

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2008-CP-26-6169

Joseph E. Mason, Jr. Appellant

v.

Catherine L. Mason, Joseph E. Mason, Sr.,
Kathy St. Blanchard, Mason Holding Company, Inc.,
and Irwin Levine Respondents

**FINAL BRIEF
OF RESPONDENT
IRWIN LEVINE**

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE CORRECTLY HOLD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC. BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT?

2. DID THE SPECIAL REFEREE CORRECTLY DETERMINED THAT SON HAD MADE NO CLAIM TO, AND WAS NOT ENTITLED TO AN ADDITIONAL 20% INTEREST IN COMPANY FROM MOTHER AND FATHER BECAUSE SUCH CLAIM WAS NOT PLEAD AND HAS NO MERIT?

3. WAS THE ISSUE OF THE VALUATION OF SON'S STOCK IN COMPANY NOT REACHED BY THE LOWER COURT AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT?
4. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S DUTY OWED TO SON BY VIRTUE OF THE STATUS AS OFFICERS, DIRECTORS OR MAJORITY SHAREHOLDERS?
5. DID THE EVIDENCE PRESENTED AT TRIAL SUPPORT THE SPECIAL REFEREE'S HOLDING THAT LEVINE DID NOT AID OR ABET ANY ALLEGED BREACH OF FIDUCIARY DUTIES BY THE MASON RESPONDENTS?
6. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT CONSPIRE TO WRONGFULLY DISCHARGE SON AND DEPRIVE HIM OF THE VALUE OF HIS STOCK OWNERSHIP IN COMPANY?
7. BECAUSE THE RECORD EVIDENCE ESTABLISHES THAT SON VOLUNTARILY QUIT HIS EMPLOYMENT, DID THE SPECIAL REFEREE PROPERLY HOLD THAT SON HAD FAILED TO ESTABLISH THAT HE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY?
8. DID THE SPECIAL REFEREE PROPERLY HOLD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME?
9. DID THE RECORD EVIDENCE SUPPORT THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM?
10. DID THE SPECIAL REFEREE PROPERLY DETERMINE THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN?
11. DID SON HAVE STANDING TO BRING THE CLAIM THAT LEVINE AIDED AND ABETTED THE MASON RESPONDENTS IN BREACHING THEIR FIDUCIARY DUTIES?
12. DID SON FAIL TO PERFECT HIS APPEAL AGAINST LEVINE?

STATEMENT OF THE CASE

The Respondent, Irwin Levine ("Levine"), adopts by reference, pursuant to Rule 208(b)(6) SCACR, the Statement of the Case of Catherine L. Mason ("Mother"), Joseph E. Mason, Sr. ("Father"), and Kathy St. Blanchard ("Sister"), (collectively referred to as the "Family Respondents"); and Mason Holding Company, Inc. ("the Company"), (the Family Respondents and the Company are collectively referred to as "Mason Respondents"). In addition the following is submitted:

The Appellant, Joseph E. Mason, Jr. ("Son") did not file a Rule 59(e) motion to alter or amend a judgment to any finding of fact or conclusion of law ruled upon in the Final Order [Ending Action as to Defendant Irwin Levine] filed on January 20, 2012 (the "Levine Order").

Thereafter, Son timely filed his Notice of Appeal dated June 4, 2012. In his Notice of Appeal, the Son did not name Levine as a respondent and did not attach the Levine Order to his Notice of Appeal. Son only attached the Final Order as to the Mason Respondents.

Son then filed his Amended Notice of Appeal on June 8, 2012 and included Levine within the caption. He did not, however, attach the Levine Order to his Amended Notice of Appeal.

Son subsequently filed his Second Amended Notice of Appeal on July 19, 2012 and this time, attached the Levine Order to the Second Amended Notice of Appeal.

After being served with the Second Amended Notice of Appeal, Levine filed a Motion to Dismiss. The Court of Appeals denied Levine's Motion to Dismiss, but allowed Levine to raise the issues in this Brief that he had raised in his Motion to Dismiss. (See this Court's Order dated 3-4-13.)

I. STATEMENT OF FACTS

Levine adopts the Statement of Facts as presented by the Mason Respondents. In addition, the following is submitted:

Son did not bring a shareholders derivative action pursuant to Rule 23(b)(1) SCRPC against the Mason Respondents nor did his complaint comply with the pleading requirements of Rule 23(b)(1) SCRPC. Specifically, in his second cause of action alleging breach of fiduciary duty, Son sued Mother, Father and Sister directly and not as a derivative action.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Scope of Review

Levine adopts the Standard of Review as presented by the Mason Respondents.

B. Arguments

- 1. THE SPECIAL REFEREE CORRECTLY HELD THAT SON IS NOT ENTITLED TO AN ORDER REQUIRING THE FAMILY RESPONDENTS TO PURCHASE HIS SHARES IN MASON HOLDING COMPANY, INC. BECAUSE SUCH EXTRAORDINARY RELIEF IS NOT WARRANTED BY THE RECORD EVIDENCE IN LIGHT OF SON'S MISCONDUCT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 1.

2. **THE SPECIAL REFEREE CORRECTLY DETERMINED THAT SON HAD MADE NO CLAIM TO, AND WAS NOT ENTITLED TO, AN ADDITIONAL 20% INTEREST IN COMPANY FROM MOTHER AND FATHER BECAUSE SUCH CLAIM WAS NOT PLEAD AND HAS NO MERIT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 2.

3. **THE ISSUE OF VALUATION OF SON'S STOCK IN COMPANY WAS NOT REACHED BY THE LOWER COURT AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 3.

4. **THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT BREACH ANY DUTY OWED TO SON BY VIRTUE OF THE STATUS AS OFFICERS, DIRECTORS OR MAJORITY SHAREHOLDERS.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 4.

5. **THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT LEVINE DID NOT AID OR ABET ANY ALLEGED BREACH OF FIDUCIARY DUTIES BY THE MASON RESPONDENTS.**

The evidence fully supports the Special Referee's findings and conclusions that Levine did not aid and abet the Mason Respondents in any alleged breach of fiduciary duty. The first element in establishing a claim for aiding and abetting a breach of fiduciary duty is that the plaintiff must prove "(1) a breach of a fiduciary duty owed to the plaintiff". Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478

S.E.2d 45, 50 (1996). See also Vortex Sports Entertainment, Inc. v. Ware, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008). The Special Referee found and concluded that the Mason Respondents had not breached any fiduciary duty to Son. Therefore, it is axiomatic that a claim that Levine aided and abetted the Mason Respondents must fail because Son has not proved an essential element of his claim.

As importantly, Levine's actions would not support a claim that he aided and abetted the Mason Respondents even if the Mason Respondents were found in breach of some alleged a fiduciary duty to Son. In order to prevail on his aiding and abetting claim, Son must also establish that Levine knowingly participated in the Mason Respondents' alleged breach of a fiduciary duty: Future Group II, id.

Levine, in essence, is being accused of having exercised poor judgment in how he prepared the 2003 and 2006 tax returns.¹ Son argues that Levine exercised his poor judgment while aiding and abetting the Mason Respondents. The facts of their breaches of their fiduciary duty owed to Son established at trial, however, demonstrate that Levine prepared these returns at the specific direction of Son. As a result, Levine cannot have knowingly participated in an alleged Mason Respondent breach of fiduciary duty when he was acting at the direction of Son.

¹ Levine prepared the tax returns based on the general ledger and other related accounting documents provided to him by the Company. Levine did not make entries into the general ledger. (R. at 409; R. at 548, 556.) The loans, which covered for the understated inventory, were all entered by Son.

Additionally, Levine prepared amended returns for 2003 and 2006 to correct the deficiencies of the previous returns. The amended returns were approved by D. Timothy Duncan, the independently retained certified public accountant for the Company.² When presented for signing at a board meeting of the Company, Son said the amended returns would not be filed. (R. at 513; R. at 536-537; R. at 625-626.) This further supports the Special Referee's ruling that was following the direction of Son, not the Family Respondents.

Lastly, Son presented no evidence as to Levine's motive for having prepared the tax returns in the manner in which he did. There is no suggestion that Levine personally profited from the preparation and filing of the 2003 and 2006 tax returns. Levine received a retainer from the Company for his accounting services but was not specially compensated for his preparation of the 2003 and 2006 tax returns. (R. at 688-689.) The only probative evidence submitted was that Levine was acting at the direction of Son.

The evidence supports the ruling of the Special Referee; the Levine Order dismissing the charge of aiding and abetting against Levine should be sustained.

6. THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S FINDING THAT THE FAMILY RESPONDENTS DID NOT CONSPIRE TO WRONGFULLY DISCHARGE SON AND DEPRIVE HIM OF THE VALUE OF HIS STOCK OWNERSHIP IN COMPANY.

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 6.

² Son approached Mr. Duncan and requested that he manipulate the inventory similar to what had been done in prior years. Mr. Duncan refused to do so, and refused to serve as the accountant for the Company for this reason. (R. at 599-600.)

7. **BECAUSE THE RECORD EVIDENCE ESTABLISHES THAT SON VOLUNTARILY QUIT HIS EMPLOYMENT, THE SPECIAL REFEREE PROPERLY HELD THAT SON HAD FAILED TO ESTABLISH THAT HE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 7.

8. **THE SPECIAL REFEREE PROPERLY HELD THAT SON IS LIABLE TO COMPANY FOR CONVERTING \$11,716.32 IN COMPANY FUNDS VIA THE CASINGS SCHEME.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 8.

9. **THE RECORD EVIDENCE SUPPORTS THE SPECIAL REFEREE'S HOLDING THAT SON IS LIABLE TO COMPANY FOR REIMBURSEMENT OF MONEY TAKEN BY SON AND PAID TO THE TURNER PADGET LAW FIRM.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 9.

10. **THE SPECIAL REFEREE PROPERLY DETERMINED THAT COMPANY'S CLAIM AGAINST SON FOR DAMAGES RESULTING FROM HIS FILING OF FALSE AND INACCURATE STATE AND FEDERAL TAX RETURNS COULD BE BROUGHT AT A LATER DATE WHEN THE AMOUNT OF SUCH DAMAGES IS KNOWN.**

Respondent Levine adopts by reference the Mason Respondents' arguments as to number 10.

11. **SON DID NOT HAVE STANDING TO BRING THE CLAIM THAT LEVINE AIDED AND ABETTED THE MASON RESPONDENTS IN BREACHING THEIR FIDUCIARY DUTIES.**

The Special Referee ruled that Son did not have standing to bring his action against the Family Respondents for breaches of fiduciary duties and as such, did

not have standing to sue Levine for allegedly aiding and abetting the Family Respondents. (R. at 122-123.) The gravamen of Son's claim against Levine is that Levine's preparation of the tax returns for 2003 and 2006 may have caused the Company to be exposed to tax liability which, in turn, may have caused a loss to the value of the Company. If the Company had suffered a loss, then Son argues he would have suffered a corresponding loss to the value of his shares in the Company.³

In South Carolina, the general rule is that individuals may not sue corporate directors or officers for losses suffered by the company. Brown v. Stewart, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001). If the gravamen of the complaint is an injury to the company and not to the individual interest of the shareholder, then the action is derivative and must be brought as a shareholders' derivative suit. Brown, id. See also Rivers v. Wachovia Corporation, 2010 WL 3258328 (D.S.C.).

In this case, Son sued the Family Respondents for breaches of fiduciary duty. The essence of his claim is that their alleged breaches of fiduciary duties caused a loss to the Company and, therefore, a loss to the value of his shares in the Company. In this type of action, the Son would have to bring an action as a shareholder's derivative action pursuant to Rule 23(b)(1) SCRPC. As a result of not bringing a shareholder's derivative action, Son did not have standing to bring this

³ In paragraph 70 of his Amended Complaint, Son alleges that the actions of Levine were "... detrimental to the Corporation and its shareholders, including the plaintiff." (R. at 43.) Son did not prove any individual loss to him that would not have been shared by all the shareholders as a result of any alleged breaches of fiduciary duty that may have been committed by the Family Respondents.

action at all. Brown, supra. If Son did not have standing to bring these claims against the Family Respondents, then he also did not have standing to bring an aiding and abetting claim against Levine.

Son's lack of standing to bring this action is an additional reason to affirm the Special Referee's Order dismissing Son's claim as to Levine.

12. SON FAILED TO PERFECT HIS APPEAL AGAINST LEVINE.

When Son filed his Notice of Appeal, he neither named Levine as a Respondent nor attached a copy of the Levine Order to his Notice of Appeal. When he filed his first Amended Notice of Appeal, Son did add Levine as a Respondent, but still did not attach a copy of the Levine Order. Finally, in his second Amended Notice of Appeal, Son did attach a copy of the Levine Order to the Notice of Appeal.

Rule 203(d)(1)(B)(ii) SCACR, requires that "[a] copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing" be attached to the Notice of Appeal. This was not done in this case until well after the thirty (30) days to file the Notice of Appeal had expired.

The requirements of 203(d)(1)(B)(ii) SCACR are mandatory, although mere clerical errors in a Notice of Appeal do not destroy the appeal. Charleston Lumber Co. Inc. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct. App. 1995). However, the errors in this case may not be mere clerical errors. Not only was Levine not originally named as a Respondent in the Notice of Appeal, Son did not attach a copy of the Levine Order to the Notice of Appeal, or even to the Amended Notice of Appeal.

In Weatherford v. Price, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct. App. 2000), the appellant failed to identify, in the notice of appeal itself, the underlying order being appealed, although he did refer to the order which denied the appellant's motion for reconsideration. The underlying order, itself, however, was attached to the notice of appeal. Under those circumstances, this Court deemed the appellant's failure to refer to the underlying order in his notice of appeal as a mere clerical error because the order itself was attached to the notice of appeal. In contrast, in this appeal, Son, at first neither named Levine nor attached the Levine Order to the Notice of Appeal. The Levine Order was only attached to the Second Amended Notice of Appeal. The combination of not originally naming Levine as a respondent and not attaching the Levine Order is more than a clerical error.

It is true that after the Clerk of Court of Appeals office notified Son's counsel that Levine was not included as a respondent, Son's counsel filed the Amended Notice of Appeal which included Levine as a respondent. However, as pointed out, Son still did not attach a copy of the Levine Order to the Amended Notice of Appeal. This was done only after the original thirty (30) days to perfect the Notice of Appeal had run.

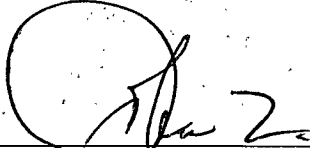
Had Son only failed to originally identify Levine as a respondent and then corrected it in his subsequent Amended Notice of Appeal, then that correctly would be seen as a mere clerical error. However, the failure to add the Levine Order is more than a mere clerical error and, for this reason, the appeal against Levine should be dismissed.

III. CONCLUSION

For the above and foregoing reasons, Respondent Irwin Levine prays that this Court affirm the Special Referee's Orders.

Respectfully submitted,

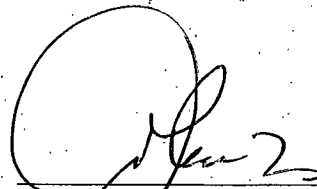
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CERTIFICATE OF COUNSEL

The undersigned certifies that this **BRIEF OF RESPONDENT IRWIN LEVINE** complies with Rule 211(b).



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August 16, 2013

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PROOF OF SERVICE

I certify that I have served the **Respondent Irwin Levine's Final Brief** by depositing a copy of it in the U.S. Mail on August 16, 2013, addressed to:

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