THE 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

ORIGINAL

Joseph E. Mason, Jr., Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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Respondents Catherine L. Mason, Joseph E. Mason, Sr., Kathy St. Blanchard, and Mason Holding Company, Inc. ("the Company") (collectively, "the Mason Respondents") make several statements in their Initial Brief regarding the facts and arguments regarding the applicable law that warrant a reply.[1] The central arguments by the Mason Respondents and Respondent Irwin Levine (collectively, "Respondents") are that Appellant Joseph E. Mason, Jr. ("Appellant" or "Joe") presented no material support for his claims at trial, Appellant participated in improper activities that were a source of the Company's problems, or that the problems raised are "not germane to his request for relief" (Mason Respondents' Initial Brief at 24), and that, as a result, Appellant is not entitled to *any* relief. As discussed herein and in Appellant's principal Brief, the Respondents' arguments are not supported by the record evidence, the applicable law, or public policy. The additional arguments advanced by Respondent Levine in his separately filed Initial Brief fail for the same reasons.

I. Reply Statement of the Case and Facts.

A. The Statement of the Case.

Respondents state that Appellant did not reply to Respondents' counterclaims set forth in their Answer to the Amended Complaint. Mason Respondents' Brief at 2, 42, 43. In response to Appellant's original Complaint, the Mason Respondents filed an answer and counterclaims dated August 28, 2008. (R. pp. 14-24.) Appellant replied to the counterclaims on September 23, 2008. (R. pp. 25-28.) Pursuant to a Consent Order dated September 23, 2009, Appellant was granted leave to file its Amended Complaint

[1] Respondent Irwin Levine ("Levine") adopted essentially all of the Mason Respondents' factual assertions and legal arguments in his separately filed Initial Brief.

"to include Irwin Levine as an additional Defendant and assert a cause of action against Defendant Levine for Aiding and Abetting Breach of Fiduciary Duty." (R. p. 29.) The Amended Complaint added no new claims against the Mason Respondents. The Mason Respondents filed an Answer to the Amended Complaint that was substantially and substantively identical to its answer to the original complaint and asserted identical counterclaims. (*Compare* R. pp. 14-24 with R. pp. 46-58.) Appellant's case was being handled by prior counsel at the time, and a record was not developed regarding this issue because it was never raised before the trial court. What is clear, however, is that Appellant had already replied to the identical counterclaims, and Respondents have identified no delay or prejudice whatsoever resulting from the lack of a filing of another reply to these counterclaims. Moreover, Respondents did not raise this hyper-technical issue to the trial court and may not raise it in this court for the first time. *Patterson v. Goldsmith*, 292 S.C. 619, 626, 358 S.E.2d 163, 167 (Ct. App. 1987) ("An issue which was not raised below cannot be considered on appeal."). Indeed, Respondents confirmed to the trial court that they had put in their case on the counterclaims at trial and did not mention any failure to file another responsive pleading or that Appellant is or should be in default for failing to file another reply. (R. p. 750.)[2]

Respondents assert, without citation to the record, that they were granted a directed verdict with regard to Appellant's Fifth Cause of Action alleging a breach of contract claim arising under the terms of the Company's employee handbook. Mason

[2] The trial court executed the proposed order provided by the Mason Respondents, which failed to include any mention of any failure by Appellant to file a responsive pleading to the amended answer.

Respondents' Brief at 2. There was no such ruling, but Appellant voluntarily dismissed that claim. (R. p. 570.)

B. Facts.

The Mason Respondents state a number of alleged facts in their brief that are disputed without noting they are disputed.[3] With regard to the primary claim for relief under the South Carolina Business Corporation Act due to shareholder oppression, this Court "may find facts according to [its] own view of a preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). It is also critical to note that Appellant need not necessarily prove that the Mason Respondents engaged in illegal or fraudulent conduct. "The concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" *Id.* at 595, 733 S.E.2d at 110 (quoting *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 604, 541 S.E.2d 257, 267 (2001)).

With regard to Appellant's contention that he was asked to testify falsely in support of Ozzy St. Blanchard's workers' compensation claim,[4] the Mason Respondents point to the fact that the claim was ultimately successful. The Mason Respondents do not address the highly suspicious facts that Joe Mason Sr. ("Joe Sr.") testified in his deposition in this case that he did not personally see Mr. St. Blanchard at the Mason Tire store on the morning of the accident (R. pp. 834, 1299-1300), but in shareholder minutes

[3] For example, Respondents assert that Appellant was absent from the Company's business without notice or excuse on several occasions over the course of many years. Mason Respondents' Brief at 9. Appellant denies he was ever absent from the Company's business without notice or excuse. (R. pp. 348-349.)

[4] Mr. St. Blanchard was the then-husband of Respondent Kathy St. Blanchard. (R. p. 644.)

of Mason Tire, he represented that he had personally seen Mr. St. Blanchard that morning. (R. pp. 829-830.) Nor do the Mason Respondents mention the fact that, although Appellant was the actual and acting president of the Company, Joe Sr. testified in his December 2, 2005 deposition in the workers' compensation proceeding that Joe Sr. was the "managing partner" of the Company. (R. p. 831.) In any event, Appellant need not prove that the Mason Respondents committed workers' compensation fraud. The evidence is clear, however, that the controversy caused friction between the parties, and that friction (which resulted from additional factors, as well) led the Mason Respondents to deprive Appellant of any value from his ownership interest in the Company. (R. pp. 378, 494, 545-547, 564, 736-741.)

Perhaps the most contentious issue that developed between Appellant and the Mason Respondents revolved around the Company's taxes and the accounting practices by Respondent Levine. The Company's shareholder minutes, annual valuations prepared by Levine, and other trial exhibits amply demonstrate that the Company's problems with regard to overstated inventory were fully disclosed to and known by all parties. (*See* R. pp. 258-265, 402, 406-407, 779, 780, 802-803, 806-807.) Mr. Levine, as the Company accountant, informed Appellant and the Mason Respondents that the accounting practices and promissory notes dealing with overstated inventory were a lawful and appropriate method to deal with the issue. (R. pp. 477-478, 483-486, 488-491, 1303-1305.) In addition, Mr. Levine prepared and signed tax returns for the Company and its affiliates for the years 2003 through 2006 based on that accounting and informed Appellant and the Mason Respondents that the tax treatment regarding the overstated inventory was lawful

and appropriate. (R. pp. 486-489.) Appellant signed those tax returns based on that advice. (R. pp. 364-365.)

A corporate officer has a statutory right to rely on information or advice presented by a public accountant or other professional as to matters the officer reasonably believes are within the person's professional competence. S.C. Code Ann. § 33-8-420(b)(2) (2006).[5] Reliance on a professional's advice is not appropriate and is not in good faith "if [the officer] has knowledge concerning the matter in question that makes reliance otherwise permitted unwarranted." S.C. Code Ann. § 33-8-420(c). It is undisputed that Appellant relied on Levine with regard to the Company's tax and accounting matters. (R. pp. 308-309, 365, 477-478.) Appellant's reliance on Levine's advice to the Company was reasonable at the time the notes were signed by the parties (2003) and the tax returns were submitted (2003-2006). (R. pp. 308-309, 827, 828, 910-922, 923-937.)

Now, by all accounts, it is understood that those promissory notes, the related accounting practices, and the 2003 through 2006 tax returns were not appropriate or lawful. These facts were emphatically brought to the attention of all Respondents and counsel for the Mason Respondents by Wayne Byrd, Esq.'s letters dated **September 17, 2007**. (R. pp. 846-847, 848-850.) All Respondents acknowledge that the assertions and tax and accounting problems identified in the letters "were substantially accurate."

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[5] The South Carolina Business Corporation Act of 1988 (S.C. Code Ann. §§ 33-1-101 to 33-20-105) consists of Chapters 1-20. S.C. Code Ann. § 33-1-101 (2006). The Company is a Statutory Close Corporation under the provisions of Chapter 18 of that Act, known as the South Carolina Statutory Close Corporation Supplement. S.C. Code Ann. §§ 33-18-101 *et seq*. (2006). The provisions of the other chapters of the South Carolina Business Corporation Act apply to Statutory Close Corporations "to the extent not inconsistent with the provisions of" Chapter 18 (S.C. Code Ann. § 33-18-102(1) (2006)), and nothing in Chapter 18 is inconsistent with the standards of conduct for officers set forth in Section 33-8-420.

Mason Respondents' Brief at 14.[6] There was never any real debate that the assertions in Mr. Byrd's letters were accurate. But, rather than appropriately dealing with the issue at the October 24, 2007 meeting, the Mason Respondents voted to remove Appellant as President and to terminate his ability to handle financial matters for the Company. (R. pp. 544, 849-881, 895.)[7] After that meeting, Appellant did not ever see another tax return, draft tax return, or proposed amended return for the Company or its affiliates until late in the discovery process in this lawsuit. (R. pp. 316-317, 538-539, 544, 565, 743, 744-745.) As the new president, Joe Sr. hired and dealt with Tim Duncan, a CPA, with regard to preparing amended tax returns or taking other appropriate steps to correct the situation. (R. pp. 744-745.) Mr. Duncan thought the problems were significant enough that he also consulted in the fall of 2007 with Eddie Bowers, an experienced tax attorney in the Myrtle Beach area. (R. pp. 577-580, 587-589.) After consulting with Mr. Bowers, Mr. Duncan concluded that there were "serious and substantial" tax and accounting

[6] Levine adopted the Mason Respondents' Statement of Facts (which includes page 14 of the Mason Respondents' Brief). Levine Brief at 2. In addition, Levine asserts that he, "in essence, is being accused in having exercised poor judgment in how he prepared the 2003 and 2006 tax returns." *Id.* at 4. This grossly mischaracterizes Levine's own testimony that he knew that his advice to the Company on preparing the 2003 and 2006 was *fraudulent at the time he made the advice*, but that he also assured Appellant and the other family members that this tax treatment was appropriate. (R. pp. 486-489.) The Respondents' own experts have described Levine's advice as "not competent" (R. p. 450)) and "fraud." (R. p. 458.) This goes far beyond mere "poor judgment."

[7] The Mason Respondents state that Appellant was the only shareholder who declined to repay personal expenses to the Company in late 2007. Mason Respondents' Brief at 14. Appellant declined because, at the time such action was requested, all the Respondents were furious at him because he raised the tax issues, and he viewed their actions as retaliation. (R. pp. 311-312, 416.) He also testified that he questioned whether the repayment plan devised by Levine was appropriate because the expenses had been fully approved by the Company previously. (R. pp. 311-312.)

issues that needed to be addressed, and so informed Joe Mason, Sr. – **in 2007**.[8] (R. pp. 577-580, 587-589.) Rather than appropriately dealing with the situation, Joe Sr. terminated the Company's relationship with Duncan on November 27, 2007. (R. pp. 580-582, 894.)

After additional and further retaliation from the Mason Respondents, which made the situation unbearable for Appellant, he accepted his constructive discharge from employment with the Company in July of 2008. (R. p. 901.)

Although Joe Sr. had control over the financial affairs and tax returns of the Company beginning in October 2007 and the Mason Respondents had sole control of the Company beginning in August 2008, they did not take action to address the problematic tax returns for several years. In fact, the tax officials were not notified of the problems *at all* until Mr. Bowers notified them after the trial of this case started in November of **2011**.[9] (R. pp. 452, 454-455.) Mr. Bowers assumed the tax authorities had not been contacted earlier because the Company would have owed substantial amounts that it did not want to pay (R. p. 456), but there is no doubt that if the Company had properly addressed the problem in 2007 or 2008 the amounts of interest and penalties owed by the Company would have been reduced "a great deal." (R. p. 455.) Under the circumstances, it is obvious that the Mason Respondents would never have informed the tax authorities about these issues but for the fact that the issues were being discussed in a

[8] The Mason Respondents argue or suggest in their brief that they did not discover the tax problems, their significance, or the need to disclose them to the tax authorities until 2011. *See* Mason Respondents' Brief at 21. As discussed above, they were aware of the situation since at least 2007.

[9] Mr. Bowers was reengaged by the Company just three weeks before trial and was then given permission for the first time to report the problems to the taxing authorities. (R. pp. 453-454.)

trial and being made a matter of public record. The Mason Respondents certainly did not conduct themselves in an appropriate manner, and their failure to properly and timely address the Company's acknowledged tax problems caused the Company significant damage. Moreover, the tax issues were a source of "terrible friction" among the parties. (R. p. 544.)

II. Reply Legal Argument

A. Respondents ignore the core harm done to Appellant that the judicial dissolution provisions of the Corporate Code were designed to address.

"The concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" *Ballard*, 399 S.C. at 595, 733 S.E.2d at 110 (quoting *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267). That is precisely the situation that Appellant faces: his investment is trapped, and the Respondents have afforded him no ability to participate in the returns of the business, whether through employment, payment of dividends, or otherwise. *See id.* ("Ballard here, like John and Louise in *Kiriakides*, similarly 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."). Respondents ignore this core reasoning behind the judicial dissolution statutes, and inappropriately focus on Appellant's actions instead of "upon the actions of" the Respondents. *Kiriakides*, 343 S.C. 600, 541 S.E.2d at 265.[10]

[10] Respondents repeatedly misstate that Appellant *knew* the Company tax returns that Levine prepared and that Appellant signed in his capacity as President were "false and incorrect" or that Appellant *knew* he was committing tax fraud (*e.g.* Mason Respondents' Brief at 26). Levine, Appellant, and Joe Sr. all testified that Levine assured Appellant (as well as the other family members) that the tax treatment he advised was appropriate and that Appellant relied on Levine's advice as the company accountant. (R. pp. 308-309,

Judicial dissolution is available when, among other situations, "the directors or those in control of a corporation 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 ...." S.C. Code Ann. § 33-14-300(2)(ii) (2006); *see also* S.C. Code Ann. § 33-18-400(a)(3) (2006) (applying the standards of § 33-14-300 to judicial dissolution of a statutory close corporation). Under South Carolina law, "'the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case.'" *Ballard*, 399 S.C. at 594, 733 S.E.2d at 110 (quoting *Kiriakides*, 343 S.C. at 602, 541 S.E.2d at 266).[11] Although analysis is done case-by-case, this case contains various hallmarks of the conduct found to be oppressive and unfairly prejudicial under South Carolina law:

1. Counsel for Appellant raised the improper tax and accounting issues by letters to Respondents in September of 2007. Respondents then demoted Appellant and prohibited him from handling the Company's financial matters, and Respondents did not properly and timely address the problems raised by Appellant. Indeed, they waited over *four years* to inform the taxing authorities. This is improper, and in the opinion of the Mason Respondents' own expert, this delay could cause the Company

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365-367, 483-489, 1303-1305.) Appellant testified that he did not understand the illegality of and adverse impacts of Levine's scheme at the time the fraudulent tax returns were prepared and filed. (R. pp. 266-269, 314-315.)

[11] The Statutory Close Corporation Supplement, which applies to this matter, is in accord: "No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants." S.C. Code Ann. § 33-18-400, Off. Cmt. 2 (2006).

significant harm in the form of interest and penalties potentially assessed by the IRS and South Carolina Department of Revenue. (R. pp. 443-446, 448.)

2. The Company workplace was entirely dysfunctional among the parties, and there is total estrangement between Appellant on one hand and the Mason Respondents on the other. *See Kiriakides*, 343 S.C. at 606, 541 S.E.2d at 268 (finding "the fact that Alex, majority shareholder in total control of Atlas, is totally estranged from John and Louise" as an important factor in the "classic situation" of a "freeze out").

3. The company has failed to hold its required annual shareholders meeting since August 2008, yet the other shareholders have conducted shareholder business informally without notifying or inviting Appellant to participate. (R. pp. 655, 656-657, 838-840.) This is improper. *Kiriakides*, 343 S.C. at 605 n.28, 541 S.E.2d at 267 n.28 (finding that "withholding information from minority shareholders" is one of a "host of factors" present in freeze out situations); *see also Ballard*, 399 S.C. at 597, 733 S.E.2d at 111 ("Thoennes admitted at trial that they have not had a directors' meeting since Ballard's election nor have they sent him any updates on financing.").

4. The Mason Respondents have paid excessive salaries to the majority shareholders, far out of proportion to what their positions would command in the marketplace. (R. 424-425, 433-435.) *Kiriakides*, 343

S.C. at 603 n.25, 541 S.E.2d at 266 n.25 (citing "paying excessive salaries to majority shareholders" as a factor "indicative of oppression").

5. After Appellant accepted his constructive discharge in July of 2008, he has received no dividends or other value for his ownership interest in the Company.[12] This is improper. *Kiriakides*, 343 S.C. at 604, 541 S.E.2d at 267 (citing "termination of a minority shareholder's employment [and] the refusal to declare dividends" as "[c]ommon freeze out techniques").

B. This Court has the power to determine issues of valuation and share ownership, both of which were properly before the lower court and were fully developed in the record.

Should this Court agree that Appellant is entitled to relief under the judicial dissolution provisions of the Corporate Code and that the most appropriate remedy is a required share purchase pursuant to Section 33-18-420, this Court can also determine the appropriate value of Appellant's shares without remand. The issue of share valuation under this statute was fully tried below. The parties and their respective experts agreed that the appropriate valuation date was August 5, 2008, that the asset approach did not lead to a reliable indication of value, that an appropriate approach to consider was the market approach, that the appropriate method to consider within the market approach was

[12] The Mason Respondents argue that Appellant was "overpaid" while he was still employed by the Company and that, now that he has left the Company, the compensation to the other family members was increased because they undertook certain of his duties (and other functions were performed by other employees). *See* Mason Respondents' Brief at 30. Given Appellant's work hours and success in building and running the business, this point is certainly debatable, but the argument misses the critical point: "returns on investment in close corporations often accrue incident to employment with the corporation as opposed to through dividends." *Ballard*, 399 S.C. at 596, 733 S.E.2d at 111. Once Appellant was no longer employed by the Company, it was improper for the Mason Respondents to pay themselves at a level higher than their services could be replaced in the marketplace rather than paying dividends. (*See* R. pp. 424-425, 433-435.)

the guideline company transaction method, and that the appropriate metric to consider using that method should be based on the level of revenues of the Company. (R. pp. 422, 667-668, 674-675, 1086, 1146-1147, 1196, 1201.)

The remaining issues debated by the parties are largely legal issues or issues that can be appropriately resolved by this Court without remand. As discussed in Appellant's principal Brief, those issues are as follows:

1. Is the appropriate analysis "fair value" within the meaning of the statutory language and cases interpreting it[13] or "fair market value"?
2. Are discounts for lack of control or marketability appropriate in this analysis?
3. Does the income approach lead to a reliable indication of value when the underlying Company expense records and tax returns are not reliable and comparisons are made to non-normalized after tax net income margins of other companies? (*See* R. pp. 674-682, 1198-1199.)[14]
4. Should the calculations use an extrapolated portion of one year's revenue or an average of three years' revenues?

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[13] *See, e.g.*, S.C. Code Ann. 33-18-420 (2006) & Off. Cmts.; S.C. Code Ann. § 33-13-101(3) (2006); *Santee Oil Co. v. Cox*, 265 S.C. 270, 274, 217 S.E.2d 789, 791 (1975); *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 116, 522 S.E.2d 357, 360 (Ct. App. 1999).

[14] Appellant's principal Brief stated on page 31 that both experts concluded that the income approach to valuation did not lead to reliable or appropriate indications of value of the Company. This is not entirely accurate, as the Mason Respondents' expert, Ms. Smith, in abandoning the income calculations in her initial report because it was based on the unreliable tax returns, modified the income approach to consider the income "based on industry average after tax income." (R. pp. 669-671, 674.)

5. Should multiples be used that are derived from sales of much smaller companies and from sales that occurred many years earlier or from more recent sales of companies of relatively similar sizes?
6. Should a value amount be added representing the non-operating asset of the Company's equity in real estate derived from the Company's books and records as of the valuation date based on the then-recent purchase and construction costs or should the analysis be based on a letter regarding value as of several years after the valuation date?
7. Should the value indication from the calculations be reduced by a potential tax liability and, if so, should that liability be computed as of the valuation date?

As discussed in Appellant's principal Brief, these questions should be decided in Appellant's favor based on applicable law and the full record on these issues.

The Mason Respondents argue that Appellant should not prevail on the issue of whether he owns 50% of the Company's shares because it was not specifically mentioned in the Amended Complaint. Mason Respondents' Brief at 32-33. Pursuant to the letter agreement regarding the conveyance of additional shares, an additional 5% interest was to be conveyed to Appellant at the end of calendar years 2008 through 2011. (R. pp. 813-814.) The Complaint was filed on August 5, 2008 (R. pp. 1-13), thus, at that time, delivery of the additional shares was not yet due. By the time the Special Referee issued his final orders in this case in January of 2012, delivery of the remaining shares was past due. These breaches of the letter agreement were supplemental developments after the filing of the original complaint. *See* Rule 15(d), SCRCP. Moreover, both the Complaint

and the Amended Complaint assert a cause of action for breach of express and implied promises and agreements. (R. pp. 6-7, 36-38.) The breaches of the letter agreement were the subjects of discovery, including questions at depositions. (*See, e.g.*, R. pp. 1297, 1308.) These breaches were also the subject of testimony at trial. (*See, e.g.*, R. pp. 566-567.)

The letter agreement was admitted into evidence on the first day of the trial without objection by the Mason Respondents. (R. pp. 234-235.) Counsel for the Mason Respondents later argued that the breaches of the letter agreement were not mentioned in the Complaint, and these responses were discussed. (R. pp. 413-415, 417, 568-569.) The Special Referee took the matter under advisement, but did not subsequently address the objection, rule that the Complaint did not fairly raise the issue, give Appellant an opportunity to submit a supplemental pleading, or determine whether the issue had been litigated by consent pursuant to Rule 15(b), SCRCP. Appellant should not be deprived of the value of the additional shares of the Company based on the Mason Respondents' argument when Appellant adequately raised the issue in the Complaint, the issues were the subject of full discovery without objection, and the Mason Respondents can show no prejudice from proceeding with the litigation of the claim at trial.

C. Respondents' retaliation against Appellant violates South Carolina public policy that seeks to protect the rights of whistleblowers and those who seek to right corporate wrongdoing.

There is abundant record evidence that the Respondents retaliated against Appellant because of his refusal to cooperate in what he believed to be possible workers' compensation fraud and raising the improper tax and accounting issues. (*See* R. pp. 369, 410-411, 505-506.)

It has long been the public policy of this State that it is unlawful to retaliate against an employee by terminating his or her employment in violation of a clear mandate of public policy. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985); *see also* S.C. Code Ann. § 41-1-80 (Supp. 2012) (prohibiting termination of employment in retaliation for filing workers' compensation claim). "The determination of what constitutes public policy is a question of law for the courts to decide." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 617, 713 S.E.2d 634, 638 (2011); *see also* S.C. Code Ann. § 8-27-20(A) (Supp. 2012) (prohibition of retaliation against public body employee as a result of employee's report of wrongdoing). Numerous federal statutes are in accord. *See, e.g.*, 26 I.R.C. § 7263(a)&(b) (establishing award program for individuals providing information for detecting underpayments or detecting violations of IRS laws);[15] 18 U.S.C. §§ 1514A & 1513(e) (Sarbanes-Oxley provisions establishing civil and criminal claims and penalties for retaliating against employees who provide information regarding securities fraud or other violation of federal law);[16] 31 U.S.C. §§ 3730(d)(1) & 3730(h) (incentive and anti-retaliation section of False Claims Act); 15 U.S.C. § 78u-6 (securities whistleblower incentives and protection provisions of Dodd-Frank Wall Street Reform and Consumer Protection Act).

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[15] An informant is not disqualified from receiving an award even if he participated in the wrongful conduct. For example, Bradley Birkenfeld was sentenced to 40 months in prison because of his participation in the UBS Swiss/offshore bank account conspiracy, but he was awarded a $104 million whistleblower payment as a result of the information he supplied that aided in collecting taxes. *See* Orly Lobel, "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems," 54 S. Tex. L. Rev. 37, 38 (2012).

[16] Firing an employee who whistleblows regarding alleged corporate tax fraud can also serve as a RICO predicate act under Section 1961(1). *DeGuelle v. Camilli*, 664 F.3d 192, 201 (7th Cir. 2011).

Here, the Mason Respondents should not be allowed to deprive Appellant of all value of his ownership in the Company in retaliation against Appellant because he raised the important but difficult issues presented in this case, including those of possible workers' compensation fraud and fraudulent tax activities on behalf of the Company. Such deprivation contravenes the important public policy of encouraging those with knowledge of wrongdoing to come forward.

D. The Mason Respondents have breached their fiduciary obligations to Appellant.

Respondent Levine argues that "[t]he essence of [Appellant's] claim is that [the Mason Respondents'] alleged breaches of fiduciary duties caused a loss to the Company and, therefore, a loss to the value of his shares in the Company." Levine Brief at 7.[17] This misstates and mischaracterizes Appellant's claims for breach of fiduciary duty. The evidence shows that the Mason Respondents' actions as corporate officers caused Appellant individualized harm. Appellant is the *only* shareholder to be excluded from the business, and Company business that was previously conducted at shareholder meetings is now being handled by other shareholders without notice or invitation to Appellant. (R. pp. 655, 656-657.) The Mason Respondents have given themselves raises, cars, bonuses, and other perquisites all the while extending *nothing* of value to Appellant in the way of a dividend or other way to reap the benefits of his ownership. (R. p. 412.) *See Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Wely, Inc.*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (holding that corporate mismanagement which resulted in a diminution of

[17] The Mason Respondents argue similarly that Appellant should have brought his fiduciary duty claims as a derivative action. Mason Respondents' Brief at 36.

corporate ownership percentage was an individual loss); *see also Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929) ("It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs directly, or as their interests were submerged in the corporation whose assets were thus dissipated.").[18]

E. Levine has aided and abetted the breaches of fiduciary duties committed by the Mason Respondents.

Levine argues that he could not be liable for aiding and abetting the various breaches of fiduciary duties demonstrated in this case because he was acting at Appellant's direction and, consequently, did not "know" he was participating in a breach of fiduciary duty. Levine Brief at 4-5. The evidence is to the contrary. While President of the Company until October 24, 2007, Appellant relied on Levine to provide competent, appropriate, and legal tax and accounting advice. (R. pp. 365-367.) Levine has admitted that the advice he provided to Appellant and the Company and the tax returns he prepared were fraudulent (and that he knew it was fraudulent at the time he was doing it), but that he nevertheless assured Appellant that it was proper. (R. pp. 486-489.) In addition, and with full knowledge of the tax and accounting problems that Appellant raised through counsel in September 2007 (R. pp. 846-847, 848-850), Levine has continued as the accountant for the Company and inexplicably failed to appropriately remedy the tax

[18] Appellant recognizes that the Mason Respondents have also breached their fiduciary duties of acting in good faith, with ordinary care, and with a reasonable belief that the action undertaken is in the best interests of the corporation and its shareholders by (1) continuing to retain Levine as the Company accountant and continuing to rely on his financial advice in the face of actual knowledge of his incompetent and fraudulent accounting advice in violation of S.C. Code Ann. § 33-8-420(c) (2006) and (2) failing to appropriately remedy the improper tax returns for 2003-2006 until the week this matter was tried (in *November 2011*) despite *actual knowledge* of the problems since *September 2007*.

problems for over four years.[19] He also retaliated against Appellant and assisted the Mason Respondents in retaliating against Appellant because Appellant brought his unprofessional and incompetent behavior to light. (R. pp. 503, 506, 513, 514-515.) Levine's claims that he had no knowledge of his participation in the many breaches of fiduciary duties and retaliation against Appellant must fail.

F. Appellant's Appeal as to Respondent Levine is properly perfected.

This Court has already considered and rejected Respondent Levine's argument that Appellant's mistake in failing to initially properly name Respondent Levine as a respondent was not a clerical error. (Order of March 4, 2013.) On June 4, 2012, Appellant filed a timely Notice of Appeal in the Court of Appeals. (Appellant's Return to Levine's Motion to Dismiss ("Return") at p. 2.) Levine was not listed as a Respondent in the Notice of Appeal, nor was the Levine Final Order listed or attached to the Notice of Appeal, although the Notice of Appeal listed and attached the Final Order and the Order denying the Rule 59(e) motion. *Id.* John M. Leiter, Esq., counsel for Levine, however, was served with the Notice of Appeal. *Id.* On June 8, 2012, Appellant filed an Amended Notice of Appeal, which listed Levine as a Respondent. *Id.* at p. 2-3. Counsel for Levine was again served with a copy of the Amended Notice of Appeal. *Id.* at p. 3. Immediately after a conversation with counsel for Levine during which he pointed out that the there was a separate final order with respect to Levine and it was not attached to the Amended Notice of Appeal, on July 19, 2012, Appellant filed a Second Amended Notice of Appeal, which again listed Levine as a Respondent and further listed and attached the Levine

[19] Even the amended returns that Levine prepared and that were reviewed in form only by Tim Duncan, CPA, were improper and would, if filed, have failed to fix the problems. (R. pp. 586, 587, 592-593.)

Final Order. *Id.* Counsel for Levine was served with a copy of the Second Amended Notice of Appeal. *Id.* On September 24, 2012, Appellant filed his Initial Brief and Designation of Matter. *Id.* Counsel for Levine was served with a copy of Appellant's Initial Brief and Designation of Matter. *Id.*

It is well established that "[c]lerical 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). The hallmark of the clerical error analysis focuses on any prejudice to the moving party. *See, e.g. Moody v. Dickinson*, 54 S.C. 526, 534, 32 S.E. 563, 566 (1899) (finding that there was no "error in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced, and were not delayed" where the error was an improper listing of the parties to the appeal in the notice); *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (discussing that the moving party "demonstrates no prejudice as a result of the omission" from the notice of appeal); *Charleston Lumber*, 318 S.C. at 478, 458 S.E.2d at 436 ("Charleston Lumber's effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled is rejected.").

In *Conner v. City of Forest Acres*, 348 S.C. 454, 460-61, 560 S.E.2d 606, 609 (2002), the South Carolina Supreme Court recognized that failure to properly name respondents in a Notice of Appeal could be a clerical error if the error was rectified promptly and prejudice did not occur. In *Conner*, the appellant filed a Notice of Appeal on January 12, 1998, naming only one of three defendants as a respondent. *Id.* at 460, 560 S.E.2d at 609. The Court of Appeals advised the appellant on January 14, 1998, that

the caption should read differently and identify the additional two defendants as defendants if not respondents. *Id.* Despite such notice from the Court of Appeals, the appellant did not file an Amended Notice of Appeal until after the appellant's initial brief and designation of matter were filed in late May 1998 – almost five months after the Notice of Appeal was originally filed. *Id.* at 461, 560 S.E.2d at 609. Under these facts and relying on *Moody*, the Court of Appeals found that the correction did not occur "soon" after the mistake was discovered and that the failure to take action promptly "misled [the two defendants] into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment." *Id.* at 462, 560 S.E.2d at 610.

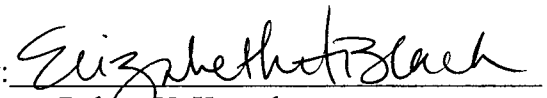
This case is clearly distinguishable from *Conner*, and indeed, the contours of *Conner* would classify the deficiencies in the various notices of appeal in this matter as clerical errors. First, Appellant filed his Amended Notice of Appeal a mere four days after the Notice of Appeal, and the Amended Notice of Appeal named Levine as a Respondent. Counsel for Levine was served with the Amended Notice of Appeal, thereby putting Levine on notice that Appellant intended to appeal issues regarding Levine. Both the Notice of Appeal and the Amended Notice of Appeal, filed on June 4, 2012, and June 8, 2012, respectively, were filed within the 30 day window after receipt of the written notice of the entry of the order denying Appellant's Rule 59(e) motion on June 1, 2012, pursuant to Rule 203(b)(1), SCACR. Second, Appellant filed a Second Amended Notice of Appeal on July 19, 2012, in direct response to inquiries from counsel for Levine about the specifics of Appellant's appeal. Levine can hardly be prejudiced or misled about whether he was to be included in the appeal if he asked for and was given

immediate oral and written confirmation that the Levine Final Order was a subject of the appeal. Third, the Second Amended Notice of Appeal was filed over two months before Appellant filed his Initial Brief and Designation of Matter on September 24, 2012. Unlike in *Conner*, in which the appellant filed his initial brief and designation of matter before correcting the notice of appeal, Levine has been included in the briefing and designation of matter all along. Consequently, Appellant has properly perfected his appeal as to Respondent Levine.

Conclusion

For the reasons set forth herein and in Appellant's principal brief, both the Final Order and the Levine Order should be reversed.

HAYNSWORTH SINKLER BOYD, P.A.

By: 

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