

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge

Opinion No. 2018-UP-078 (S.C. Ct. App. Filed Feb. 7, 2018)

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA
CUSTOM CONVERTING, LLC, Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA
CUSTOM CONVERTING, LLC, Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH
WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems,
Inc., are the..... Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM
CONVERTING, LLC, are the..... Petitioners.

BRIEF OF PETITIONERS JOHN GANDIS AND ANDREA COMEAU-SHIRLEY

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I. STATEMENT OF ISSUES ON APPEAL

6. Did the Circuit Court err by holding Petitioners John Gandis (“Gandis”) and Andrea Comeau-Shirley (“Shirley”) individually liable for member oppression of Respondent David Wilson (“Wilson”)?
7. Did the Circuit Court err by concluding that Gandis and Shirley oppressed Wilson?
8. Did the Circuit Court err by holding that Wilson did not breach his fiduciary duty to CCC, Gandis, and Shirley?
9. Did the Circuit Court err in the manner in which it determined the value of Wilson’s interest in Carolina Custom Converting, LLC (“CCC”)?
10. Did the Circuit Court err by granting equitable relief to Wilson despite his unclean hands?

II. STATEMENT OF THE CASE

This case presents the novel question of whether members of an LLC may be held individually liable for actions that were taken to protect the LLC from another member’s relentless efforts to harm it. In a decision with far-reaching implications for the business climate throughout South Carolina, the Circuit Court held the two members who attempted to protect the business, Gandis and Shirley, individually liable to Wilson, who systematically plundered the company of its trade secrets, proprietary information, and customer base as he withdrew from the LLC, for member oppression. The Circuit Court ordered Gandis and Shirley to purchase Wilson’s interest in CCC without regard to the amount of their respective ownership interests in CCC and at a valuation that was plainly wrong because, among other errors, the Circuit Court failed to apply several statutory computational adjustments. Finally, the Circuit Court essentially excused Wilson’s demonstrated pattern of conduct that breached his fiduciary duty to CCC in which Wilson hid his side deals from Gandis and Shirley, charged personal expenses on CCC’s credit cards, and stole CCC’s intellectual property, then misappropriated it when he began seeking employment with, committing covert acts of self-dealing, and ultimately working for CCC’s competitors,

among other nefarious acts.

The Circuit Court's decision contravenes the legislature's express intent that LLC members should be shielded from individual liability for actions taken in the ordinary course of the LLC's business while simultaneously disregarding the statutory adjustments to the LLC's valuation, which the legislature intended to dissuade wrongful dissociations. The decision also flies in the face of South Carolina's jurisprudence and the oft-stated desire by the State's leaders to maintain a business-friendly climate and judicial restraint regarding the business judgment of private sector enterprises. For these reasons, and as explained further below, Petitioners respectfully petition the Court for certiorari to review the erroneous opinion of the Circuit Court.

A. Factual Background.

1. CCC's Formation

Gandis and Wilson formed CCC in November 2007 as equal partners. (R. p. 1773-74.) Prior to CCC's formation, Wilson owned and operated Eastern Film Solutions ("EFS"), which bought and sold polyester, plastic, and metalized films. (*Id.* at 1773.) Gandis and Wilson intended CCC's business to consist of perforating and slitting film. (*Id.*) At the time of CCC's formation, Wilson agreed to route EFS customers to CCC. (*Id.*) Gandis and Wilson agreed upon CCC's formation that Wilson would receive a monthly \$8,000 draw during CCC's startup phase, and he would be responsible for leading CCC's sales efforts. (*Id.* at 1774.) Gandis, who did not receive any monthly draw, was responsible for managing CCC's operations. (*Id.*) Gandis engaged Shirley, who is a Certified Public Accountant licensed in Georgia, to assist with issues relating to CCC's formation. (*Id.*)

In 2009, Gandis and Wilson agreed to offer a 10% interest in CCC to Shirley, with each of them reducing their respective interests by 5%. (*Id.*) Shirley accepted the offer. (*Id.*) Shirley has

never had any voting rights with respect to corporate decisions and is merely a non-voting minority member of CCC. (*Id.* at 1775.)

2. Wilson's Purchase of Excessive Inventory Causes Financial Distress

CCC initially flourished, earning a profit of over \$1 million in 2010. (*Id.*) These profits, however, created “phantom income” on which the members were taxed. (*Id.*) CCC's financial position declined in 2011, due largely to Wilson's ordering of significantly greater inventory than CCC could sell. (R. p. 1962-63 ¶ 23, 1967 ¶ 40, 1969 ¶ 48.) As a result, CCC's revenue in 2011 was less than its members' tax liability. (R. p. 1775.) Indeed, Wilson's tax obligation exceeded \$200,000, and he was unable to meet that obligation. (*Id.* at 1963 ¶ 25.)

3. Gandis' and Shirley's Efforts to Accommodate Wilson's Desire for More Immediate Cash from CCC to Meet His Personal Tax Obligations

Around Christmas 2010, Wilson admitted to Gandis that he was engaged in side deals that contravened their agreement when they formed CCC. (R. p. 1963 ¶ 26.) This revelation caused Gandis and Shirley to grow concerned that Wilson was not committed to fulfilling his fiduciary duty to CCC by acting in CCC's best interests. (*Id.* at ¶¶ 26-27.) Unbeknownst to Gandis and Shirley, Wilson made **more than \$1.7 million** in sales through his surreptitious side deals while he was receiving a monthly draw from CCC. (*Id.* at 1972 ¶ 63.)

In April 2011, Shirley met with Wilson to discuss CCC's diminishing financial returns and Wilson's desire for additional cash immediately despite his business' cash flow crisis. (*Id.* at 1964 ¶¶ 29-30.) Prior to the meeting, Shirley wrote that restructuring Wilson's position with CCC may benefit him, and that it was important that Wilson “not feel TRAPPED by his [membership in CCC] and realize that ... at this point in the game ... we can talk restructure of his participation in a way that should be a win-win.” (*Id.* at ¶ 30.)

Despite CCC's perilous financial position and the fact that CCC was no longer in the

“startup phase,” Wilson continued to insist that CCC pay him a monthly draw. (*Id.* at 1967-68 ¶ 42.) Neither Gandis nor Shirley received monthly draws at that time or any other time. (*Id.* at 1968 ¶ 43.) Wilson’s monthly draws resulted in delinquent payments to CCC’s vendors. (*Id.*) Despite Wilson’s and Gandis’ equal and identical membership interests, Wilson received almost \$200,000 more in distributions from CCC than Gandis received. In essence, Wilson wanted CCC to pay him regularly as though he were an employee but also wanted to maintain all the benefits of ownership while shielding him from business risks.

In an effort to alleviate some of the financial pressure on CCC while also accommodating Wilson’s desire for regular cash distributions (and not in an effort to “freeze out” Wilson), Gandis and Shirley discussed three options with Wilson on October 31, 2011: (1) Wilson could remain a member and begin being treated the same as Gandis and Shirley were treated by forgoing regular cash distributions so that cash could remain in the cash-starved business; (2) Gandis and Shirley could buy out Wilson’s interest in CCC (which would have eliminated Wilson’s tax obligation), and Wilson would become a salaried corporate officer with a bonus plan designed to enable Wilson to continue to profit from CCC’s growth; or (3) Wilson’s membership would be modified such that his tax obligation would be satisfied, and he would become a salaried corporate officer with a bonus plan designed to enable Wilson to continue to profit from CCC’s growth. (*Id.* at ¶ 45, 1969 ¶ 49.)

Gandis and Shirley did not present these options to Wilson because they wanted to drive him out of CCC, and indeed, none of the options involved Wilson’s departure from CCC. (*Id.* at ¶ 47.) Rather, they merely wanted to resolve CCC’s cash flow emergency, which required resolving whether Wilson wanted to be treated in the same manner that they were treated (meaning non-preferentially, as the LLC Act expressly requires) or as an employee with a bonus plan. (*Id.*)

See also S.C. Code Ann. § 33-44-405(a) (requiring pre-dissolution distributions to members to be made in equal shares). Wilson demonstrated just how committed he was to CCC by utterly failing to respond to the proposal despite Gandis' and Shirley's extensions of the deadline by which they needed a response. (*Id.* at ¶ 49.) Wilson further demonstrated how little he cared about CCC and its employees when he repeatedly threatened to liquidate the company (because he incorrectly believed he was authorized to do so unilaterally), including during the 2011 holiday season, which would have resulted in CCC's 23 employees immediately losing their jobs. (*Id.* at ¶ 50.)

4. Wilson's Self-Dealing and Systematic Efforts to Cripple CCC

In late 2011, Wilson told Gandis that his family was considering buying out Gandis' and Shirley's interests in CCC and asked if they would sell their interests to Wilson and his family for the same price at which Wilson's interest was valued. (*Id.* at ¶¶ 51-52.) Gandis and Shirley replied that they would, and Gandis offered to include the building that CCC occupied in the sale at a discounted price. (*Id.* at ¶ 52.) Gandis and Shirley soon discovered that Wilson was attempting to find buyers outside his family, though he uniformly refused to disclose to his business partners the names of the prospective buyers or the information that he was sharing with them. (*Id.* at ¶ 53.) Wilson never made an offer to purchase CCC outright in spite of his purported interest in doing so. (*Id.* at ¶ 54.)

On January 17, 2012 (only hours after discussing with Gandis CCC's most significant prospective deal and strategy for consummating it), Wilson, through his legal counsel, abruptly informed Gandis and Shirley, through CCC's legal counsel, that he intended to leave CCC. (*Id.* at ¶¶ 56-58.) The tenor of the conversation led CCC's counsel to believe that Wilson may abscond with CCC's trade secrets and other proprietary information. (*Id.* at ¶ 57.) Gandis suspected that Wilson would join one of CCC's competitors (FilmTech). (*Id.* at ¶ 59.)

Upon the advice of legal counsel, Gandis enlisted the help of law enforcement to ask Wilson to leave CCC's premises in an ultimately futile effort to protect CCC's trade secrets and proprietary information. (*Id.* at 1971-72 ¶ 60.) When he left the premises that day, Wilson made off with multiple computers, files, and other property that belonged to CCC. (*Id.* at 1972 ¶ 61.)

Wilson later returned two computers and a Blackberry that CCC owned after he copied, then completely deleted the computers' files and replaced the Blackberry's SIM card in an attempt to cover up his theft and misappropriation of CCC's trade secrets and proprietary information. (*Id.* at 1972-73 ¶ 64.) Gandis and Shirley then learned that Wilson had lied to them about seeking prospective buyers for CCC. (*Id.* at ¶ 65.) In truth, Wilson approached FilmTech on January 11, 2012, to seek employment with FilmTech. (*Id.*) Indeed, Wilson explicitly stated to FilmTech's owner that he intended to "move as much of the business [he] manage[d] at CCC to Filmtech as quickly as possible. In addition, [he would] work to bring prospective business that CCC ha[d] been working on ... over the past 3 to 6 months." (*Id.*) Rather than going to work for FilmTech, Wilson was hired by Neologic/Fresh Water (a company that had recently been started by Wilson's brother-in-law), another of CCC's competitors, where he ruthlessly executed his scheme to take as much of CCC's business and prospective business with him as possible. (*Id.* at 1974 ¶ 68.)

Wilson's departure caused CCC's customers and vendors to become concerned that it would not survive, and it lost the established credit that suppliers had extended the company. (*Id.* at 1978 ¶ 93, 95.) CCC began a rebranding initiative to try to repair the damage that Wilson inflicted on the company to no avail, and several months after Wilson left, Gandis and Shirley believed they had no choice but to start another film company, ZoiFilms, to escape the taint that hung over CCC due to Wilson's departure. (*Id.* at ¶¶ 93, 96-97.) After consulting with legal counsel, Gandis and Shirley agreed not to begin actively operating ZoiFilms until this litigation

was resolved, and they deposited every penny of the revenue earned by ZoiFilms into CCC and its business efforts. (*Id.* at ¶¶ 97-98.)

III. STANDARD OF REVIEW

An action for shareholder oppression is one in equity. *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). Likewise, a business dissolution and an action to determine the fair market value of an ownership interest of one or more dissenting business owners are actions in equity. *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 142-43, 641 S.E.2d 53, 57 (Ct. App. 2007) (citations omitted). Accordingly, the Court “may find facts according to [its] own view of the preponderance of the evidence.” *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 110 (2012) (citing *S.C. Dep’t of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011)).

IV. ARGUMENT

A. **The Circuit Court Erred by Imposing Individual Liability on Petitioners for Actions that Were Consistent with Their Statutorily-Imposed Fiduciary Duties to CCC and Each Other, and Were Taken in the Course of Their Duties as Members of a Limited Liability Corporation.**

The Circuit Court erroneously held Gandis and Shirley jointly and severally individually liable for member oppression and ordered them to purchase Wilson’s interest in CCC at a price of \$347,863.23. The Circuit Court’s ruling cannot withstand scrutiny under this Court’s jurisprudence, statutes governing corporations and companies, or fundamental principles of corporations or limited liability companies. Further, the Circuit Court’s decision, if allowed to stand, would set a precedent that is toxic to the State’s business climate. Indeed, allowing the Circuit Court’s judgment to stand will promote an environment in which the interests of a limited liability company are subordinate to the respective interests of the company’s individual members, who will avoid actions that could expose them to individual liability even where, as here, those

actions would benefit the company, and encourages litigation to circumvent the statutory capital account reductions for dissociating members.

1. Gandis' and Shirley's Actions Were Undertaken to Further and Protect CCC, and Thus Cannot Give Rise to Individual Liability.

It is well-settled in South Carolina that as a general rule, a member of an LLC may not be held personally liable for corporate acts or debts. S.C. Code Ann. § 33-44-303 (“the LLC Act”). Indeed, limiting the liability of a business’ owners, directors, officers, and employees is one of the central reasons for creating a corporation. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct. App. 2005) (quoting *Hunt v. Rabon*, 275 S.C. 475, 477-78, 272 S.E.2d 643, 644 (1980)). The LLC Act’s text and the State’s desire, which has been repeated on countless occasions by its courts and its Legislature, to maintain a business-friendly climate dictate that this well-settled principle should apply to members’ acts undertaken to protect the company from another member’s attempts to misappropriate its property and to protect non-voting minority members (as Shirley is here) from actions of the LLC’s managers.¹ Indeed, the LLC Act explicitly provides that the LLC is liable for a member’s or manager’s actions taken within the LLC’s ordinary course of business. S.C. Code Ann. § 33-44-302.

South Carolina courts have not addressed, however, whether a member of an LLC may be held personally liable for conduct other than fraud. *See, e.g., 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 344, 728 S.E.2d 448, 451 (2012) (“*Jade Street I*”), *superseded by 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 405 S.C. 384, S.E.2d (2013) (“*Jade Street II*”) (noting that whether an LLC member may be held personally liable for acts committed in furtherance of the LLC’s business “is a question of first impression in this State.”). But a joint resolution introduced

¹ The Circuit Court’s judgment is particularly inequitable to Shirley, whom the Circuit Court held equally liable as Gandis even though Shirley is a non-voting member who provides extensive services to CCC in exchange for her 10% interest in the company.

by multiple members of the South Carolina Senate specifically in response to this Court's initial decision in *Jade Street I* underscores the novelty of the legal question that this case presents. On April 10, 2012, four Senators sponsored a joint resolution, S. 1416, that referred to the Court's decision in *Jade Street I* in the first line of the resolution's text, and the resolution's recitals explicitly state that it is being introduced for the purpose of superseding that decision. To wit, Section 1 of the resolution provides that S.C. Code Ann. § 33-44-303 shall be recodified:

so that the clear and unambiguous intent of the General Assembly ... as expressed in the language of that section is that the limited liability act was intended by the General Assembly **to shield a member of an LLC from personal liability for actions taken in the ordinary course of business of the LLC.**

119-S. 1416 § 1, available at http://www.scstatehouse.gov/sess119_2011-2012/bills/1416.htm (emphasis added).

The LLC Act furthers that bedrock policy objective by strictly limiting the acts that may give rise to a member's personal liability. S.C. Code Ann. § 33-44-303. For instance, the LLC Act expressly provides that an LLC's failure to observe corporate formalities cannot be grounds for imposing personal liability on the LLC's members. *Id.* at § 33-44-303(b). Likewise, the LLC Act explicitly states that a member may not be held personally liable for the LLC's debts, obligations, or liabilities unless a provision to that effect is included in the LLC's articles of organization and the member to be held liable consented in writing to adopt or be bound by the provision. *Id.* at § 33-44-303(c). In contrast to personal liability, the LLC Act expressly provides that a member who fails to provide services or property to the LLC is obligated at the LLC's option to contribute money and capital to the LLC. *Id.* at § 33-44-402(a). In operation, an LLC's capital accounts are determined for each member, and these accounts affect members' respective distributional rights, *id.* at § 33-44-405, and their respective exposure to additional capital

contributions or obligations to return prior distributions, *id.* at §§ 33-44-406-407.

The LLC Act also allows the Circuit Court to dissolve an LLC under certain circumstances, such as “unlawful, oppressive, fraudulent, or unfairly prejudicial” conduct toward the member-petitioner by the individuals who control the LLC. S.C. Code § 33-44-801(4)(e). Section 801 permits the court to fashion equitable remedies other than dissolution in such cases, including ordering a buyout of the disgruntled member’s interest when “one or more members have engaged in fraudulent or unconscionable conduct....” S.C. Code § 33-44-801 Reporter Comments.

South Carolina courts have held that the LLC Act’s liability shield may be pierced only where a member engages in such extreme acts as conversion of corporate funds or fraud. *See, e.g., Worthy*, 362 S.C. at 319, 608 S.E.2d at 155 (evidence indicated that member may have engaged in fraud, so summary judgment in the member’s favor on grounds that he could not be held personally liable for possibly fraudulent conduct was inappropriate); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 208-09, S.E.2d , 720 (Ct. App. 2009) (member could be held individually liable for conversion and/or fraud for personally disbursing corporate funds from corporate bank account, among other acts). Courts, however, have not identified conduct short of fraud for which a member may be held personally liable, however. *See, e.g., 16 Jade St.*, 405 S.C. at 390, S.E.2d at 773 (citation omitted) (declining to address whether LLC member may be held liable for negligent acts in furtherance of LLC’s business).

Here, the Circuit Court took the extreme and legally unsupported step of holding Gandis and Shirley personally liable for alleged oppression of another member. (R. pp. 1770-89.) As a threshold matter, Gandis and Shirley vehemently deny that they oppressed or “froze out” Wilson, and the Circuit Court erred in so holding. Nonetheless, there can be no dispute that Gandis’ and Shirley’s acts were not so egregious as to constitute fraud, and thus they may not, as a matter of

law, be forced to purchase Wilson's interest pursuant to the LLC Act. In fact, the record evidence shows that Gandis's and Shirley's actions that the Circuit Court deemed oppressive were taken to preserve CCC to the greatest extent possible as the company's cash flow ebbed and Wilson looted the company of several of its most valuable assets.² In particular, Gandis and Shirley:

- presented three options to Wilson during a cash flow crisis largely created by Wilson's unrestrained spending on inventory intended to allow Wilson to remain affiliated with CCC as either a member or employee while also breathing life into the company (*id.* at 1963 ¶ 45, 1969 ¶ 49);
- negotiated in good faith with Wilson in 2011 and 2012 to sell their respective interests in CCC to Wilson after Wilson stated that he was interested in purchasing the company outright (*id.* at 1970 ¶¶ 51-52);
- terminated Wilson's access to CCC's server on January 16, 2012, after they were led to believe by Wilson's counsel that he would leave the company imminently (*id.* at 163:2-17, 435:14-436:13);
- attempted to protect CCC's intellectual property and trade secrets by ejecting Wilson from the company's premises on January 17, 2012 (*id.* at 164:18-165:8); and
- attempted to recover the intellectual property and trade secrets that Wilson stole on January 17, 2012 (*id.* at 1706-08), among other acts.

In sum, the actions for which the Circuit Court held Gandis and Shirley personally liable were rooted in a desire to protect CCC, often against Wilson's brazen attempts to sabotage the company for his personal gain and self-dealing. Notably, Gandis and Shirley had no obligation to perform any of these tasks. They undertook each act simply because they believed doing so was most beneficial to CCC. In other words, Gandis and Shirley sought to hold as trustees for CCC "property, profit, or benefit" that they derived in CCC's conduct, precisely as the LLC Act requires. S.C. Code Ann. §33-44-409(b)(1). As such, even if Gandis's and Shirley's actions can

² Critically, the Circuit Court did not deem Gandis' or Shirley's "oppressive" acts fraudulent or unconscionable. (R. at 1770-92.) Presumably because the LLC Act requires a finding that a member's conduct was fraudulent or unconscionable to order a member to purchase another member's interest in an LLC, the Circuit Court baldly stated for the first time in its order denying Gandis' and Comeau-Shirley's motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure that their conduct was unconscionable. (*Id.* at 1795.) The Circuit Court did not deem Gandis' or Shirley's acts to be fraudulent. (*Id.*)

be considered oppressive (which Gandis and Shirley vehemently deny), they are far from so egregious that, as in cases of fraud or embezzlement of corporate funds, they should give rise to personal liability.

Further, each of Gandis' and Shirley's "oppressive" actions were taken within the ordinary course of their responsibilities as members of CCC. Plainly, Gandis and Shirley had a fiduciary obligation (as did Wilson) to act in the best interests of CCC at all times in their conduct or winding up of CCC's business. S.C. Code Ann. § 33-44-409(b). Gandis and Shirley engaged in the above-discussed acts that the Circuit Court deemed "oppressive" in response to Wilson's pattern of underhanded conduct that was designed to strip-mine CCC of its most valuable assets on his way out the door. The Circuit Court apparently believed that Gandis and Shirley should not have responded to Wilson's clandestine efforts to seek alternative employment and take CCC's trade secrets and proprietary information with him. After all, the Circuit Court faulted Gandis and Shirley for ejecting Wilson from CCC's premises and demanding the return of CCC's property that contained its trade secrets and proprietary information, among other acts. (R. p. 1778.) Had Gandis and Shirley failed to take every possible measure to protect CCC's assets (as the Circuit Court advocated) from Wilson's devious actions, they almost certainly would have breached their fiduciary duty to CCC by failing to act in the company's best interests in the conduct of its business.

In sum, the Circuit Court's decision, if permitted to stand, places LLC members in a no-win situation: if a member raids the LLC of its assets in violation of his fiduciary duty, the other members have no choice but to allow the raid to proceed unabated lest they be found to have oppressed the raiding member by trying to protect the LLC and thwart the raid. This result contravenes the very nature of the fiduciary duty that the LLC Act expressly imposes on an LLC's

members and cannot be allowed to stand.

2. The Circuit Court's Decision Sets a Precedent that Significantly Harms the State's Business Climate and Should Not Be Permitted to Stand.

The corrosive effects on the business climate throughout South Carolina of the Circuit Court's decision, if permitted to stand, dictate that the Circuit Court's judgment should be reversed. Taken to its logical conclusion, the Circuit Court's judgment would permit a member of an LLC who engages in all manners of misconduct, such as misappropriation of trade secrets, circumvention of corporate opportunities, or breach of the LLC's articles of incorporation, to recover for member oppression because the LLC's other members attempted to stop him from harming the LLC through his misconduct. Even worse, the Circuit Court would hold the members who attempted to stop the misconduct personally liable for doing so, without regard to the size of their respective ownership interests. Worse still, the member who engaged in the misconduct would pay no penalty whatsoever for his misdeeds that tear at the very essence of the relationship among members of an LLC in spite of the various statutory provisions designed by the legislature to discourage wrongful dissociation. S.C. Code Ann. §§ 33-44-602, -603(2)(a), -701(f).

The Circuit Court's decision would result in members of an LLC either walking on proverbial eggshells in their dealings with one another to avoid the possibility that their conduct may be construed as oppressive or allowing a member to raid the LLC of its most valuable assets for fear that attempting to stop the raid would lead to personal liability to the raiding member. Either result is antithetical to the nature of an LLC, in which members are bound to act in the best interests of the company and are protected from personal liability so long as they discharge their duties in accordance with the law and the LLC's governing documents. Because the Circuit Court's decision would corrode the business climate by promoting mistrust and self-serving conduct by LLC members, it should be reversed.

B. The Circuit Court Erred by Holding that Gandis and Shirley Oppressed Wilson.

1. The Circuit Court Erred by Failing to Find that Gandis' and Shirley's Actions Were Business Judgments that Should Not Be Disturbed by the Court.

The Circuit Court found that Gandis and Shirley “froze-out” and “oppressed” Wilson as the other member of CCC by:

- Initiating an “Exit Strategy” for Wilson on August 16, 2011;
- Giving Wilson the option to eliminate the tax burden from prior phantom income allocations, including the transition from member to employee in order to keep receiving the \$8,000 a month he had been receiving and prevent future phantom income issues or remain a managing member and be treated as such;
- Using company funds to repay a line of credit held by Gandis through which he funded CCC since its inception rather than disbursing that money solely to Wilson as a tax distribution (to cover his tax liability);
- Monitoring Wilson’s company emails when he, like Gandis, Shirley, and all of CCC’s employees and members, had no expectation of privacy, as expressly stated in CCC’s employee handbook and evidenced by Wilson’s ability to access accounts of others;
- Informing Wilson that he may not receive distributions for two or more years;
- Managing CCC’s money supply in a way Wilson contends made it appear as if cash was more limited than it actually was;
- Limiting Wilson’s access to CCC financial information so as to restrict his ability to export or otherwise distribute company data as of January 7, 2012;
- Removing Wilson from signatory authority on the operating account and revoking his ability to make wire transfers on behalf of CCC;³
- Excluding him from certain discussions concerning CCC business operations (although the discussions did not pertain to the subject matters which the statute outline requires full member involvement);
- Physically locking Wilson out of the company following his resignation;

³ Significantly, Wilson testified that he did not learn that he was unable to write checks on behalf of CCC until he discovered that he could not execute his plan to effectively steal from CCC by writing a check to himself unbeknownst to Gandis and Shirley. (R. pp. 418:5-419:3.) Wilson did not learn that he could not make wire transfers on behalf of CCC until reviewing documents produced in discovery in this litigation. (*Id.* at 419:14-17.) Wilson did not write a single check or make a single wire transfer on behalf of CCC when he was a member.

- Demanding Wilson return CCC's computer and Blackberry following his resignation which he had removed while claiming to the law enforcement officer present that he was only taking personal assets from his office;
- Terminating CCC funded cell phone plans for Wilson and his family while maintaining coverage for Gandis after accepting Wilson's resignation;
- Terminating health insurance coverage for Wilson and his family after accepting his resignation as of the month following his resignation;
- Forming ZOi after Wilson's departure from CCC to compete with the company.

(R. pp. 1777-78). Based on these findings, the Circuit Court directed Gandis and Shirley to individually buy-out Wilson's interest in CCC for \$347,863.23. (*Id.* at 1789). This finding is factual and legal error as Wilson was neither "oppressed" nor "frozen-out." Further, the Circuit Court's calculation of Wilson's interest is incorrect due, in part, to the omission of subsequent adjustments required by the LLC Act.

The Circuit Court's order ignores basic realities of business, such as the need to adjust business operations according to the company's financial condition. Expenses must be paid from the business' revenues before a distribution to members may be made. When revenues fall, owners are not able to continue to pay themselves out of cash flow and debt. These are not "oppressive acts" as the Circuit Court erroneously concluded, but instead were business decisions made and acted upon to address ordinary business issues.

The judiciary has long respected and looked to the business judgment rule to evaluate whether actions by those in power within a business are actionable because acts that appear nefarious or unlawful may very well be justified reasonable business decisions under the circumstances. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Deytens*, 291 S.C. 214, 217 (Ct. App. 1987). The Fourth

Circuit Court of Appeals applied South Carolina law in *Kreischer v. Kerrison Dry Goods Co.*, Nos. 97-1230, 97-1800, 1999 U.S. App. LEXIS 1097, *12-14 (4th Cir. Jan. 26, 1999), to hold that defendants were not engaged in a series of oppressive to squeeze plaintiffs out of their minority interests, but rather made business decisions that the court would not disturb. The business judgment rule is codified in the LLC Act. *See* S.C. Code Ann. § 33-44-409(c).

The actions taken by Gandis and Shirley were not oppressive acts, but rather were fundamental business decisions taken to protect CCC from Wilson's rampant misconduct and self-dealing. For example, in 2011 when there was a cash flow problem at CCC stemming from massive inventory purchases by Wilson and market difficulties resulting from the massive economic recession that took place at that time, Gandis and Shirley decided that CCC could no longer afford to advance \$12,000 per month to Wilson. This was a business decision that was made for the well-being and survival of the company, not to "freeze out" Wilson. Similarly, the decisions to limit Wilson's access to CCC's trade secrets and removing him from the company's premises were made to protect CCC from Wilson's theft of trade secrets. This effort proved futile, as there is no dispute that Wilson made off with and subsequently misappropriated CCC's trade secrets and proprietary information. Accordingly, the Circuit Court erred when it failed to find that Gandis' and Shirley's actions were business decisions that the judiciary should not disturb, and the Circuit Court's judgment should be reversed.

2. The Circuit Court Erred by Finding that Gandis and Shirley Engaged in Oppressive Conduct.

Even if Gandis' and Shirley's actions were not business decisions that are subject to the business judgment rule, they could not be considered to be oppressive. The LLC Act empowers an LLC member to "maintain an action against a limited liability company or another member or manager for legal or equitable relief...to enforce: (1) the member's rights under the operating

agreement; (2) the member's rights under this chapter; and (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company." S.C. Code Ann. § 33-44-410. The Act allows the court to dissolve an LLC under certain circumstances, including a member's showing that "the managers or those in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." *Id.* at § 33-44-801(4)(e). The LLC Act also permits the court to fashion equitable remedies other than dissolution in such cases, including ordering a buyout of the disgruntled member's interest when "one or more members have engaged in **fraudulent or unconscionable conduct**...." *Id.* at Reporter Comments to § 33-44-801 (emphasis added).

South Carolina courts have declined to fashion a standard for determining the conduct that constitutes shareholder/member oppression, instead opting to consider shareholders'/members' conduct on a case-by-case basis. In *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), this Court articulated the analysis used to determine whether a majority shareholder in a corporation oppressed a minority shareholder.⁴ The Court recognized "that the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case" which should be determined on a case-by-case analysis. *Id.* at 602, 541 S.E.2d at 266. "Although [the court] declined to set out specific factors in *Kiriakides*, [it] observed several commonly considered ones including: eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation [and] withholding information from minority

⁴ The case established how to determine if majority shareholders acted oppressively within the meaning of S.C. Code Ann. § 33-14-310 which is similar to § 33-44-801.

shareholders.” *Ballard v. Roberson*, 399 S.C. 588, 594, 733 S.E.2d 107 (2012). The *Ballard* court noted that an oppressed minority shareholder “faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment.” *Id.* at 595.⁵

“Freeze out” and “squeeze-out,” meaning “the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control or utilization of some legal device or technique, to eliminate from the enterprise one or more owners or participants,” *Kiriakides*, 343 S.C. 587 at 604, 541 S.E.2d at 267 n.26, are used interchangeably. “Common freeze out techniques include termination of a minority shareholder’s employment, the refusal to declare dividends, the removal of the minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation.” *Id.* at 604-05, 541 S.E.2d at 267. “The primary vulnerability of a minority shareholder is the specter of being locked in...having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.” *Id.* at 605, 541 S.E.2d at 267 (quotation omitted). “The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion [and] [t]he court should be cautious...so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.” *Id.* at 598, 541 S.E.2d at 263 (quoting S.C. Code Ann. § 33-14-300 cmt. 2(b)). This cautionary admonition looms large in this case. The Court continued:

[W]e do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party’s reasonable expectations have been frustrated by majority shareholders. To examine the reasonable expectations of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in

⁵ It should be noted that *Kiriakides* and *Ballard* involved corporations, not LLCs. Neither this Court nor the Court of Appeals has addressed whether or to what extent the holdings in those cases apply to LLCs.

forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33–14–300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.

Id. at 599, 541 S.E.2d at 264. Importantly in the context of this case “[S]ection 33–14–300 does not place the focus upon the rights or interests of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, i.e., whether they have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder.” *Id.* at 600, 541 S.E.2d at 265.

Kiriakides involved a family owned close corporation, Atlas, in which the brother held the majority share. *Id.* at 591. His siblings, who were the plaintiffs in the case, were minority shareholders in Atlas. *Id.* The siblings sought judicial dissolution of the company on the ground that they were oppressed. *Id.* at 593. The Court agreed that the plaintiffs had been oppressed because, among other factors, the majority shareholder:

- paid a minority shareholder less than what she was owed;
- transferred 21% of a wholly-owned subsidiary to his children instead of to a partnership that included the minority shareholders; and
- maintained extremely low buyout options for the minority, offering them \$4,000,000 in 1998 when one minority had been told by an accountant in 1995 that his interest alone was worth \$10,000,000.

Id. at 603-06, 541 S.E.2d at 266-68. The Court also noted that there was no market for the minority’s stock, which supported a finding of oppression. *Id.* at 605, 541 S.E.2d at 267 n.29 (citation omitted).

Critically, the Court held that the majority shareholder engaged in fraud in numerous respects. *Id.* at 594-96, 541 S.E.2d at 261-62. Specifically, the Court found that the transfer of 21% of the wholly-owned subsidiary to his children was fraudulent. *Id.* at 595-96, 541 S.E.2d at

262. Based on the majority shareholder's fraudulent conduct and oppressive actions toward the minority shareholders, the Court affirmed the lower court's judgment that the company should be dissolved on grounds of shareholder oppression. *Id.* at 606-07, 541 S.E.2d at 267-68.

Gandis' and Shirley's actions plainly do not rise to the level that the *Kiriakides* and *Ballard* courts deemed "oppressive." For instance, Gandis' and Shirley's actions of (1) giving Wilson the option to eliminate the tax burden by transitioning from member to employee or to remain a member and (2) initiating an "exit strategy" for Wilson were not motivated by a desire to shut out Wilson. To the contrary, Gandis and Shirley afforded Wilson the option to remain a member of CCC. Moreover, Gandis' and Shirley's actions immediately before and following Wilson's resignation that the Circuit Court deemed oppressive, such as ejecting Wilson from company premises, demanding the return of the electronic devices that CCC issued to Wilson, and terminating service on Wilson's CCC-funded cell phone, were nothing more than (ultimately futile) efforts to secure CCC's proprietary information against Wilson's attempts to steal it. Therefore, Wilson was not "oppressed" or "frozen-out" of the business by Gandis and Shirley. He did not find himself in a "trapped investment" or suffering "indefinite exclusion from participation in business returns." Rather, Wilson took issue with the business decisions made by his fellow CCC members, many of which Wilson necessitated through his pilfering of CCC's trade secrets and proprietary information. In short, the Circuit Court held Gandis and Shirley liable for acting in the best interests of CCC, while it turned a blind eye to Wilson's strip-mining of CCC's intellectual property and trade secrets. Thus, the Circuit Court's judgment contravenes the LLC Act and should be reversed.

3. The Circuit Court Erred by Rewarding Wilson, the Primary Party Who Engaged in Deceptive and Destructive Conduct.

In *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015), the Court of Appeals

affirmed a finding that a minority shareholder of a family-owned auto service company was not oppressed because he engaged in numerous acts of misconduct and was the primary beneficiary of those acts. The minority shareholder, Son, brought an action for oppression and breach of fiduciary duty, among other claims, against the other shareholder family members and the company. *Id.*

The court rejected Son's claims:

Based on the evidence in the record, Son seems to be the primary party who engaged in illegal activities and benefited from those activities. He received the benefits of his casing scheme. He was not reelected as president of the Company, but was elected to serve as vice-president and receive the same salary. He chose to leave the Company and as a result to stop receiving a salary and other benefits he and the other stockholders enjoyed.... He was the one stockholder who refused to repay the Company for personal expenses.

Id. at 55-56, 770 S.E.2d at 419.

As in *Mason*, there should be no doubt here about which party primarily engaged in and profited from underhanded conduct. As discussed in Sections I(A)(3)-(4), *supra*, Wilson willfully engaged in a course of conduct that ran roughshod over the basic principles of cooperation and mutual obligation at the core of the relationship among LLC members. Like the Son in *Mason*, Wilson reaped the rewards of his theft of CCC's trade secrets and proprietary information. Like the Son in *Mason*, Wilson chose to leave CCC and accordingly stopped enjoying the benefits of ownership in the company. Wilson enjoyed even more benefits than the Son in Wilson enjoyed, however. In particular, Wilson received monthly advances of \$8,000-12,000, which Gandis and Shirley did not enjoy. As a result, Wilson was paid approximately \$100,000 more than Gandis and Shirley. Wilson also erased company computers, replaced SIM cards in company phones, shared confidential and trade secret company information in seeking a new investor partner, had numerous options to assist on the tax issue confronting the company due to phantom income under the tax code, and held a superior position to the success or failure of the company due to the control

of its sales and customers.

Despite Wilson's rampant deceitful conduct and the more favorable financial treatment he received than Gandis and Shirley, the Circuit Court concluded that Gandis and Shirley oppressed him when they took a series of steps to try to reverse CCC's downward trajectory and protect CCC from Wilson's mendacity. Put simply, the evidence of record cannot support the Circuit Court's conclusion, and, as the Court of Appeals held in *Mason*, the party who primarily engaged in deceptive actions should not be rewarded for that conduct. Thus, the Circuit Court's judgment should be reversed.

C. The Circuit Court Erred in Holding that Wilson Did Not Breach His Fiduciary Duty to CCC.

As detailed previously, Wilson engaged in a pattern of conduct while he was a member of CCC that was specifically intended to benefit himself and his subsequent employer at the expense of the company and its other members. Wilson's concerted raiding of CCC's customers, trade secrets, and proprietary information cannot be construed as conduct that comports with the statutorily-imposed fiduciary duties that Wilson owed to CCC, Gandis, and Shirley. *See* S.C. Code Ann. § 33-44-409(b)-(c).⁶ Thus, the Circuit Court's confounding ruling that Wilson did not breach his fiduciary duty is wholly without legal support and should be reversed.

D. The Circuit Court Erred in Awarding a Remedy to Wilson that Is Not Provided by the Statute and in Its Valuation of Wilson's Interest in CCC.

The Circuit Court erred in ordering Gandis and Shirley, not CCC, to purchase Wilson's interest in CCC. The Circuit Court failed to articulate any legal basis for ordering individual members of an LLC—particularly a non-voting member (Shirley)—rather than the LLC itself to

⁶ Former Chief Justice Toal characterized the duty of loyalty of a member to an LLC codified in S.C. Code Ann. § 33-44-409 as "mandatory." Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench*, 56 S.C. L. Rev. 275, 289 (2004-05).

purchase another member's interest. The LLC Act offers no support whatsoever for the Circuit Court's order. *See* S.C. Code Ann. § 33-44-801. Further, although the LLC Act technically permits the Circuit Court to order the purchase of a member's interest, such an order was not warranted in this case because, as discussed previously, the acts that the Circuit Court deemed oppressive were merely defensive measures intended to protect CCC from Wilson's unyielding destruction of the company, not acts of fraud.

The Circuit Court also erred in determining the value of Wilson's interest by relying on the adjusted December 30, 2011 valuation, which greatly inflated the value of Wilson's interest while failing to consider his actions that greatly devalued CCC. (R. p. 1789). In particular, the Circuit Court failed to consider Wilson's theft of CCC's trade secrets and proprietary information, the results of Wilson's "scorched earth" litigation tactics, or Wilson's raiding CCC's customer base when he left the company. The Circuit Court effectively bestowed a windfall upon Wilson by incorrectly basing the value of his interest on CCC's financial position before his deceitful conduct stripped CCC of its most valuable assets and refusing to penalize Wilson for his duplicitous actions. As a result, the Circuit Court's judgment should be reversed.

E. The Circuit Court Erred by Awarding Equitable Relief to Wilson Despite Wilson's Unclean Hands.

It is axiomatic that a party who has unclean hands is not entitled to equitable relief. *See Straight v. Goss*, 383 S.C. 180, 207 (Ct. App. 2009) (finding the minority shareholder's "own inequitable conduct came directly to bear on the transactions of which [he] now complains."). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* 383 S.C. at 206. Indeed, the Court of Appeals has established that a party's request for judicial dissolution should be rejected when that party has unclean hands. *Mason*, 412 S.C. at 46, 770 S.E.2d at 414.

Despite this precedent and Wilson's unclean hands, the Circuit Court improperly awarded equitable relief to Wilson.

Wilson agreed at the outset of his membership to convert all of his EFS customers into CCC and to dedicate his full-time efforts to CCC's success in exchange for a monthly draw. Gandis personally provided the draw. However, Wilson did not uphold his end of the bargain. Instead, Wilson orchestrated a steady stream of side deals that he actively concealed from the other members.⁷ Wilson also shared CCC's trade secrets and confidential information with competitors when he was attempting to get a new job under the false pretense of selling the business. (*See* R. p. 1788) ("Evidence at trial demonstrated that Neologic/Freshwater used CCC's confidential information and that CCC was justified in bringing the trade secrets claim."). Finally, in a demonstration that he will stop at nothing to protect himself at the expense of anyone or anything that may hold him accountable for his actions, Wilson destroyed evidence before and during this litigation. (R. p. 1312; R. pp. 1314-17). Wilson's pre-litigation evidence destruction is particularly troubling because he received a letter advising him of his obligation to preserve evidence the day after taking CCC's computers and Blackberry. (R. pp. 1706-08). Wilson's conscious destruction of evidence denied Gandis and Shirley their right to conduct complete discovery in this case. Wilson's egregious pattern of duplicitous conduct should have resulted in the denial of his request for equitable relief, and the Circuit Court's award of equitable relief should be reversed accordingly.

CONCLUSION

This Court should reverse the Circuit Court's judgment because, as discussed above, the

⁷ Discovery showed that Wilson transacted over **\$1.7 million** in illegal side deals while being paid with Gandis' personal money. (R. pp. 1318-27). Gandis was unaware his partner was conducting side deals for his own gain which could and should have come through CCC.

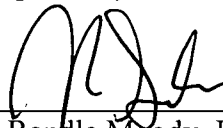
Circuit Court's judgment contravenes the LLC Act and the public policy interests undergirding it. Furthermore, the Circuit Court overlooked or misapprehended several matters of fact and law when it:

1. Improperly concluded that member oppression occurred.
2. Improperly concluded that individual members (including a non-voting member) of the LLC and not the LLC had to buyout Wilson's interest.
3. Applied an incorrect legal standard and found that Wilson did not breach his fiduciary duties he owed to CCC, Gandis, and Shirley.
4. Based the remedy awarded to Wilson on an incorrect valuation that afforded Wilson a windfall.
5. Improperly awarded an equitable remedy to Wilson despite his unclean hands.

As a result, this Court should reverse the Circuit Court's judgment.

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Respectfully submitted,



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December 6, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 10 2018

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. Garrison Hill, Circuit Court Judge

Opinion No. 2018-UP-078 (S.C. Ct. App. Filed Feb. 7, 2018)

DAVID WILSON, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF CAROLINA
CUSTOM CONVERTING, LLC, Plaintiff,

v.

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, ZOI FILMS, LLC, AND CAROLINA
CUSTOM CONVERTING, LLC, Defendants,

JOHN GANDIS AND ANDREA COMEAU-SHIRLEY, Third-Party Plaintiffs,

v.

CAROLINA CUSTOM CONVERTING, LLC,
..... Third-Party Defendant and Counterclaim Plaintiff,

v.

DAVE WILSON, STEVE NORVELL, NEOLOGIC DISTRIBUTION, INC. AND FRESH
WATER SYSTEMS, INC.,

Of Whom David Wilson, Neologic Distribution, Inc., and Fresh Water Systems,
Inc., are the..... Respondents,

and

JOHN GANDIS, ANDREA COMEAU-SHIRLEY, AND CAROLINA CUSTOM
CONVERTING, LLC, are the..... Petitioners.

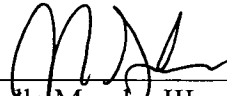
CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellants this 6th day of December
2018, on counsel for Wilson and counsel for CCC in the underlying action by depositing the same
in the United States Mail, first class postage prepaid, as follows:

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