THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Cynthia Graham Howe
Master-in-Equity, Fifteenth Judicial Circuit

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SC Court of Appeals

Case No.: 2009-CP-26-620
Appellate Case No.: 2016-001075

Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc., a South Carolina Corporation ..... Plaintiffs,

vs.

Arthur Wayne Vereen, Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction, Inc., Linda C. Vereen, Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, and Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust, ... Defendants,

AND

Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc. and 29th Place Developers, Inc., ... Third-Party Plaintiffs,

vs.

E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually, ... Third-Party Defendants.

OF WHOM Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc., Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust and 29th Place Developers, Inc. are ..... Appellants,

AND

Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc., a South Carolina Corporation and E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually are ..... Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

I. TIMELINESS OF APPEAL

Appellants timely filed their notice of appeal for the following reasons:

(A) Appellants timely filed a Rule 59(e) motion upon receiving written notice of the master-in-equity's final order on April 11, 2015;

(B) Respondents' argument improperly seek to start the clock for post-trial motions and for appeal before the issuance of a final order;

(C) Trial counsel for Appellants followed the Supreme Court's directive in Ackerman v. 3-V Chem., Inc., 349 S.C. 212, 562 S.E.2d 613 (2002) as to how to proceed in the absence of a final written order;

(D) Given the confusion associated with determining whether the First Order was a final order, this Court should, in accordance with Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018) and Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211, 810 S.E.2d 856 (2018), find the notice of appeal was timely filed;

(E) In the alternative, this Court should, at the very least, allow the Other Appellants[1] to appeal the judgment, as they were not on notice that they would be liable for the judgment until they received notice of page 37 on April 11, 2015.

A. Final Order

Appellants timely filed a Rule 59(e) motion upon receiving written notice of the entry of the master-in-equity's final order.

"A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. Generally speaking,

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[1] As set forth in Appellants' Initial Brief, the "Other Appellants" consists of the following: Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, As Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, As Trustee of the Linda C. Vereen Residence Trust, and 29th Place Developers, Inc.

"[o]nly final judgments ... are appealable." Cobb v. Maccaro, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992). In determining whether a matter is a final judgment or interlocutory, the Supreme Court has stated that if there is some further act that must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory and not immediately appealable. Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

A final judgment must "dispose of the cause ... as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined." Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209, 212 (1942). "[A] final judgment ... must put the case out of Court, and must be final in all matters within the pleadings." Id.

In multi-party litigation or where there are multiple claims for relief, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties **only** upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b), SCRCP (emphasis added). "In the absence of such a determination and direction, any order or other form of decision, however designated, **which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties** .... Id. (emphasis added). Under such circumstances, the order remains subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Id.

The March 23, 2015 order signed by the master-in-equity ("First Order") was not a final order because it did not dispose of all of the Appellants, and it did not issue a ruling upon which

all of the Appellants would be liable for the judgment. See Good, 201 S.C. at 42, 21 S.E.2d at 212 (A final order is one that disposes of all parties in the lawsuit and leaves nothing to be done but the enforcement of the judgment.); see also Rule 54(b), SCRCP (In multi-party and/or multi-claim litigation, an order is only final if it disposes of all the parties and all the claims, absent express direction to the contrary.).

The First Order was not a final order because it did not contain page 37. This is an uncontroverted fact. In the Post-Trial Order, the master-in-equity acknowledged "the [First] Order's missing, Page 37" and, in a moment of foreshadowing, the master-in-equity questioned the effect of the missing page 37 "on the finality of the [First] Order."[2] **(R. p. 69)**. Page 37 did not surface until April 10, 2015, and trial counsel for Appellants did not receive written notice of page 37 until April 11, 2015. **(R. p. 12689; R. pp. 12734-36)**. Upon receiving written notice of page 37, trial counsel for Appellants timely filed a Rule 59(e) motion on April 20, 2015. **(R. p. 12689; R. pp. 77-108)**. See Rule 59(e), SCRCP (A Rule 59(e) motion must be filed within ten (10) days "after receipt of written notice of the entry of the order."); see also Rule 203(b)(1), SCACR (When a party makes a timely post-trial motion, the time for appeal begins to run upon the receipt of written notice of entry of the order ruling on the post-trial motion.).

The question on appeal has been incorrectly framed by Respondents. The question on appeal is that question posed by the master-in-equity in the Post-Trial Order, which is whether the First Order was a final order without page 37—that is, before page 37 surfaced on April 10, 2015. **(R. p. 69)**. The answer is no. Rule 54(b) of the South Carolina Rules of Civil Procedure determines when an order is final in multi-party litigation. Rule 54(b) is extremely clear in stating that in

[2] By ruling on Appellants' Rule 59(e) motion, the master-in-equity treated it as timely. See Overland, 423 S.C. at 256, 815 S.E.2d at 433 ("A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served.").

multi-party litigation, an order is not final if it "adjudicates fewer than all the parties." Rule 54(b), SCRCP. In such a circumstance, the order is not only "not final" as it relates to the un-adjudicated parties, but also the order is not final and does not "terminate the action as to **any of the claims or parties**." Id. Instead, the trial court retains jurisdiction to "revis[e]" the initial order "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties." Id.

Here, the First Order neither disposed of all of the Appellants, nor issued a ruling upon which all of the Appellants would be liable for the judgment. The First Order was silent with respect to the Other Appellants. It was not until April 10, 2015, when page 37 first surfaced, that the master-in-equity adjudicated Respondents' claims with respect to the Other Appellants and held them liable for the judgment under a veil piercing theory. **(R. p. 12689; R. pp. 12734-36)**. Prior to the emergence of page 37, there was no final order, as there was no adjudication of the Other Appellants.

The significance of page 37 to the finality of the order cannot be overstated and is demonstrated by the Post-Trial Order. The Post-Trial Order reversed only one (1) finding in the First Order—the finding on page 37, that the Appellants should be jointly and severally liable for the judgment under a veil piercing theory. **(R. p. 69)**. The Post-Trial Order found this to be error, and instead, the Post-Trial Order held the Appellants liable for the judgment "under an amalgamation of interest or blurred identity theory." **(R. p. 69)**.

Accordingly, for the foregoing reasons, this Court should find that the Appellants timely filed a Rule 59(e) motion upon receiving written notice of the entry of the master-in-equity's final order.

B. Respondents' Argument Improperly Seek to Start the Clock for Post-Trial Motions and for Appeal Before the Issuance of a Final Order

Respondents allege the time for Appellants to file their motion for reconsideration and notice of appeal started before the emergence of page 37. While Respondents avoid committing to a specific date or citing to the mailing of a particular "order," Respondents generally contend that by mailing some combination of the First Order (excluding page 37), the *Nunc Pro Tunc* Order, and the Form 4 coversheets to trial counsel for Appellants, the clock started for post-trial motions and for appeal.

Respondents' argument completely disregards Rule 54(b) of the South Carolina Rules of Civil Procedure, which provides that in in multi-party litigation, an order is not final if it "adjudicates fewer than all the parties." Rule 54(b), SCRCP. The "orders" Appellants served on trial counsel for Appellants were not final orders because they did not adjudicate Respondents' claims with respect to the Other Appellants. Respondents do not dispute that page 37 did not emerge until April 10, 2015. Because there was no final order until the emergence of page 37, the actions taken by Respondents prior to the final order in mailing the First Order (excluding page 37), the *Nunc Pro Tunc* Order, and the Form 4 coversheets did not start the clock for post-trial motions or for appeal.

Respondents mailed a copy of the First Order, excluding page 37, to trial counsel for Appellants on March 25, 2015.[3] **(Respondents' Brief, p. 24 n. 8)**. This mailing did not provide notice of a final judgment to Appellants. As set forth above, the First Order was not final because

[3] Respondents also briefly mention the fact that the master-in-equity's law clerk emailed a copy of the First Order and *Nunc Pro Tunc* Order to trial counsel for Appellants. Pursuant to the Supreme Court's decision in Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018), email notice from the court is insufficient to start the clock on the time to appeal in circumstances arising before the decision in Wells Fargo, that is, before February 28, 2018. Because the relevant facts here predate Wells Fargo, the email notice from the master-in-equity's law clerk was insufficient to start the clock for purposes of appeal or for post-trial motions.

it did not dispose of all of the Appellants. **(R. p. 69; Respondents' Brief, p. 24 n. 8)**. Because the First Order Respondents mailed to Appellants was not final, it did not start the clock for Appellants time to file a Rule 59(e) motion.

Following the First Order, the master-in-equity issued a *Nunc Pro Tunc* Order on March 24, 2015. **(R. pp. 61-62)**. The *Nunc Pro Tunc* Order consists of two (2) pages, with the first page consisting entirely of the case caption. **(R. pp. 61-62)**. The *Nunc Pro Tunc* Order does not identify any of the parties by name, and it only recalculates the rate of prejudgment interest in the First Order. **(R. pp. 61-62)**. Like the First Order, the *Nunc Pro Tunc* Order is not a final order, because it does not dispose of all of the Appellants. **(R. pp. 61-62)**. Respondents mailed a copy of the *Nunc Pro Tunc* Order to trial counsel for Appellants on March 27, 2015. **(Respondents' Brief, p. 23)**. However, because the *Nunc Pro Tunc Order* was not a final order, the mailing of the order did not start the clock for Appellants to file a Rule 59(e) motion.

The Form 4 cover sheets accompanying the First Order and the *Nunc Pro Tunc* Order were also defective. The Form 4 cover sheet accompanying the First Order did not identify all of the Appellants, as it excluded Parkway Offices, LLC and 29th Place Developers, Inc. **(R. pp. 59-60)**. The Form 4 cover sheet accompanying the *Nunc Pro Tunc* Order did not include 29th Place Developers, Inc. **(R. pp. 63-64)**. Accordingly, the mailing of the Form 4 coversheets did nothing to convert either the First Order or the *Nunc Pro Tunc* Order into a final order disposing of all of the Appellants. See Rule 54(b), SCRCP (In multi-party litigation, an order is not final if it "adjudicates fewer than all the parties.").

In sum, there is no order from the master-in-equity resolving all of the claims against all of the Appellants until the emergence of page thirty-seven (37), which trial counsel for Appellants received written notice of on April 11, 2015 and thus started the ten-day clock for Appellants to

file their Rule 59(e) motion. **(R. p. 12689)**. The actions taken by Respondents prior to April 11, 2015 are immaterial, because trial counsel for Appellants did not have written notice of the final order until this time.

C. Trial Counsel for Appellants Followed the Supreme Court's Directive in Ackerman

This Court should find that the Appellants timely filed their Rule 59(e) motion and their notice of appeal because trial counsel for Appellants followed the Supreme Court's directives in Ackerman as to how to proceed in the absence of a final written order.

A notice of appeal must be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), (b)(4), SCACR. Upon the timely filing of a motion to alter or amend the judgment under Rule 59, SCRCP, the time for appeal is stayed and shall run from the receipt of written notice of entry of the order granting or denying such motion. Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. A motion to alter or amend the judgment must be served not later than 10 days after receipt of written notice of the entry of the order. Rule 59(e), SCRCP.

In Ackerman, 349 S.C. at 215, 562 S.E.2d at 615, the Supreme Court explained how to deal with the "due process problem in requiring an appeal to be taken when the party is not in receipt of the order." The Supreme Court observed, "The short and simple answer to this contention is that **upon receiving written notice of the entry of an order or judgment, an attorney may immediately call and request a copy of the order**." Id. (emphasis added).

Here, trial counsel for Appellants acted in accordance with the instructions provided by the Supreme Court in Ackerman. The master-in-equity signed the First Order on March 23, 2014. **(R. pp. 17-58)**. The next day, on March 24, 2015, the master-in-equity's law clerk sent an email to all attorneys of record, with the First Order attached to the email. **(R. p. 12690)**. Page 37 of the First

Order was absent. **(R. p. 12734)**. On March 25, 2015, counsel for Respondents mailed a copy of the First Order to trial counsel for Appellants, but it did not include page 37. **(R. p. 12689; Respondents' Initial Brief, pp. 23-24)**. Upon recognizing she was not receipt of the final order, trial counsel for Appellants wrote a letter to the mater-in-equity requesting "page 37 or a complete copy of the Order ... so I can take steps to file a motion to reconsider this case." **(R. p. 12734)**. Trial counsel for Appellants acted in accordance with the specific instructions from the Supreme Court in Ackerman, and, under such circumstances, due process mandates that this Court find Appellant's timely filed their motion for reconsideration.

Unfortunately, trial counsel for Appellants found herself in the "due process problem" envisioned by Ackerman. The "due process problem" was not the only problem trial counsel faced, as she also found herself in an issue preservation quandary. On appeal, a losing party is required to file a Rule 59(e) motion to raise any issue that was raised to the trial court but that the trial court did not rule upon. If a party fails to do so, the issue is not preserved for appellate review. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

Appellants were required to preserve issues for appeal by pointing out the errors in the First Order. It is impossible to preserve arguments in a Rule 59(e) motion without a copy of the final order. Thus, trial counsel for Appellants acted appropriately and in accordance with Ackerman in requesting a copy of the final order from the trial court. Appellants received page 37 on April 11, 2015, and thereafter, Appellants timely filed a motion for reconsideration on April 20, 2015. (**R. p. 12689**).

Accordingly, because trial counsel for Appellants followed the Supreme Court's directives as to how to proceed in the absence of a final written order, this Court should find that the Appellants timely filed their Rule 59(e) motion and their notice of appeal. See Elam v. S.C. DOT, 361 S.C. 9, 25, 602 S.E.2d 772, 780-81 (2004) ("We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.").

D. The Supreme Court's Decisions in Overland & Wells Fargo Demands that the Notice of Appeal Should be Deemed Timely

Given the confusion associated with the rules governing whether the First Order was a final order, this Court should find that the Appellants timely filed their notice of appeal.

In 2018, the Supreme Court authored two (2) opinions on the timeliness of appeals. Both decisions use the word "confusion" to describe the rules governing timeliness of appeals. See Overland, 423 S.C. at 255, 815 S.E.2d at 432 ("We clarify, however, **a point of confusion** that appears to have existed between the parties and the circuit court.") (emphasis added); Wells Fargo Bank, 422 S.C. at 217, 810 S.E.2d at 859 ("[F]airness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law interpreting Rule 203, SCACR, which creates **confusion** as to whether receipt of electronic correspondence is sufficient to trigger the time to appeal.") (emphasis added).

Both decisions refused to find the notice of appeal was untimely filed, even though the appellant in Overland filed his Rule 59(e) motion more than ten (10) days after receiving written notice of the entry of the order and even though the appellants in Wells Fargo filed their notice of appeal thirty-one (31) days after receiving written notice of the court's order. Overland, 423 S.C. at 256-57, 815 S.E.2 at 433; Wells Fargo, 422 S.C. at 213, 810 S.E.2d at 857. Both decisions took the opportunity to clarify confusing rules regarding timeliness for appeals, and both decisions decided the appeals on their respective merits.

Here, like Overland and Wells Fargo, this case involves a confusing issue—a determination of whether the First Order was final. As argued above, the First Order did not dispose of all of the parties in the action; therefore, under Rule 54(b), SCRCP, the First Order was not final. To add to the confusion, with only the First Order, trial counsel for Appellants found herself in the unenviable position of choosing between two (2) bad alternatives: (1) immediately filing a Rule 59(e) motion after receiving notice of the First (but not the final) Order; or (2) following Ackerman and requesting a copy of the final order from the master-in-equity. Trial counsel for Appellants chose to follow Ackerman. Such a decision was rooted in precedent, and it would be unjust to punish Appellants (and trial counsel for Appellants) for following precedent in such a confusing situation. Practitioners ordinarily do not find themselves in the situation that trial counsel for Appellants found herself in. Under these circumstances, this case, like Overland and Wells Fargo, presents as an opportunity for the Court to clarify confusing timeliness issues going forward. In doing so, the Appellants respectfully request that this Court reach the merits of this appeal.

E. Other Appellants

At the very least, this Court should allow the Other Appellants to appeal from the judgment.

The Other Appellants did not receive notice of their liability for the judgment until they received notice of page 37 on April 11, 2015. On page 37, the master-in-equity found the Other Appellants jointly and severally liable for the judgment based on a finding that the corporate veil should be pierced and "that each of the Defendants is the alter ego of the other." **(R. p. 53)**. On April 20, 2015, Appellants filed a motion for reconsideration, arguing the master-in-equity erred in piercing the corporate veil and in finding the Other Appellants jointly and severally liable for the judgment. **(R. p. 80)**. Appellants argued the master-in-equity erred in granting this relief because Respondents did not seek it in their pleading. **(R. p. 80)**.

On April 25, 2016, the master-in-equity issued a Post-Trial Order, reversing the First Order's finding that the Other Appellants should be jointly and severally liable for the judgment under a veil piercing theory. **(R. p. 69)**. Instead, the Post-Trial Order found the Other Appellants liable for the judgment "under an amalgamation of interest or blurred identity theory." **(R. p. 69)**. Within thirty (30) days of receipt of the Post-Trial Order, Appellants timely filed a Notice of Appeal. On appeal, the Other Appellants seek to challenge the trial court's imposition of liability upon them based on an amalgamation theory. Respondents did not seek this relief in their pleading, and the Other Appellants had no notice that such liability would ever be imposed upon them until the receipt of page 37. As the master-in-equity observed in the First Order, this lawsuit "is a shareholder's derivative action brought by Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc. against Arthur Wayne Vereen, the treasurer and remaining shareholder ...." **(R. p. 18)**. The Other Appellants had no notice that liability would be imposed upon them in this type of action.

Accordingly, this Court should, at the very least, allow the Other Appellants to appeal from the judgment.

II. FAILURE TO ORDER ACCOUNTING & IN RELYING ON BRADY COMPILATION

A. Master-in-Equity Erred in Failing to Order an Accounting

In Appellants' Initial Brief, Appellants argued the master-in-equity committed reversible error in failing to order an independent forensic accountant to perform an accounting in this case. Respondents attempt to combat this argument by arguing Appellants did not hire an expert to testify at trial. These are two entirely separate matters. Whether this case called for the master-in-equity to appoint an independent forensic accountant is a completely different issue from whether a litigant should, in the exercise of trial strategy, retain an expert to testify. One issue is a matter of law; one is a matter of trial strategy. Also, Respondents' argument overlooks the fact, that from the very beginning, Appellants requested that the court order an accounting in its pleading. **(R. pp. 464-67; R. p. 18)**.

In Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009), the Supreme Court decided whether the master-in-equity erred in failing to order an independent accounting. The Supreme Court held an accounting was not necessary in Historic Charleston Holdings because the case was simple and the stakes were low. Id. at 429, 673 S.E.2d at 454. By contrast, this case is complicated, and the stakes are extremely high. See 1 Am.Jur.2d Accounts and Accounting § 56 (2005) ("[A]n accounting is an appropriate remedy when the accounts at issue are complicated or mutual.").

Accordingly, under these circumstances, the master-in-equity erred in failing to order an independent forensic accounting. For this reason, this Court should reverse the master-in-equity's order and remand this case for a new trial.

B. Master-in-Equity Erred in Relying on Brady's Compilation

In Respondents' Initial Brief, they accuse Appellants of making "unsupported attacks on [Brady's] work." (**Respondents' Brief, pp. 23-24**). Appellants have not attacked Brady's work. Rather, Appellants argued that Brady did not perform an accounting, and because Brady did not perform an accounting, the master-in-equity committed reversible error in relying on Brady's compilation to award damages.

Respondents go to great lengths to offer their interpretation of the work performed by Brady. Brady is the only person who offered testimony as to the scope of the work she performed. Brady's testimony speaks for itself. Brady testified she did not perform an accounting. (**R. p. 718; R. p. 725; R. p. 769; R. p. 771**). Brady testified she performed a compilation, and in doing so, she offered no opinion as to how much was due each shareholder of A&E Constructors and Consultants, Inc. ("the Company"). (**R. pp. 1513-14; R. p. 1607**). Brady testified she did not know whether the Company made or lost money. (**R. p. 1508**). Brady testified she did not account for all expenses. (**R. p. 1417**). Brady stated it was not in the scope of her job to determine "whose job was whose," " whose income was whose," "who paid the expenses" or "what the expenses really are." (**R. p. 1508**).

Based on Brady's testimony about the work she performed, Appellants argued the master-in-equity erred in relying on her testimony, because it did not account for how much was owed to each shareholder of the Company or the Company itself. While Respondents try to minimize Brady's testimony, it speaks for itself and establishes that the master-in-equity erred in relying on her work. Accordingly, this Court should reverse the master-in-equity's order and remand this case for a new trial.

III. PREJUDGMENT INTEREST

When Smith's claims arose in September 2007, the amount of damages were not fixed. See Historic Charleston Holdings, 381 S.C. at 435, 673 S.E.2d at 457 (The proper test for determining whether damages are fixed is whether the measure of recovery is fixed by conditions existing at the time the claim arose.). The amount of damages were not fixed because the Company continued to operate after September 2007. The continued operation of the Company affected Company funds, which in turn, affected the amounts potentially due each shareholder. In addition, Smith formed his own competing construction company, E. Smith and Sons Construction, LLC, on April 3, 2007 and began working for E. Smith and Sons in competition with the Company in mid-September 2007. **(R. pp. 916-17; R. p. 994; R. p. 1030)**. Smith thus competed against the Company after September 2007, causing damages to the Company and affecting the amounts due each shareholder. Lastly, after Smith's claims arose, Smith engaged in new construction projects in the name of the Company, exposing it to potential future liability.

For all of these reasons, the amount of damages were not fixed when Smith's claim arose in September 2007; therefore, the master-in-equity erred in awarding prejudgment interest.

IV. BRADY'S COMPILATION ENDED IN 2007

In Respondent's Roman Numeral IV, Respondents attempt to minimize the fact that Brady ended her compilation in September 2007, when Smith left the Company. There can be no dispute that Brady ended her compilation in September 2007, and by doing so, Brady ignored the fact that the Company remained operational after September 2007.

The Brady compilation did not consider the fact that the Company remained operational after Smith left the Company in September 2007 to form his own competing construction company. **(R. pp. 2590-94; R. pp. 2789-93)**. The evidence reveals that after Smith left the Company, the Company had existing jobs to finish, had to fix problems with completed

construction projects, and had to resolve legal claims against it for completed construction projects. **(R. pp. 2590-94; R. pp. 2789-93; R. pp. 2911-14; R. p. 1015)**. These problems continued, even after the filing of this lawsuit on January 23, 2009. **(R. pp. 417-35; R. pp. 2591-93; R. pp. 2789-93)**. Brady did not consider any Company liabilities after 2007 or any contributions made by Vereen to the Company after 2007. **(R. pp. 2716-17)**. The master-in-equity, by accepting the Brady compilation, ignored this evidence and relied on the Brady compilation, even though it was obviously flawed.

Accordingly, the master-in-equity erred in relying on the Brady compilation because it ends in 2007, when the Company remained operational. This Court should therefore reverse the master-in-equity's order and remand this case for a new trial.

V. JOINT AND SEVERAL LIABILITY

There is no basis for this Court to hold the Other Appellants[4] jointly and severally liable for the judgment.

As an initial matter, it should be noted that the Post-Trial Order did not enter a judgment against any of the Appellants under a joint and several theory of liability. In the First Order, the master-in-equity concluded (without analysis) that the "judgment should be rendered against the Defendants jointly and severally for the damages sustained by the Plaintiff." **(R. p. 53)**. The master-in-equity recognized the error in this ruling and corrected herself in the Post-Trial Order. In their Initial Brief, Respondents argue that joint and several liability was properly imposed on

[4] "Other Appellants" are defined on page 1, footnote 1 of the Reply. In their Initial Brief, Respondents dedicate a separate heading to Ms. Vereen, arguing she should be held jointly and severally liable for the judgment. As set forth herein, there is no cause of action to hold Ms. Vereen liable for the judgment; therefore, joint and several liability is improper.

all of the Appellants, and Respondents appear to argue that this Court should affirm the judgment against the Other Appellants pursuant to Rule 220(c), SCACR.

Respondents' argument misapprehends the application of joint and several liability and Rule 220(c), SCACR. Joint and several liability is not derivative liability, where one party can be held legally accountable for the wrongdoings of another party. Instead, in order to invoke the doctrine of joint and several liability, the plaintiff must plead[5] and prove a cause of action against multiple defendants, alleging that the multiple defendants jointly caused harm to the plaintiff. See Pendleton v. Columbia Ry. Gas & Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926) (defining joint and several liability as "a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties). Negligence cause of actions are the most common for the imposition of joint and several liability, and they are asserted where the alleged negligent acts of more than one tortfeasor caused harm to the plaintiff. Id.

The concept of joint and several liability speaks as to how a judgment against multiple defendants can be satisfied. In its pure form, joint and several liability allows a plaintiff to decide from which defendant she would like to seek payment of her damages, which is the foundation of the 'plaintiff chooses' rule." Smith v. Tiffany, 419 S.C. 548, 568, 799 S.E.2d 479, 490 (2017) (Pleicones, C.J. dissenting).

Here, there is no cause of action to hold the Other Appellants liable for the judgment jointly and severally. The only legal theories asserted in the Complaint are against Vereen. The Complaint contends that Vereen, as a shareholder of the Company, breached fiduciary duties owed to Smith and the Company by diverting Company assets and by freezing Smith out of the Company. **(R. pp. 417-435)**. There is no cause of action asserted against the Other Appellants.

[5] Respondents did not plead joint and several liability in the Complaint.

The Complaint uses the word "conspiracy" on two (2) occasions, but use of the word conspiracy is not tantamount to pleading a cause of action for conspiracy, which has numerous specific and distinct elements. See Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.").

The master-in-equity never made a finding that the Other Appellants should be liable for the judgment under a conspiracy cause of action. Like the Complaint, the maser-in-equity uses the word "conspiracy," but the master-in-equity never issued a ruling finding the Respondents proved the elements necessary for a civil conspiracy. Under Appellate Court Rule 220(c), an appellate court may affirm any ruling upon any grounds appearing in the record. However, there are no grounds in the record to find that the Other Appellants should be held jointly and severally liable for the judgment. Additionally, there is no cause of action asserted against the Other Appellants to hold them liable for the judgment.

Accordingly, for the foregoing reasons, this Court should not apply the doctrine of joint and several liability to hold the Other Appellants liable for the judgment.

VI. AMALGAMATION

Appellants submitted their initial brief prior to the Supreme Court's decision in Pertuis v. Front Roe Restaurants, Inc., 817 S.E.2d 273 (2018). Pertuis makes clear that the master-in-equity erred by holding the Other Appellants liable for the judgment under an amalgamation theory.

In Pertuis, the Supreme Court, for the first time, recognized the amalgamation or single business enterprise doctrine. Id. at 280. Prior to Pertuis, the Court of Appeals considered the following factors in determining whether amalgamation was appropriate: (1) shared owners/shareholders among the corporations, (2) shared officers by the corporations, (3) shared

office location by the corporations, (4) shared employees among the corporations, and (5) evidence that the corporations present themselves to the public as sharing common interests. Magnolia North Prop. Owners Ass'n v. Heritage Cmntys., Inc., 397 S.C. 348, 360, 725 S.E.2d 112, 118 (Ct. App. 2012); Pope v. Heritage Cmtys., 395 S.C. 404, 417, 717 S.E.2d 765, 772 (2011).

In Pertuis, the Supreme Court completely departed from the framework previously used by the Court of Appeals. 817 S.E.2d at 280-81. The Supreme Court indicated that the Court of Appeals framework, at most, revealed that the operations of one corporation were "intertwined" with the operations of another corporation. Id. However, the Supreme Court stated emphatically that the "single business enterprise theory **requires a showing of more than the various entities' operations are intertwined**." Id. (emphasis added).

"[E]quitable principles govern the application of the single business enterprise remedy." Id. at 281. The single business enterprise theory should not be applied by the courts "without substantial reflection." Id. "The party seeking to pierce the corporate veil has the burden of proving that the doctrine should be applied." Id. In order to apply the single business enterprise theory, the court must find evidence of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." Id. d

The master-in-equity found that amalgamation was proper based upon the following finding:

> Arthur Vereen blurred the identity of his various entities. They shared the same office, employees, construction jobs, and shareholders. Mr. Vereen paid debts for one entity out of another entity's checking account. This created an accounting nightmare .... I conclude that Mr. Vereen used the various entities as an extension of himself to pay whatever debts he needed to pay, whether they were personal, family, or any of his corporations' debts. This was a classic amalgamation theory case.

(R. pp. 69-70).

The master-in-equity erred in holding the Other Appellants liable for the judgment under an amalgamation theory.[6] Like the trial court in Pertuis, the master-in-equity erred in failing to assign the burden of proof to Respondents, as the party seeking amalgamation. 817 S.E.2d at 281. The master-in-equity further erred in applying the doctrine without "substantial reflection" and in applying the doctrine without consideration of equitable principles.[7] Id. at 281; Drury Dev. Corp. v. Found Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008). The master-in-equity also erred in using pre-Pertuis factors to make her finding. The master-in-equity found the various entities were blurred together because they shared the same offices, employees, construction jobs, and shareholders. **(R. p. 69)**. These factors are insignificant for determining whether to apply the single business enterprise doctrine, and the master-in-equity erred in relying on them. See Pertuis, 817 S.E.2d at 280 (holding the single business theory requires a showing of more than the various entities' operations are intertwined).

The only other justification for the master-in-equity's ruling was her finding that Vereen commingled corporate funds with non-corporate funds. **(R. p. 69)**. This finding alone is insufficient to justify the application of the single enterprise doctrine. Id. at 281. In order to apply the single enterprise doctrine, there must be a finding of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the alleged blurring of the corporations together. Id. There is no such finding, and without such a finding, the master-in-equity erred in finding the Other Appellants should be liable for the judgment under an amalgamation theory.

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[6] The Supreme Court's decision in Pertuis makes it all the more clear that the master-in-equity erred by amalgamating individuals, trusts, and corporations together. That issue was fully argued in Appellants' Initial Brief.

[7] Equity does not favor the result in this case. Smith left the Company under false pretenses; Smith invested nothing in the Company; and while the Company was still operational, Smith competed with the Company by forming his own construction company and performing competing construction work.

Accordingly, for the foregoing reasons, this Court should find that the master-in-equity erred in holding the Other Appellants liable for the judgment under an amalgamation theory. Because there is no other theory articulated by the master-in-equity to hold the Other Appellants liable for the judgment, this Court should vacate the judgment against the Other Appellants in its entirety.

VII. UNCLEAN HANDS OF SMITH

Respondents argue Appellants failed to preserve their arguments pertaining to Smith's unclean hands. Initially, Respondents argue Appellants did not plead unclean hands. This argument overlooks clear and unmistakable language in Appellants' responsive pleading. In their responsive pleading, Appellants clearly asserted specific acts of Smith that constituted unclean hands. Appellants asserted the following:

> That while still alleged to be a member of [the Company], Smith performed work as E. Smith and Sons Construction, LLC ... and EES Construction and Consulting, Inc.
>
> That Smith, while still an employee, officer and[/]or director of [the Company], did perform work, under the name and license and/or on behalf of [the Company], without remitting to [the Company] payments made to him for said work.
>
> That Smith, during and after his employment, and while still an officer and[/]or director of [the Company], did perform work under the names of separate entities, thereby misappropriating a corporate opportunity for [the Company] for himself or his alternate companies.
>
> That Smith, during and after his employment, and while an officer and/or director of [the Company], did permit jobs using [the Company's] license, received compensation for his sole benefit, without notice to [the Company] or [the Company's] liability insurance carriers, thereby exposing [the Company] to possible uninsured and uncompensated liability.
>
> That Smith also drew a salary from [the Company] for a period during which he performed work not for [the Company's] benefit,

> was a disloyal employee of [the Company], or was misappropriating corporate assets or opportunities.
>
> That Vereen believes that Smith, E. Smith and Sons and EES should be required to account for outstanding amounts due to Vereen, individually, his companies, and [the Company].

(R. pp. 464-67).

At trial, Appellants presented ample testimony of Smith's unclean hands.[8] This testimony is cited fully in the Initial Brief of Appellants in Roman Numerals IV and V, and to avoid repetition, Appellants will not repeat it here. The master-in-equity erred in disregarding the unclean hands of Smith in issuing her order. Because the master-in-equity did so, this Court should reverse the ruling of the master-in-equity and remand this case for a full and complete judicial accounting.

VIII. PUNITIVE DAMAGES

The master-in-equity failed to engage in the constitutionally required analysis necessary to award punitive damages. Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 587-88, 686 S.E.2d 176, 185-86 (2009). Before awarding punitive damages, a trial judge **must** review the constitutionally of a punitive damages award by determining whether the award was reasonable under the following Gore guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Id. The master-in-equity

[8] While not necessary for preservation, Appellants also argued that the master-in-equity erred in failing to consider the unclean hands of Smith in Appellants' Rule 59(e) motion. **(R. pp. 86-87; R. p. 90; R. p. 97; R. p. 99; R. pp. 104-05)**.

plainly did not consider the Gore guideposts in awarding punitive damages; therefore, this Court must reverse the punitive damages award.

Appellants argue that such an error was harmless because the Gore guideposts are "largely duplicative" of the factors the master-in-equity considered, which are set forth in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). **(Respondents' Brief, p. 50)**. The Gore guideposts are not the equivalent of the Gamble factors. The first Gore guidepost—reprehensibility—calls for a five-part analysis not contemplated by Gamble. See Mitchell, 385 S.C. at 587, 686 S.E.2d at 185 ("In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident"). The second Gore guidepost—disparity between actual harm and potential harm—is not contemplated by Gamble. The third Gore guidepost—difference between punitive damages awarded by the jury and civil penalties—is also not contemplated by Gamble.

Therefore, contrary to Respondents' arguments, the Gamble factors are not the equivalent of the Gore guideposts. Because the master-in-equity did not engage in the Constitutionally required inquiry of considering the Gore guideposts, this Court should reverse the master-in-equity's award of punitive damages.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court reverse the master-in-equity's ruling in its entirety and remand this case for a new trial. On remand, this Court should instruct the trial court to order an independent forensic accounting as requested by the

Parties in their pleadings. If this Court refuses to reverse and remand, the Appellants respectfully request the following relief:

(i) Reverse/vacate the judgment in its entirety against the Other Appellants;

(ii) Reverse/vacate the award of prejudgment interest;

(iii) Reverse/vacate the award of punitive damages.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR and the Supreme Court Order of August 13, 2007.

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