

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

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The Honorable Joseph M. Strickland, Master-in-Equity

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Appellate Case No. 2016-001514

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MAY 22 2017

SC Court of Appeals

Tiffany's Café & Bakery on Devine, Inc.....Respondent,

v.

James S. Archer.....Appellant.

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**FINAL REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

This reply brief is intended solely to respond to the Respondent's contentions that require further discussion for proper determination of the issues raised on appeal. This brief does not respond to issues that Appellant believes were adequately discussed in the Initial Brief of Appellant, and Appellant intends no waiver of these issues by not expressly reiterating them herein.

The trial court erred in allowing the Plaintiff to proceed on its causes of action due to the unjustified delay of seven years in prosecuting its case. The trial court further erred entering judgement against Appellant personally obligating him for the debts of the corporation and in not providing Appellant a setoff against any obligation on the Promissory Notes for payments made by him in the amount of \$3,500. Finally, the trial court erred in not awarding damages to Appellant for the numerous breaches of statutory and fiduciary duties that caused substantial financial harm to Appellant.

In response to the Initial Brief of Appellant, Respondent argues that Appellant did not properly preserve the issue of Plaintiff's delay for appellate review. Respondent further argues that, despite the clear language of the Amended Order, the trial court did not hold Appellant was personally liable for corporate debt, rather the court awarded the Corporation damages for alleged negligence. Finally, Respondent argues the trial court properly found that Appellant was not entitled to damages on his counterclaims.

## ARGUMENT

**I. The lower court erred as a matter of law in not dismissing Plaintiff's action for its unreasonable neglect in proceeding with its suit.**

Appellant contends the lower court erred as a matter of law in not dismissing Plaintiff's action for its unreasonable neglect in proceeding with its suit and Shareholder

respectfully request an Order of this Court reversing same. As set forth in the Initial Brief of Appellant, the Corporation commenced this action against Shareholder on May 1, 2008. The Corporation then waited seven years, until May 21, 2015 to request a final hearing on the matter. In its brief, Respondent offers no justification for this delay. Rather, Respondent argues that the issue is not preserved for appellate review.

At the trial in this matter, the lower court raised the issue of delay *sua sponte* and ruled that the case could proceed. Once the trial court has made its ruling clear, it is not incumbent on a party to continue arguing that issue in order for it to be preserved for appeal. The Appellant in this matter timely filed his Motion to Alter or Amend and sought review of every factual determination and legal ruling of the trial court. Accordingly, Appellant properly preserved the issue of Respondent's delay for this Court's review.

**II. The lower court erred as a matter of law in awarding the Corporation a judgment against the Shareholder in the sum of Nineteen Thousand Five Hundred Seventy Three and 27/100 (\$19,573.27) Dollars representing a 49% share of money paid by McMillan to various creditors of the Corporation.**

The lower court erred as a matter of law in awarding the Corporation a judgment against Shareholder in the amount of Nineteen Thousand Five Hundred Seventy Three and 27/100 (\$19,573.27) Dollars representing a 49% share of money claimed to have been paid by McMillan for various liabilities of the Corporation and Shareholder respectfully request an Order of this Court reversing same.

The Amended Order issued by the trial court in this matter provides, "Plaintiff is awarded judgment against Defendant in the sum of Nineteen Thousand Five Hundred Seventy Three and 27/100 (\$19,573.27) Dollars *representing Defendant's share of the tax liability and other costs of closing the business*, less all credits and adjustments supported by the evidence." Appellant first disputes the amount of debt attributed to the Corporation

because Plaintiff put forth no evidence that the Corporation actually paid these debts. Rather, McMillan, the majority shareholder, claims to have paid debts of the Corporation from his personal funds. It is undisputed that no money for the payment of these debts was transferred to the company and thus no accounting for the Corporation's satisfaction of these debts is provided.

Appellant further argues, that it even if the trial court believed the Corporation paid debts in the amounts testified to by McMillan, the trial court erred as a matter of law in assigning Shareholder a pro rata share of those debts.

Respondent now appears to waive its argument that Shareholder should be responsible for a pro rata share of corporate debt. Instead, Respondent now argues that the trial court did not assign Shareholder a pro rata share of the Corporation's debt, rather it awarded Respondent damages for negligence in an amount equal to Shareholder's pro rata share of the Corporation's debt.

The determination of whether a corporate officer acted negligently is governed by the business judgment rule. South Carolina law provides that "an officer with discretionary authority shall discharge his duties under that authority: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interest of the corporation and its shareholders." S.C. Code Ann. § 33-8-420. The Supreme Court of South Carolina in discussing these fiduciary duties has stated,

The duties of a fiduciary are composed of three elements: care, loyalty, and good faith . . . Courts monitor the duty of care through the business judgment rule, which delegates the business affairs of . . . corporations to the board of directors.

The business judgment rule presumes that in making decisions and managing the corporation, fiduciaries have acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.

The duty of loyalty requires corporate officers and directors act in the best interest of the corporation and prioritize the corporation's interest above their own. The traditional formulation of the duty of loyalty states that if corporate directors and officers are independent of, and disinterested in, the complained transaction, the court will not find them liable for a breach of that duty, unless the facts of the transaction are 'such that no person could possibly authorize it if he or she were attempting in good faith to meet their duty.'

Finally, corporate directors and officers acting in good faith abide by the norms of corporate governance and comply with legal standards while performing their jobs. Egregious or conspicuous failures to do so are subject to liability under the duty of good faith.

*Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 531, 744 S.E.2d 178, 183 (2013). Here, so long as Shareholder acted in good faith he breached no duty owed to the Corporation. Respondent neither alleged nor presented any evidence that Shareholder acted in bad faith with regard to any actions related to the Corporation. Specifically, with regard to the tax obligations, Respondent argues that Shareholder owed a duty to Corporation to pay the taxes as they came due. Respondent offers no authority nor presented any evidence at trial which would establish such a duty. The only duty Shareholder owed the Corporation was to act in good faith and in the best interest of the business. The undisputed evidence presented at trial is that the Corporation simply lacked sufficient funds to timely pay the tax bill. Shareholder cannot be held liable in tort for failure to pay an obligation of the business that the business does not have sufficient funds to satisfy. Further, both shareholders were at all times, equally aware of the financial status of the Corporation as

both were provided regular financial statements from the Corporations accountant. (Tr. p. 101, lines 7-9; R. p. 166, lines 7-9.)

Respondent further argues that Shareholder violated statutes requiring the payment of payroll and sales taxes, amounting to negligence *per se*. This is novel argument. Respondent did not plead negligence *per se* and the trial court made no such finding. Additionally, Respondent does not identify or set forth any statute it claims Shareholder violated. Rather, Respondent cites to *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) in support of its argument. A careful reading of this case reveals it involves a motor vehicle accident and the alleged violation of statutes which aim to protect the safety of motorist. The facts of *Trivelas* are so dissimilar to the facts of this matter the case should not control this Court's decision in this matter.

**III. The lower court erred as a matter of law in not awarding Shareholder a credit against his obligation to pay on the Promissory Note for the \$3,500.00 of the Corporation's debt paid by Shareholder in 2007.**

Shareholder argues that the trial court erred in not granting him a setoff in the amount of \$3,500.00 against any obligation he may have under the Promissory Note. Respondent argues that this \$3,500.00 payment made by Shareholder is similar to payments made by the majority shareholder and thus should be maintained on the books as a loan to the corporation or alternatively, be credited toward the judgment entered by the trial court. However, the transactions are not alike in substance or form and warrant different treatment.

At the time Shareholder issued the \$3,500.00 payment he owed the Corporation on the Promissory Note. This is distinguished from the payments purportedly made by

McMillan because McMillan had no financial obligation to the Corporation. A payment made to or on behalf of the Corporation should first act as a dollar for dollar reduction of any financial obligation the payor has to the payee corporation. Subsequently, any payment made to or on behalf of the corporation should be characterized as a gift, an increase the payor shareholder's capital account, or a loan.

**IV. The lower erred as a matter of law in not awarding Shareholder damages and/or setoffs for the Corporation's breaches of statutory and fiduciary duties owed to Shareholder including: selling off substantially all of the assets and winding down the business without notice to Shareholder; selling substantially all of the assets of the Corporation for less than their fair market value; transferring all of the Corporation's inventory to another business without providing an accounting; transferring the Corporation's walk-in oven for less than its fair market value and failing to account for the proceeds; continuing to operate the business at a loss for the sole purpose of benefiting the majority shareholder.**

Shareholder argues that throughout the 2007 calendar year, the Corporation breached numerous statutory and fiduciary duties owed to him. Respondent denies the breach of any duty and further argues that Shareholder does not have the right to counterclaim for these breaches. Respondent's argument that Shareholder's claim must be pursued through a derivative action is a novel defense. Respondent made no motion to dismiss under 12(b)(6), neither did it file a motion for summary judgment as to this issue. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Respondent raises this defense for the first time in its Initial Brief to this court and thus it has not been properly preserved for appellate review.

As set forth above in Argument II, the law in South Carolina imposes duties of care, loyalty and good faith on corporate officers. The evidence at trial revealed that

Corporation, on numerous occasions acted in the interest of the majority shareholder, to the detriment of Appellant. Although set forth more fully in the Initial Brief of Appellant, some examples of this bad faith include, the selling off of all of the assets without notice to Appellant, the liquidation of assets for well below fair market value, the transfer of assets to a separate entity for no value including inventory and a walk-in oven valued at \$30,000, and the continued operation of the business at a loss for the sole purpose of protecting the majority shareholder from personal liability on a lease.

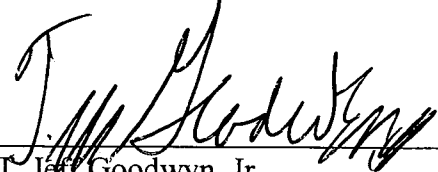
### CONCLUSION

Shareholder respectfully request that this Court issue an order dismissing Plaintiff's action in its entirety for its willful and unjustified delay in prosecuting its case. In the alternative, Shareholder respectfully request that this Court (1) reverse the trial court's order granting Plaintiff a judgment against Shareholder for debts claimed to have been paid by a co-shareholder; (2) reverse the trial court's order denying Shareholder a setoff against the promissory note for corporate debts he paid in the amount of \$3,500.00; (3) reverse the trial court's order denying Shareholder relief in the form of damages and/or setoffs for the Corporation's numerous breaches of fiduciary and statutory duties; and (4) issue an Order that any remaining obligation Shareholder had on the promissory note has been fully discharged.

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Respectfully Submitted,

GOODWYN LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "T. Jeff Goodwyn, Jr.", written over a horizontal line.

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**CERTIFICATE OF COUNSEL**

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

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May 22, 2017