

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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.

REPLY BRIEF OF PETITIONERS JOHN GANDIS AND ANDREA COMEAU-SHIRLEY

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JAN 30 2019

S.C. SUPREME COURT

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I. ARGUMENT

A. **Notwithstanding Wilson's Attempts to Whitewash His Own Perfidy by Cherry-Picking the Record, Gandis' and Shirley's Actions that the Trial Correct Incorrectly Deemed "Oppressive" Were Undertaken Solely to Protect the Company.**

Conveniently absent from Respondent David Wilson's ("Wilson") Brief in Reply to Brief of Petitioners John Gandis and Andrea Comeau-Shirley ("Wilson's Brief") is any reference to his systematic campaign to steal Petitioner Carolina Custom Converting's ("CCC") trade secrets that understandably led Petitioners John Gandis ("Gandis") and Andrea Comeau-Shirley ("Shirley") to take action to protect CCC. Those measures included:

- changing the locks on CCC's building;
- removing Wilson from signatory authority on the operating account and revoking his ability to make wire transfers on behalf of CCC (which Wilson did not discover until he attempted to write a check to himself unbeknownst to Gandis and Shirley, the only check he ever attempted to write on CCC's behalf during his membership);
- 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; and
- terminating CCC-funded cell phone plans for Wilson and his family after accepting Wilson's resignation.

(R. p. 1777-78.) Wilson apparently believes that Gandis and Shirley should have simply allowed him to make off with CCC's intellectual property unabated, as he complains in his Brief about the termination of his cell phone service after he resigned from the company. (Wilson's Brief at 17.)

While Wilson would have the Court believe that he was an innocent member who played no role in the circumstances that led him to resign (e.g., wrongfully dissociate) and forced Gandis and Shirley to take drastic action to protect CCC, the record tells a decidedly different story. Indeed, the record shows that Wilson lied to Gandis and Shirley about his supposed effort to find buyers for CCC; secretly approached one of CCC's chief competitors (FilmTech) to seek

employment and volunteered 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[;]” and ultimately siphoned off as much of CCC’s business and prospective customers with him as possible when he was hired by Neologic/Fresh Water, another competitor of CCC. (R. p. 1970-74.) Wilson also earned more than \$1.7 million through his secret side deals while he was a member in—and earning a monthly draw from—CCC. (*Id.* at 1972 ¶ 63.) Neither Gandis nor Shirley received a monthly draw. (*Id.* at 1968 ¶ 43.)

Rather than acknowledge his own extreme misconduct, Wilson recycles the same strategy in his Brief that admittedly worked for him at trial: he shifts the focus to Gandis’ and Shirley’s conduct. To wit, Wilson strips snippets of evidence of its context to weave a distorted narrative of two members who were determined to force the third member out of the company due solely to their greed and not to any misconduct on the part of the third member. Wilson’s story suffers from one fatal flaw: it is fiction.

For instance, Wilson cites emails that Shirley wrote regarding Gandis’ and her proposals to Wilson to restructure the ownership interests held by each member and other restructuring ideas of Shirley’s and Gandis’, which Wilson claims show that Shirley was surreptitiously trying to force him out of CCC. (*See, e.g.*, Wilson’s Brief at 25-29.) Contrary to Wilson’s claims, Gandis and Shirley sought to restructure CCC in an effort to save the company from insolvency and simultaneously meet Wilson’s desire for additional immediate cash. (R. p. 1964 ¶¶ 29-30.) In particular, 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.) Indeed, Gandis’ and Shirley’s October 31, 2011 offer that Wilson claims constitutes shareholder oppression afforded Wilson the option to remain a member of CCC if he so chose. (R. 1999-2005.) Wilson tacitly acknowledges that he immediately set out to compete directly against CCC following his wrongful dissociation despite his continued ownership in the company when he argues that he owed “no special duty to [CCC] or [Gandis and Shirley]” and was thus free to compete against CCC upon his wrongful dissociation. (Wilson’s Brief at 38.)

In short, Gandis and Shirley’s actions do not approach the “commonly considered” acts that, according to this Court, could constitute shareholder oppression, such as “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 shareholders.”¹ *Ballard v. Roberson*, 399 S.C. 588, 594, 733 S.E.2d 107 (2012) (discussing *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001)). Rather, their discussions with Wilson about restructuring CCC were motivated by Gandis’ and Shirley’s shared desire to improve CCC’s precarious financial position caused largely by Wilson’s mismanagement of inventory and Wilson’s monthly draw. Likewise, the record demonstrates that Gandis’ and Shirley’s actions after they discovered Wilson’s campaign to steal CCC’s trade secrets were motivated exclusively by their desire to protect the company and its employees.

If the Circuit Court’s judgment is permitted to stand, members of LLC will have the perverse incentives to allow an LLC to founder rather than attempt to restructure its membership if its membership structure is harming the company financially and to allow the company to be

¹ Wilson complains in his Brief that he has been denied access to CCC’s financial information since his resignation, which he inaccurately characterizes as an “ouster.” (Wilson’s Brief at 30.) Yet again, Wilson conveniently fails to offer any context concerning why he may have been denied access to such records: he stole CCC’s intellectual property and trade secrets and immediately misappropriated them for the benefit of one of CCC’s chief competitors, Neologic/Freshwater. In essence, Wilson placed Gandis and Shirley in the impossible position of having to either share CCC’s confidential financial information with him while he was competing directly against CCC or deny him such access in an effort to protect the company and in so doing provide ammunition for Wilson’s oppression claim.

raided of its intellectual property rather than take steps to stop such a raid. Such a judgment would promote uncertainty and distrust among LLC members, and significantly expand the actions that could be deemed oppressive to encompass acts designed to benefit the LLC, thereby subverting core tenets of the LLC Act. Accordingly, the Circuit Court erred when it concluded that Gandis and Shirley oppressed Wilson, and its judgment should be reversed.

B. Wilson Fails to Cite Any Authority Supporting the Circuit Court’s Unprecedented Conclusion that Gandis and Wilson May Be Held Personally Liable for Acts Taken in Furtherance of CCC’s Business.

Wilson makes the remarkable assertion in his Brief that the Circuit Court “did not impose personal liability for corporate acts or debts” when it ordered Gandis and Shirley to purchase Wilson’s interest in CCC. (Wilson’s Brief at 35 (internal quotation marks omitted).) This claim is easily disproved by asking a simple question: if the Circuit Court’s judgment is permitted to stand, who will be responsible for satisfying the judgment? The obvious answer is Gandis and Shirley.

Wilson makes yet another remarkable claim by asserting without citation to any legal authority that the LLC Act “places **no limitations** on the equitable relief [that may be] fashioned by the [Circuit Court].” (*Id.* (emphasis added).) If this bold assertion is true and the Circuit Court may order literally any equitable relief it desires, including imposing personal liability for an LLC’s acts or debts, one is left to wonder what purpose the LLC Act serves. Fortunately for members of LLCs and the state’s business climate more broadly, the LLC Act itself contradicts Wilson’s sweeping claim. Specifically, S.C. Code Ann. § 33-44-303 provides that, except as expressly provided by the LLC Act:

the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liability of the company. **A member or manager is not personally liable for a debt obligation, or liability of the company solely by reason of being or acting as a member or**

manager.

Id. (emphasis added).²

Accordingly, even if the Circuit Court's judgment that Gandis and Shirley oppressed Wilson is permitted to stand (which Gandis and Shirley vehemently dispute), the Circuit Court erred when it held Gandis and Shirley jointly and severally individually liable for member oppression when the specific acts giving rise to the Circuit Court's judgment were undertaken in furtherance of CCC's business. Indeed, numerous acts that the Circuit Court deemed "oppressive," such as ejecting Wilson from CCC's premises and demanding the return of his company-issued computer, were actions intended to protect CCC that were necessitated by Wilson's subterfuge, essentially the opposite of fraudulent conduct necessary to support a finding of oppression. Accordingly, the Circuit Court's judgment holding Gandis and Shirley personally liable for member oppression should be reversed.

C. Wilson Fails to Offer Any Authority to Support the Circuit Court's Unprecedented and Inequitable Conclusion that Shirley, a Non-Voting Member Who Owns Only 10% of CCC, May Be Held Equally Liable As Gandis, a Member-Manager Who Owns 45% of CCC.

Wilson does not address the Circuit Court's judgment holding Shirley, a non-voting member who owns 10% of the company, equally liable for the full amount of the judgment as Gandis, a voting member who owns 45% of the company.³ In this respect, the Circuit Court's judgment lacks any legal or logical support and should be reversed.

² Additional sections of the LLC Act contradict Wilson's arguments and the Circuit Court's expansive application of equity, including S.C. Code Ann. §§ 33-44-401 ("Form of Contribution"); 33-44-403 ("Member's and Manager's Rights to Payments and Reimbursement"); 33-44-406 ("Limitations on Distributions"); and 33-44-601 ("Events Causing Member's Dissociation").

³ The Circuit Court's judgment threatens to be exponentially more devastating for Shirley because she may lose her CPA certificate due to her being found personally liable for member oppression. Thus, if the Circuit Court's judgment is permitted to stand, any investor in an LLC who holds a professional certification risks losing it if a court determines that one of the LLC's members was oppressed.

Shirley's position is unique due to her non-voting status and because she is a licensed professional. The Circuit Court's judgment creates obligations to Shirley that may well jeopardize her ability to practice the trade in which she makes her livelihood. Among the dangers of the Circuit Court's judgment is the possibility of threatening the career of a professional who was merely trying to protect CCC's assets and providing advice on restructuring its enormous tax obligations.

The Circuit Court's effect on Shirley's ability to earn a living exemplifies the perils of permitting the imposition of individual liability to LLC members for engaging in actions to protect an LLC from one of its members. In this respect, the Circuit Court's judgment contravenes—indeed, effectively nullifies—the LLC Act and any private agreement limiting liability. Further, the Circuit Court's judgment poses an existential threat to South Carolina's ability to attract private equity investment in LLCs because it essentially allows for the removal of personal liability caps by judicial fiat. After all, why would an investor choose to invest in a South Carolina LLC if he or she may be exposed to personal liability in an amount far exceeding his or her investment (as Shirley is here)⁴ should a court determine that another member was oppressed when countless safer investment options, including LLCs in other states, are available?

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 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

⁴ Shirley's monetary investment in CCC was \$0. Yet, the Circuit Court held her personally liable for \$347,863.23.

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. Importantly, the Circuit Court utterly ignored the legislative intent behind the financial "haircut" prescribed by S.C. Code Ann. §§ 33-44-602(c) and -701(f), as well as Wilson's ongoing obligation to CCC set forth in S.C. Code Ann. § 33-44-402(a). 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.

In response to Gandis' and Shirley's argument that Wilson's unclean hands preclude the equitable relief that the Circuit Court awarded him, Wilson recites what the Circuit Court did and did not believe at trial and in so doing highlights the litany of evidence of Wilson's underhanded conduct that the Circuit Court ignored. 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. Gandis did not receive the benefit of his bargain, and the Circuit Court failed in its accounting to make any adjustments to Wilson’s capital interest ratio due to his ongoing breach of contract. 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). Nevertheless, Wilson destroyed evidence in direct defiance of that letter, then violated a protective order by soliciting CCC’s customers on behalf of Neologic and using a protected supplier. (*R.* pp. 1796-99 (Protective Order)

at ¶ 3; 1757-62 (Wilson's violations of Protective Order.) 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 and in Petitioners' initial Brief, the Circuit Court's judgment contravenes the LLC Act and the public policy interests that it is designed to serve. Contrary to the fictions that the Circuit Court accepted due to Wilson's counsel's outstanding advocacy, the record shows that Wilson engaged in a pattern of conduct designed to cripple CCC that simultaneously precludes him from receiving the equitable relief the Circuit Court awarded and establishes that Gandis and Shirley did not oppress him. Moreover, the Circuit Court's novel approach in holding Gandis and Shirley personally and equally liable for Wilson's purported oppression has no legal precedent and flies in the face of the LLC Act's purpose. Therefore, the Circuit Court's judgment should be reversed.

Respectfully submitted,



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January 28, 2019

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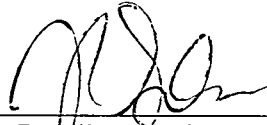
CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellants this 28th day of January
2019, 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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