2) Also on November 19, 2015, the Court of Appeals issued its order denying the second motion for reconsideration. (R. p. 50)

The Supreme Court summarily denied the petition for certiorari on September 8, 2016. After the issuance of the remittitur by the Court of Appeals, Ballard moved the Circuit Court on September 21, 2016, to modify the order appointing the receiver so as to allow assets held or subsequently acquired by the receiver to be distributed to respondent in order to pay down the judgment. (R. pp. 98-99) Previously, on August 29, 2016, the receiver had filed a motion to transfer Roberson's interests in several LLC's into the possession of the receiver. (R. pp. 94-97)

On January 12, 2017, the Circuit Court set these motions for a hearing on January 25, 2017 (later changed to January 27). On January 13, 2017, after the hearing had been scheduled, appellant Roberson moved for relief from the judgment pursuant to Rule 60(b)(5), SCRCP. Following the motion hearing, Judge Miller issued separate orders dated February 17, 2017, granting Ballard's motion to modify the receivership, denying Roberson's motion for relief from the judgment, and granting the receiver's motion to transfer Roberson's LLC interests to the possession of the receiver. (R. pp. 51-64) Roberson filed his notice of appeal on March 16, 2017.

STANDARD OF REVIEW

All of the issues raised by appellant in this appeal are matters committed to the discretion of the Circuit Court. *See Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013) ("The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge."); *Midlands Util., Inc. v. S.C. Dept. of Health and Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989) ("[T]he appointment of a receiver is within the discretion of the circuit judge."); S.C. Code § 33-44-504(a) (Circuit Court may "make all other orders [or] directions ... which the circumstances may require to give effect to the charging order"); *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 377, 746 S.E.2d 26, 31 (2013) (observing that § 33-44-504 "grants broad judicial discretion in fashioning remedies").

It is incumbent upon appellant, therefore, to demonstrate that Judge Miller abused his discretion in ruling as he did. *See BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (abuse of discretion standard applies on review of order under Rule 60(b)). As appellant's counsel conceded at the hearing below, "we leave to you [Judge

Miller] to determine upon your good conscience what you're going to do in this matter and how the [Circuit] Court is going to proceed." (R. p. 357, lines 19-21) 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 I, supra*, 399 S.C. at 592 n.3, 733 S.E.2d at 109 n.3.

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 change of circumstances that was caused by his own wrongful conduct. Ironically, the relief he seeks from this Court would give litigants the incentive to do exactly as he has done – prolong litigation as long as possible; cause maximum time, effort and expense to be spent by the court system as well as the adverse party; continue the wrongful conduct that led to the judgment against him in the first place; and then argue that circumstances have changed such that it is no longer equitable to apply the judgment against him.

The Circuit Court was right not to reward appellant for protracting the litigation and bringing about the very change of circumstances he seeks to invoke as grounds for relief. The Circuit Court was right to refuse appellant's request to make the final

judgment meaningless and the years of litigation leading to it and following from it an utter waste of time.

As to appellant's other two issues on appeal, the Circuit Court's decision not to compel the receiver to continue releasing funds for appellant's living expenses and to transfer possession of appellant's LLC interests are matters committed to the trial judge's discretion. Appellant is, again, the author of his current circumstances, which are the result of his deliberate refusal to meet his legal obligations at a time when he had the means to do so; and since then he has manipulated the legal system and his LLC ownership with the aim of thwarting the judgment and related orders entered against him. The history of this case and evidence in the record overwhelmingly support Judge Miller's exercise of discretion on these issues.

The Court should affirm summarily and bring an end to this long-protracted case.

I. Judge Miller Did Not Commit Abuse of Discretion in Denying Appellant's Motion for Relief from the Judgment, when the Ground of the Motion Was a Change of Circumstances of Which Appellant's Own Wrongful Conduct Was the Cause.

Appellant's primary argument is that Judge Miller should have vacated the judgment against him because of a change of circumstances – specifically, Duke Energy's termination of the lease to Warpath. Roberson bases his position on rule 60(b)(5), SCRCP, which states in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) ... it is no longer equitable that the judgment should have prospective application.
>
> "The motion shall be made within a reasonable time ...."

Thus, Roberson bears the burden of showing that (a) the judgment is no longer equitable, (b) that it is prospective in application, and (c) that he made his motion within a reasonable time. Moreover, because the rule undercuts the finality of judgments, a party seeking relief under it must make "a strong showing ... 'the movants' task is to provide close to an unanswerable case.'" 11 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 2863, at 461 & n.24 (2012) ("WRIGHT & MILLER") (quoting *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969)). "Because the standard is an exacting one, many applications for relief on this ground are denied ...." *Id.* at 463.[2]

Particularly in light of the heavy burden Roberson faced, Judge Miller correctly found that he failed to meet any of these requirements, let alone all three.

The fundamental defect in appellant's position is that his own wrongdoing was the cause of Duke Energy's termination of the lease. Under the Lease Agreement with Duke Energy, Warpath had a certain amount of time in which to commence and complete construction (R. p. 572, sec. 29(d)), and when Duke Energy terminated the lease, construction had not yet started even though nine years had then elapsed since the lease was signed. (R. p. 169, lines 11-15) Accordingly, the reasons for Duke Energy's termination were "failure to comply with the Conceptual Plan ... as required by the Lease [and] nonperformance of the lessee." (R. p. 716)

Warpath's failure to commence construction was in turn the result of appellant's refusal to meet his contractual obligation to provide the funds necessary to obtain long-

[2] In interpreting rule 60(b)(5), the South Carolina Supreme Court has "looked to the federal courts' interpretation," noting that South Carolina's rule "is similar to the federal rule." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013) (citing WRIGHT & MILLER).

term financing for the project. Roberson admitted that he had the means to do so, but refused because he became disenchanted with the economics of the deal. After the defendants acquired control of Warpath, Duke Energy limited the number of boat slips at the marina to 102 rather than the 200 slips that Roberson was hoping to put there.[3] This decision by Duke Energy led Roberson to become dissatisfied with the return on the investment he would have to make in order to procure the financing he was contractually obligated to obtain. *See* 2010 Order, ¶¶ 21, 22, 23, 26 (R. pp. 4-5); *Ballard I*, 399 S.C. at 591-92, 733 S.E.2d at 108-09.

Consequently, Roberson and the other defendants sought to improve the economics of the deal for themselves by forcing Ballard out. In an email exchange the three individual defendants made clear their intentions as to Ballard. Thoennes III wrote Thoennes and Roberson: "Don't we want to get [Ballard] out of the deal?" Roberson responded to the two other individual defendants: "I think he will take his 1M and run ... after a little threatening, posturing, and whining." (R. p. 557) Thereafter, they set up a shareholders meeting where they removed Ballard from involvement in the management of the corporation he created, authorized the issuance of 900,000 additional shares "to raise capital" in order to get around Roberson's obligation to "provide the necessary capital to obtain long term financing," and thereby threatened Ballard with a resulting ownership of only 2% of Warpath. (R. pp. 553-56) In an email prior to the shareholder meeting that authorized 900,000 additional shares, Roberson explained his reasoning to Thoennes:

---

3 The Lease between Duke and Warpath provided that the marina would have "100- 200" boat slips and contained no guarantee of 200. (R. pp. 518, 525; R. p. 129, lines 3-18; R. p. 141, line 9 – p. 142, line 25) In the end, Duke Energy approved a design that accommodated 102 slips. (R. p. 131, line 22 – p. 132, line 1)

> "When an investor realizes that an expected ROI [return on investment] is not forthcoming, his only viable option is acquire more equity at a reduced rate. In order to properly refinance the project, I would suggest that we increase the number of outstanding shares to 500,000 with a mixture of both preferred and common stock."

(R. p. 559)

This email clearly expresses Roberson's conclusion that the only way he could increase the return on his investment was to reduce the per-share cost by acquiring additional shares at a reduced price. Thereby, he would reduce Ballard's interest in the corporation and Ballard's share of Warpath's value and earnings. This plan flies directly in the face of the plain language of the parties' Agreement, which requires Roberson (without limitation) to provide the necessary capital to obtain long term financing of Warpath, makes clear that Ballard does not have an obligation even to sign a personal guarantee, and sets the final holdings of the shareholders, including Ballard's 20% ownership. This email is also consistent with the deposition testimony of Thoennes III that the individual defendants wanted "a way for [them] to recover some of what [they] thought they had lost" in the investment. (R. p. 150, lines 20-24)

In the 2010 trial, Roberson acknowledged that he had the financial means to meet his obligation "to provide the necessary capital to obtain long term financing on the project," but would not do so because of his *post hoc* disappointment in the economics of the deal:

> Q. But you could have provided the cash. You wouldn't have to borrow money. You could have done that, correct?
>
> A. Why would I?
>
> Q. Because you agreed to, in writing.

A. ... If there is a reason to put – if there is a reason to put more money in, you do it. If it doesn't quite make sense you sometimes decide you don't ...

Q. And the reason you decided not to is you thought it was no longer a good deal to do it that way, correct?

A. The pro formas fell off drastically.

Q. And what that means in layman's terms is either lose money or wouldn't make as much as you wanted to?

A. The return on investment was not suitable.

...

Q. But you chose not to do that?

A. That's right.

(R. p. 143, line 25 – p. 144, line 14; p. 145, lines 1-2 (testimony of Tim Roberson) (emphasis added); *see also* R. p. 146, lines 1-16 (Roberson answers "Absolutely not" when asked whether he would provide an amount of capital that would obtain financing for the marina in the current market))

As the Circuit Court noted, "[i]f Roberson and the other Defendants had simply done what they had contractually agreed to do in 2007, rather than putting their efforts and energy into forcing out the Plaintiff or rendering his interest worthless, they would not be in the position they find themselves." (R. p. 53) Thus, "it was Roberson's own breach of contract and wrongful conduct toward Ballard ... that created the circumstances that resulted in Duke Energy's termination of the lease." (R. p. 52) The Circuit Court pithily observed: "[Roberson's] position is truly like the old adage of the child who kills his parents and then begs for mercy because he is an orphan." (R. p. 53)

Duke Energy's formal termination notice states clearly that the failure to develop the property was the cause of termination, and the failure to develop the property was the

direct result of Roberson's wrongdoing. Roberson's attempt to shift responsibility for this outcome to Ballard is nothing more than an impermissible attempt to relitigate settled issues. *See Money Store, Inc. v. Harriscorp Fin., Inc.*, 885 F.2d 369, 372 (7th Cir. 1989) (noting that "Rule 60(b)(5) does not allow relitigation of issues which have been resolved by the judgment" (citation and quotation marks omitted)). Therefore, Roberson is in no position to claim that "changed circumstances" make application of the judgment against him "no longer equitable."

Roberson implies that it was Ballard's interaction with Duke Energy in 2014 that led to Duke Energy's decision to terminate the lease, but this is rank speculation on his part. Roberson was not present during Ballard's meeting with Duke Energy, and he has no evidence to support his speculation. The only evidence on the matter is to the contrary. Ballard stated in his affidavit in opposition to Roberson's motion that "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." (R. p. 437, ¶ 4) This frustration was expressed in Duke Energy's letter to the undersigned counsel for Ballard dated September 30, 2014, in which Duke's John Crutchfield makes the following statements:

- "Duke Energy has significant concerns regarding Warpath's failure to perform as required under the Lease." (R. p. 467)
- "Of course, if Warpath and Duke Energy do not enter into a Lease amendment extending the time for Warpath to complete construction of the Development,

> Duke Energy retains all of its rights and remedies under the Lease as currently written and signed including, but not limited to, the right to terminate for Warpath's continuing nonperformance of its obligations under the Lease." (R. p. 469)

When Duke Energy refused to commit to allow Ballard sufficient time to complete the project himself, he decided not to proceed with that route and terminated the conditional settlement with the defendants. (R. p. 438, ¶ 6) Duke Energy gave notice of its intent to terminate to Roberson on January 4, 2016, and issued its formal termination of the lease on March 4, 2016. These events occurred 16 to 18 months after Ballard withdrew from his negotiations with Duke Energy and more than two years after the Circuit Court ordered the defendants (on October 3, 2013) to buy out Ballard's shares within 90 days, which was expressly affirmed by the Court of Appeals in the summer of 2015. Yet Roberson did not move for relief under rule 60(b)(5) until 2017.

In light of this sequence of events, the Circuit Court was correct in concluding that the judgment in this case is not of "prospective application" and thus was outside the scope of rule 60(b)(5). The rule is directed to judgments that are prospective in effect, typically injunctions and consent decrees that require ongoing supervision by the court of conduct or conditions. *See* WRIGHT & MILLER § 2863. If Roberson and the defendants had complied with the Court's order, either in 2013 or in 2015, there would have been nothing prospective about the judgment from which Roberson could have moved for relief in 2017. Indeed, at the time of the 2013 damages hearing, Roberson represented that he could carry out the purchase of Ballard's stock if the Court were to give him "several years" to do so, rather than the 90 days as ordered. Because of his delay tactics,

Roberson ended up with more than "several years" to comply with the judgment, and yet failed to make any attempt to do so during that time.

"Equity regards that as done which ought to have been done," *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 352-53 (Ct. App. 2011); 12 S.C. JUR. *Equity* § 9. If Roberson had "done what ought to be done," the judgment would have been paid long before Duke Energy terminated the lease, and the prospective-looking provision of rule 60(b)(5) would be inapposite. *Moody v. Empire Life Ins. Co.*, 849 F.2d 902, 906 (5th Cir. 1988) ("A judgment operates prospectively if it requires a court to supervise changing conduct or conditions that are provisional or tentative."). The result should be the same when a party has acted inequitably by failing to satisfy the judgment in question.

Similarly, it is well established that rule 60(b)(5) does not apply to a judgment of money damages. *See, e.g., Saro Inv. v. Ocean Holiday Psp.*, 314 S.C. 116, 120 n.3, 441 S.E.2d 835, 838 n.3 (Ct. App. 1994) ("[A] judgment of damages for past wrongs is not such a judgment as is covered or contemplated in [rule 60(b)(5)]."). While the Order of Judgment in this case directed the defendants to buy out the plaintiff, this directive was enforced with the entry of a money judgment, and it is the money judgment to which Roberson's motion was directed. When entered in 2013, the judgment was "a present remedy for a past wrong [which does] not fall within the rule." WRIGHT & MILLER, § 2863, at 455-56. Roberson should not be allowed to take advantage of his own failure to comply with the Court's judgment by asserting that failure as a basis for invoking rule 60(b)(5).

Finally, the Circuit Court was well within its discretion in finding that Roberson did not make his motion within the "reasonable time" required by rule 60(b)(5). As noted above, Duke Energy gave notice of its intent to terminate the lease on January 4, 2016, but Roberson did not file his motion until more than a year later.[4] The reason for this delay is obvious: Roberson was waiting to see if the Supreme Court would grant certiorari to review the decision of the Court of Appeals. As the Circuit Court noted, "[t]his is pure gamesmanship. ... Once again, Defendant Roberson is seeking equitable consideration from the Court, while failing himself to act with equity." (R. pp. 54-55)

For all of the above reasons, this Court should affirm the Circuit Court's denial of Roberson's motion for relief from the judgment.

II. Judge Miller Did Not Commit Abuse of Discretion in Denying Appellant's Request To Require the Receiver To Continue To Pay Appellant's Living Expenses after the Judgment Became Final.

Roberson claims that he is impoverished and that Judge Miller should have provided in the receivership order that Roberson would continue to receive money from the receiver for living expenses, as had been done during the pendency of Roberson's second appeal. Whether such relief is appropriate in view of all the circumstances of this case is exactly the kind of detail that should be left to the discretion of the trial judge. Roberson has cited no support for the proposition that Judge Miller was obligated to do as requested as a matter of law, or that his refusal in this instance was an abuse of discretion. Given the particular facts and history of the case at bar, it was well within

[4] Indeed, ten days after Duke's notice of intent to terminate, Roberson's counsel advised Ballard's counsel that Roberson was "[s]till waiting on some information from Duke, but things are moving along." (R. p. 423, lines 13-17 (quoting email from J. Howard to W. Wilson (Jan. 14, 2016))

Judge Miller's discretion to refuse to continue requiring the receiver to pay for Roberson's living expenses.

As Judge Miller noted in his 2013 Order of Judgment, defendants had already had over six years at that time (and now have had over ten years) to satisfy their contractual and fiduciary obligations to Ballard, and they had known since entry of the 2010 Order that they were facing the possibility of having to buy Ballard's remaining shares. Moreover, in the valuation hearing, Roberson testified that the $1,000,000 price he paid for Ballard's 20,000 shares in 2007 was a fair price. (R. p. 195, lines 14-19; p. 196, lines 2-4) Thus, he had to have known that the buy-out price for Ballard's remaining 20,000 shares would be at least something higher than $1,000,000. In short, he had more than enough time to prepare for the buyout. Instead of scheming to find ways to squeeze out the founder of the company, if he had merely done what he had agreed to do in the first place, or alternatively marshaled his assets so as to be ready to pay a reasonable buyout price, he would not now be in the predicament he claims to face.

Furthermore, during the nine months from the remand in 2012 to the valuation hearing in 2013, Roberson repeatedly assured counsel and the Court that he would be able to pay Mr. Ballard when the time came. (R. p. 158, lines 5-12; R. p. 290, lines 5-25) As a result of these assurances, the respondent, the Circuit Court, and the Court of Appeals expended numerous hours determining a fair value for Ballard's shares and concluding that Roberson is liable for that amount of money jointly and severally with the other defendants. Moreover, at the 2013 hearing, Roberson's attorney represented that Roberson could make the payment if the Court gave him "several years" to do so.

(R. p. 157, lines 19-21) The "several years" that Roberson requested has now, in effect, been received, and yet he still has not done what he was ordered to do in 2013.

Further, Roberson's claim of poverty and plea for mercy are disingenuous. Even taking his assertions at face value, he and his wife receive approximately $50,000 a year in Social Security benefits. (R. p. 380) In addition to this tax-free income, Roberson holds investments worth approximately five million dollars. (R. pp. 95-96, 360-61, 368-70, 375) And throughout the long course of this litigation, Roberson had multiple occasions to settle on terms that would have left him more than sufficient funds to meet his living expenses, yet chose to reject them. (R. pp. 420, 422) As the Court of Appeals observed in its 2015 opinion, rejecting appellant's claim of inability to effectuate the buyout: "The record actually indicates the buyout did not occur because the defendants chose not to complete it – not because it was impossible." *Ballard II,* Op. No. 2015-UP-364, at 7-8.

In short, Roberson had numerous opportunities to avoid the predicament he now claims to face, and he chose not to avail himself of those opportunities. He chose the unlawful path he pursued against Ballard, and he chose to protract this litigation rather than to resolve it. For all of these reasons, it was within Judge Miller's discretion to deny the modification of the receivership sought by Roberson.

III. Judge Miller Did Not Commit Abuse of Discretion in Transferring Appellant's LLC Interests to the Possession of the Receiver in Order To Prevent Appellant from Continuing To Thwart and Evade the Court's Receivership and Charging Orders.

Roberson contends that Judge Miller erred as a matter of law by ordering the transfer of Roberson's interests in several LLC's to the receivership. The applicable statutes, however, expressly give the Circuit Court the discretion to take such action. In particular, the South Carolina Code provides as follows:

> "A receiver may be appointed by a judge of the circuit court ... (2) After judgment, to carry the judgment into effect; (3) After judgment, to dispose of the property according to the judgment ... when an execution has been returned unsatisfied[5] and the judgment debtor refuses to apply his property in satisfaction of the judgment ...."

S.C. Code § 15-65-10 (emphasis added). More particularly, the Uniform Limited Liability Company Act states:

> "On application by a judgment creditor of a member ... a court having jurisdiction ... may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order."

S.C. Code § 33-44-504(a) (emphasis added).

Thus, the Circuit Court had substantial latitude in fashioning relief to enable the receiver "to carry the judgment into effect" and "to dispose of the property according to the judgment," and to "make all other orders [and] directions ... which the circumstances may require to give effect to the charging order." As the receiver's motion noted, Roberson was using his membership interest in the LLC's to thwart and circumvent the receivership and charging orders that had previously been entered. (R. pp. 94-96) At the

[5] Writs of execution against Roberson's assets were returned *nulla bona*. (R. p. 39, ¶ 7)

hearing, the receiver reported that Roberson had used his LLC interests to cause the LLC's to stockpile cash to the tune of $50,000 a month (R. p. 360, line 2 – p. 361, line 2), except when funds were needed for Roberson's personal expenses, approximately $200,000 of which had been distributed and treated as loans to him from the LLC. (R. p. 368, line 9 – p. 369, line 17; R. p. 360, lines 2-11)

While the Circuit Court appropriately did not transfer ownership of Roberson's memberships to the receiver, it had the authority under the above statutes to place the possession of Roberson's interests with the receiver in order to prevent Roberson from continuing to evade the receivership and charging orders. Otherwise, the statutory empowerment to "make all other orders [and] directions ... which the circumstances may require" would mean nothing. *See Hinton v. S.C. Dept. of Probation, Parole & Pardon Services*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (S.C. App. 2004) (noting that courts should "seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless".)

As noted above, the Supreme Court has observed that S.C. Code section 33-44-504 "grants broad judicial discretion in fashioning remedies." *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 377, 746 S.E.2d 26, 31 (2013). Given the appellant's deceitful conduct throughout this case, his efforts to secrete or waste assets, and his protraction of the litigation for (at that time) nine years through multiple trials, hearings, appeals, and motions for reconsideration, Judge Miller was well within his discretion in transferring possession of the LLC interests in order to enable the receiver to effectuate the charging order and begin paying down the judgment.

CONCLUSION

It is time to bring this decade-old case to an end. Judge Miller's decisions were well within his discretion, are supported by the record evidence and the law, and follow naturally from the appellate decisions in *Ballard I* and *Ballard II*.

This Court should affirm.

Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson (S.C. Bar Id. No. 15808)
Wade S. Kolb (S.C. Bar Id. No. 100379)
Amos A. Workman (S.C. Bar Id. No. 6231)
WYCHE P.A.
P.O. Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Respondent

Dated: February 21, 2018

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 22 2018
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000690

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

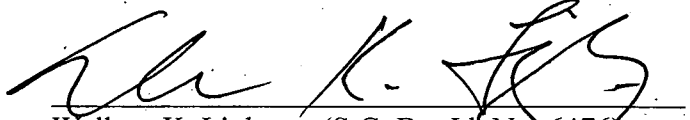
v.

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

Of whom Tim Roberson is .....Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

Respondent hereby certifies that he has complied with the requirements of Rule 211(b), SCACR.



Wallace K. Lightsey (S.C. Bar Id. No. 6476)
William M. Wilson (S.C. Bar Id. No. 15808)
Wade S. Kolb (S.C. Bar Id. No. 100379)
Amos A. Workman (S.C. Bar Id. No. 6231)
WYCHE P.A.
44 East Camperdown Way
Greenville, SC 29601
(864) 242-8200

Attorneys for Respondent

Dated: February 21, 2018