THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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

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

vs.

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

AND

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

vs.

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

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

AND

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

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF CASE

This case arises out of a shareholder dispute between Ellis R. Smith ("Smith") and Arthur Wayne Vereen ("Vereen"). Smith and Vereen were the two sole shareholders of a construction company known as A&E Constructors and Consultants, Inc. ("the Company"). Smith served as President and Chairman of the Company, while Vereen served as Secretary/Treasurer. **(R. p. 1002; R. p. 3018)**.

The Company was formed in October 2003 and became operational on January 1, 2004. **(R. pp. 871-72; R. pp. 2642-43; R. p. 2735; R. pp. 8401-04; R. p. 8428)**. Smith stopped working for the Company in 2007 and formed his own competing construction company, E. Smith and Sons Construction, LLC ("E. Smith and Sons").[1] **(R. p. 917; R. p. 1030; R. pp. 3038-39)**. In September 2007, Smith began competing against the Company by working on jobs for E. Smith and Sons. **(R. p. 916-17; R. pp. 1021-23)**. All the while, Smith remained a shareholder of the Company and continued receiving a salary from the Company. **(R. pp. 1021-23; R. p. 1032; R. pp. 3038-39)**.

Shortly after forming E. Smith and Sons, Smith sent two demand letters to Vereen in the latter part of 2007. **(R. p. 2740; R. p. 2952; R. p. 2955; R. pp. 8405-13)**. In the first demand letter, Smith alleged Vereen owed the Company $400,006.67, and in the second demand letter, Smith alleged Vereen owed the Company $1,614,345.40. **(R. pp. 8405-13)**.

On January 23, 2009, Smith filed this lawsuit against Vereen in the Horry County Court of Common Pleas. **(R. pp. 422-435)**. Smith styled the lawsuit as a derivative action against Vereen, commenced on behalf of himself and the Company. **(R. pp. 422-435)**. In addition to Vereen, Smith named other parties as defendants as well. Smith named Vereen's wife, Linda C. Vereen,

[1] Smith claimed he stopped working for the Company in mid-September 2007; Vereen contends it was in June 2007. **(R. p. 917; R. pp. 3038-39)**.

Park Place Properties of Myrtle Beach, LLC ("Park Place"), Parkway Offices, LLC ("Parkway"), and Arthur Vereen Construction, Inc. ("AVC") as defendants.[2] **(R. pp. 422-435)**.

On July 23, 2009, the Honorable Larry B. Hyman, Jr. signed an Order of Reference, referring this case to the master-in-equity for Horry County, where it was heard by the Honorable Cynthia Graham Howe. **(R. pp. 9-10; R. p. 18)**. This case was tried in nine (9) days, over the course of eighteen (18) months, with the trial beginning on February 15 and 16, 2011, continuing on June 13 through June 15, 2011, continuing again on October 11 through October 13, 2011, and concluding on August 27 through August 30, 2012. **(R. p. 67)**. The master-in-equity did not issue a written order until two and one-half years after the last day of trial. **(R. pp. 17-58; R. pp. 67-68)**.

On March 23, 2015, the master-in-equity issued a forty-two (42) page order, granting judgment against the Appellants in the amount of $2,968,790.68. **(R. pp. 17-58)**. The master-in-equity entered the judgment against Vereen individually, as well as against Park Place, Parkway Offices, AVC, Linda C. Vereen, the Arthur W. Vereen Residence Trust, Linda C. Vereen Residence Trust, and 29th Place Developers, Inc. (collectively "Other Appellants"). **(R. pp. 17-58)**. The master-in-equity held the Other Appellants liable for the judgment against Vereen under veil piercing and alter ego theories.[3] **(R. p. 53)**.

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[2] The master-in-equity apparently allowed Smith to add 29th Place Developers, Inc., Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, and Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust. **(R. pp. 17-58)**.

[3] The master-in-equity uses the term "conspiracy" in her Orders, but there is no finding that the Other Appellants engaged in a conspiracy according to the elements of such a cause of action. Furthermore, Smith did not plead a cause of action for conspiracy. See Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.").

The next day, March 24, 2015, the master-in-equity issued a one-page *Nunc Pro Tunc* Order, which recalculated prejudgment interest and added Parkway's name to the Form 4 Order. (**R. pp. 61-62; R. p. 68**). Otherwise, the *Nunc Pro Tunc* Order did not alter the First Order. (**R. pp. 61-62; R. p. 68**). With the recalculation of prejudgment interest, the *Nunc Pro Tunc* Order increased the judgment total to $4,226,383.90 against Vereen and the Other Appellants. (**R. pp. 61-62**).

Appellants filed a Motion for Reconsideration. (**R. pp. 77-108**). In the Motion for Reconsideration, Appellants argued, in part, that the master-in-equity erred in holding the Other Appellants liable for the judgment under veil piercing and alter-ego theories. (**R. p. 80**). Appellants argued this relief was improper because Smith did not seek it in the Complaint. (**R. p. 80**).

On April 25, 2016, the master-in-equity issued a written order, ruling on Appellants' Motion for Reconsideration. (**R. pp. 65-70**). In the Post-Trial Order, the master-in-equity agreed she erred in holding the Other Appellants liable for the judgment under veil piercing and alter ego theories. (**R. p. 69**). Instead, in the Post-Trial Order, the master-in-equity held the Other Appellants liable for the judgment against Vereen "under an amalgamation of interest or blurred identity theory."[4] (**R. p. 69**). The effect of the Post-Trial Order is to hold the Other Appellants, consisting of individuals, trusts, and other corporate entities, liable for the judgment against an individual, Vereen.

Appellant received a copy of the Post-Trial Order on April 25, 2016, and Appellants filed a Notice of Appeal within thirty days thereafter, on May 20, 2016. (**Notice of Appeal**).

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[4] Respondents neither asserted a cause of action for amalgamation, nor requested such relief in the Complaint. (**R. pp. 422-433**).

STATEMENT OF FACTS

Smith and Vereen were long-time friends, but going in to business together, made them enemies. **(R. p. 872)**. Smith and Vereen have known each other since 1981. **(R. p. 872)**. Vereen has been involved in the construction business for over forty (40) years, and throughout the years, Smith worked for Vereen on various projects. **(R. pp. 2730-32; R. p. 2801)**. Smith and Vereen have never been in business together, until the formation of the Company in October 2003. **(R. p. 872)**.

In the early 1990s, Smith experienced personal financial hardship, as his home fell in foreclosure, and he filed for bankruptcy. **(R. pp. 1035-40; R. pp. 1981-83; R. pp. 3332-36)**. Smith had no place to live, and he turned to Vereen for help. **(R. pp. 1982-83)**. In the words of Smith, Vereen "helped" him. **(R. pp. 1982-83)**. Smith testified Vereen helped him "more than you will ever know! More than you will ever know!" **(R. pp. 1982-83)** (emphasis in original).

Vereen[5] sold Smith a lot, located at a subdivision known as 29th Place at Carriage Row, "at cost." **(R. p. 1036; R. p. 1982; R. pp. 3244-49; R. pp. 3332-36)**. Vereen[6] paid for construction materials in the amount of $38,795.83, so Smith could build a home on the lot. **(R. p. 1981; R. p. 1993; R. pp. 3250-51)**. Smith testified he intended to pay Vereen back for the construction materials, and in fact, in a Land Sales Contract, Smith agreed to do so in sixty installment payments of $322.92. **(R. p. 1979; R. pp. 3244-49)**. At trial, Smith testified he "couldn't tell you" whether he paid this money back to Vereen. **(R. p. 1994)**. According to Vereen's records, Smith owed approximately $44,000.00 for these materials at the time of trial. **(R. pp. 2002-03)**.

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[5] The lot was owned by 29th Place Developers, Inc., a company Vereen maintained an ownership interest in.

[6] The materials were owned by AVC, a company Vereen maintained an ownership interest in.

Before going in business with Vereen, Smith performed construction work through his own company, EES Construction and Consulting, Inc. ("EES"). **(R. p. 1053; R. pp. 1884-85; R. p. 1887)**. EES performed construction work from 1996 through 2004. **(R. p. 1887)**. By Smith's own admission, all of the construction work performed by EES during this period of time was illegal, as EES held no license to perform such work.[7] **(R. p. 1053; R. pp. 1881-84, p. 1887)**.

In 2003, Smith approached Vereen about starting the Company. **(R. pp. 2731)**. Smith told Vereen he had some projects getting ready to start that he could not permit.[8] **(R. p. 2731)**. Smith also told Vereen that by starting a business together, it would give Smith the opportunity to pay Vereen back the money he owed him. **(R. p. 2731)**. Smith and Vereen agreed to form the Company. **(R. pp. 2731-32)**.

Smith and Vereen agreed they would each invest $50,000.00 to start the Company. **(R. pp. 2753-54)**. Smith and Vereen further agreed they would finish up existing construction jobs in 2003, and the Company would perform any new jobs. **(R. p. 2635, R. pp. 2640-43)**. Vereen abided by this agreement; Smith did not. **(R. pp. 2752-54; R. pp. 2731-35)**.

Vereen made an initial capital investment of $50,000.00 in the Company. **(R. p. 2658; R. pp. 2752-54)**. Smith "never put a penny" in the Company. **(R. p. 2753)**. After the initial capital investment, the Company never had enough money, and when the Company needed money, Vereen funded it, either through personal funds or from funds of other companies he maintained an interest in. **(R. pp. 2752-54; R. pp. 2934-37)**.

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[7] Section 40-11-200 requires contractors to have a license in order to perform work in South Carolina.

[8] Vereen had an unlimited B5 construction license. **(R. p. 1030)**. In order to obtain this license, the Company must have a worth of $250,000. **(R. p. 1030)**. Because of Smith's financial hardships, he was unable to do projects of this scope and needed Vereen. **(R. p. 1030)**.

Smith also failed to bring any jobs to the Company. Instead of bringing jobs to the Company, Smith, in 2004 and 2005, spent most of his time working on jobs for his own construction company, EES. **(R. p. 1048; R. p. 1074; R. p. 2508)**. Vereen and Smith formed the Company in October 2003 but agreed not to begin operations until January 1, 2004. **(R. p. 1832; R. p. 2642; R. p. 2735)**. During this period of time—from formation to operation, Smith and Vereen agreed they would finish up existing construction jobs with their separate construction companies, but any upcoming or new jobs would be performed by the Company. **(R. p. 2635, pp. 2640-43)**. Smith and Vereen were supposed to "roll" "every job that we had scheduled to work on ... into [the Company]." **(R. p. 2734)**. Vereen abided by this agreement, Smith did not. **(R. pp. 2731-35)**.

By his own admission, Smith performed jobs for EES for "quite a while" after the Company became operational. **(R. p. 1048)**. Smith, through EES, performed work on a fence project at Grande Dunes in 2004, after the Company became operational.[9] **(R. pp. 1061-62; R. p. 1837)**. The contract price for the fence job was $290,000.00. **(R. pp. 2989-92)**. The Company did not receive any money for the fence job. **(R. p. 2992; R. pp. 1045-46)**. Smith also performed work on the following construction projects for EES after the Company became operational: Cari Ann Davis' home, an office up-fit for Robert Sealy, the Perez house, and the Selena Mann house. **(R. pp. 1837-38; R. pp. 3252-56; R. pp. 3261-97; R. pp. 3298-20)**. The Company did not receive any money for these jobs; instead, EES did. **(R. pp. 1850-54; R. pp. 1855-60)**.

[9] This fence project is sometimes referred to as the Burroughs and Chapin fence at Callaya. **(R. pp. 1061-62)**.

Smith acknowledges he did not begin working "full time" for the Company until March 2005.[10] **(R. p. 1074)**. Once Smith began working full time for the Company, he started receiving a salary from the Company, like Vereen. **(R. p. 1075)**.

As the two (2) sole shareholders of the Company—with Smith serving as President/Chairman and Vereen as Secretary/Treasurer, both Smith and Vereen maintained full authority to write Company checks; however, because Smith never went to the bank to sign a signature card, Vereen wrote all of the checks. **(R. p. 3018; R. p. 1107)**. Smith testified he was never denied access to the Company books, financial records, or checking accounts. **(R. pp. 2009-10; R. p. 2715)**. In fact, Smith testified he would "quite often" ask Carrie Drewett, the Company bookkeeper, "to run a general ledger of what kind of costs we had on the job and where we stood." **(R. p. 1108)**. Smith testified that instead of printing the ledgers for him, the Company bookkeeper "would tell [him] what was going on." **(R. p. 1108)**. Smith accepted this response from the bookkeeper. **(R. p. 1108)**.

In June 2007, Smith approached Vereen, stating "he was due some vacation time and he was going to take a couple weeks off." **(R. p. 2739)**. During this conversation, Smith did not reveal his true intentions to Vereen, which were to leave the Company and never return. **(R. p. 2739)**. Smith left the Company in June 2007, under the guise of a vacation, and never returned to work for the Company again. **(R. pp. 2739-40)**. The Company continued to pay Smith until Smith sent his first demand letter to Vereen in September or October 2007. **(R. p. 2740)**.

In June 2007, when Smith approached Vereen about taking a vacation, he knew he was leaving the Company. A couple of months prior—in March 2007—an individual by the name of

[10] Vereen testified Smith did not come to work every day for the Company until June 2005. **(R. pp. 2738-39)**.

Martin Brown contacted Smith about performing work on the Condolux[11] project. **(R. pp. 916-17)**. After speaking with Brown, Smith, on April 3, 2007, decided to form his own construction company, E. Smith and Sons Construction, LLC ("E. Smith and Sons"). **(R. p. 1030)**. Smith did not tell Vereen about the Condolux project or about forming E. Smith and Sons. **(R. pp. 1890-90; R. p. 1032; R. p. 2797)**. The Condolux job was a $1.3 million dollar job. **(R. p. 1023)**.

While allegedly on vacation, Smith, without the knowledge or permission of Vereen, pulled construction permits in the name of the Company to perform work on the Condolux project and other projects, including the warehouse on Madison Drive and a deck on South Ocean Boulevard in Windy Hill. **(R. pp. 1021-23; R. p. 3257; R. pp. 3258-60; R. pp. 3323-31; R. pp. 3332-36)**. Smith did not tell Vereen about these jobs. **(R. p. 1050; R. p. 2797)**. E. Smith and Sons performed the work on these jobs and received all the money from them. **(R. pp. 1021-23)**. Smith was still a shareholder of the Company at this time and was still receiving a salary from the Company. **(R. pp. 1021-23; R. p. 167; R. p. 2740)**.

In September or October 2007[12], Smith left a demand letter on Vereen's desk ("First Demand Letter"). **(R. p. 2740; R. p. 2952; R. pp. 8405-12)**. In the First Demand Letter, Smith acknowledged Vereen, either personally or through other companies, contributed $1,186,129.80 to the Company. **(R. pp. 8405-12)**. Smith claimed the Company paid personal expenses on behalf of Vereen in the amount of $1,586,136.47. **(R. pp. 8405-12)**. Smith demanded that Vereen

[11] The Condolux project is sometimes referred to as the Martin Brown project in the record. **(R. p. 1021)**.

[12] Vereen testified Smith left the First Demand Letter on his desk in September or October 2007. **(R. p. 2740)**. Smith testified that by mid-September 2007, he had already delivered the First Demand Letter to Vereen. **(R. p. 917)**.

reconcile the difference and pay the balance of $400,006.67[13] to the Company. **(R. pp. 8405-12)**. For his part, Vereen acknowledged that some of the expenses were personal. **(R. p. 2955)**.

Prior to the end of 2007, Smith delivered a second demand letter to Vereen. **(R. p. 2955; R. pp. 8413-14)**. In the Second Demand Letter, Smith greatly increased the amount of money he contended Vereen owed the Company. **(R. pp. 8413-14)**. In the Second Demand Letter, Smith alleged the Company paid expenses on behalf of Vereen in the amount of $2,950,079.90. **(R. p. 8413)**. The Second Demand Letter remained consistent with the amount of money Vereen contributed to the Company, setting that number at $1,218,449.50. **(R. p. 8413)**. In the Second Demand Letter, Smith demanded that Vereen reconcile the difference and pay the Company $1,614,345.40—$1.2 Million Dollars more than his initial demand. **(R. pp. 8413)**. It is unclear why Smith's numbers changed so dramatically, but it proved to be a theme, even at trial, as Smith's expert, Susan Brady, continually made changes to the amount she contended Vereen "retained" from the Company. **(R. p. 2848; R. p. 1581; R. p. 1608)**.

Smith enlisted the help of Susan Brady, his long-time accountant, to assist him in reviewing the Company's financial information. **(R. pp. 1376-79; R. p. 1387)**. Brady has a long association with Smith and no association with Vereen. **(R. pp. 1345-47; R. p. 1355)**. Since 1996, Brady performed accounting work for Smith. **(R. pp. 1345-46)**. Brady also performed accounting work for Smith's companies and his son. **(R. pp. 1345-47; R. p. 1355)**. In this case, Brady testified that Smith asked her "to look through the books of [the Company] and to find out if there were some problems." **(R. p. 1376; R. pp. 1387-88)**. Brady required Smith to sign an engagement letter with her, and after doing so, Brady began her review. **(R. pp. 1387-88)**. Brady testified that "[Smith] was my client," not the Company, certainly not Vereen. **(R. p. 1340; R. p. 1603)**.

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[13] $1,586,136.47 - $1,186,129.80 = $400,006.67.

Brady did not perform an accounting of the Company or the other corporate entities involved in this lawsuit. **(R. pp. 718-19; R. p. 725; R. p. 769; R. p. 771)**. Brady performed what she termed a "compilation." **(R. p. 719; R. p. 725; R. p. 769; R. p. 771)**. Brady described three (3) different types of services an accountant could provide in a case such as this one, and she ranked them from most to least stringent. **(R. pp. 723-24)**. Brady began by discussing an audit; then, she discussed a review, and finally, she testified about a compilation, which is the least stringent of the three (3) services. **(R. pp. 723-24)**. Brady described a "compilation" as follows:

> A compilation is you are compiling a client's information, putting it together .... You don't go in and audit. If you have receipts, you take those receipts. ***You're not saying that you stand behind them.*** This is an expense or this is a legitimate expense .... If it looks like it could be an expense or if [it] could be a payable, you use your judgment.

(R. pp. 724-25) (emphasis added).

Brady testified she has never performed an "accounting" of a business, an accounting review of a business, or a forensic audit for a company.[14] **(R. p. 725; R. p. 727)**. It is critical to understand what Brady did (and did not do) in preparing the compilation. Brady neither made a determination of whether the Company made or lost money, nor the amount due each shareholder. **(R. p. 1508; R. pp. 1607-08)**. The following colloquy occurred at trial:

> Q. So, did this business make money or lose money?
>
> A. I don't know if that can be determined.
>
> Q. ... You don't think at this point, it can be determined if ... [the Company] made or lost money?
>
> A. I think until whose job was whose and whose income was whose and who paid the expenses and what the expenses

[14] Brady testified she did an "audit" of the Company in January 2004, before the Company began doing business, so the Company could obtain its contractor's license. **(R. pp. 727-28)**.

really were, I don't know that you can determine how much money was really made.

Q. And that was not the scope of your job?

A. No.

(R. p. 1508).

Brady further testified she could not make a determination of what was owed each shareholder—Smith and Vereen. **(R. p. 1607)**. Brady testified "that would take some time because there's notes on the books. You would have to go through the notes. Like you said, the capital accounts and to clean out all of that ... you got equipment on the books. You have to clean it all out." **(R. p. 1607)**. Brady testified she was not rendering an opinion on how much the Company owed each shareholder. **(R. p. 1607)**.

In preparing her compilation, Brady did not consider whether Vereen or any of the companies he maintained an ownership interest in paid expenses for the Company. **(R. pp. 1417-18)**. Brady testified it was not in the scope of her job to determine "whose job was whose," "whose income was whose," "who paid the expenses" or "what the expenses really are." **(R. p. 1508)**.

Brady often times had no backup information for the numbers she used. **(R. pp. 1479-80; R. p. 1518; R. p. 1582)**. The lack of backup information was only a problem for Brady if Vereen could not produce it. **(R. p. 1581)**. Brady did not require Smith to produce backup information to verify checks paid by the Company to EES. **(R. p. 1603)**. Brady testified she asked Smith if he had invoices for the checks paid by the Company to EES, and he said yes. **(R. p. 1603)**. Brady did not require Smith to produce invoices; rather, she took him at his word, explaining "He [Smith] was my client." **(R. p. 1603)**. Brady did not treat Vereen the same way.

In preparing the compilation, Brady did what Smith told her to do. **(R. p. 1269; R. p. 1582; R. p. 1603)**. Smith told Brady to stop her analysis in 2007, because that is when Smith stopped

working for the Company. **(R. pp. 1545-46; R. p. 1563)**. However, the Company did not (and could not) simply cease its operations, when Smith, all of a sudden, and without warning, unilaterally left the Company and formed his own competing construction company. **(R. pp. 2590-94; R. pp. 2789-93; R. pp. 3337-52)**. As Vereen put it, after Smith left, "someone had to keep finishing up [the Company]." **(R. p. 2591)**. After Smith left the Company, the Company had existing jobs to finish, had to fix problems with completed construction projects, and had to resolve legal claims against it for completed construction projects. **(R. pp. 2590-94; R. pp. 2789-93; R. p. 472-75; R. p. 1015; R. pp. 3337-38; R. pp. 3339-52)**. These problems continued, even after the filing of this lawsuit on January 23, 2009. **(R. pp. 417-35; R. pp. 2591-93; R. pp. 2789-93)**. In preparing the compilation, Brady neither considered any Company liabilities after 2007, nor any contributions made by Vereen after 2007. **(R. pp. 2716-17)**.

Other examples of Brady following Smith's instructions are replete in the record. For instance, Brady relied on Smith's assertion that the rentals for the lull and skid were not Company expenses, even though Vereen disagreed. **(R. p. 814; R. pp. 958-59; R. p. 2878)**. Also, Brady accepted Smith's word over Vereen's about whether certain jobs the Company performed were at cost or for profit. **(R. pp. 841-43)**. If it was a for profit job, Brady added fifteen percent (15%) to the total job costs. **(R. p. 841; R. p. 1555)**. Brady added fifteen percent (15%) when Smith told her to do so, despite Vereen's contention that personal projects would be at cost. **(R. p. 841; R. p. 1555; R. p. 2773)**.

Brady alleges she determined only the amount of "retained earnings" Vereen kept from the Company. **(R. p. 1581; R. p. 1608)**. Brady testified that Vereen "retained earnings" from the

Company of over $2.8 Million Dollars.[15] **(R. p. 1581; R. p. 1608)**. However, as set forth above, Brady was not submitting that Vereen owed the Company or Smith this amount of money. **(R. p. 1607)**. Brady testified she was not rendering an opinion on how much money was owed each shareholder, either Vereen or Smith. **(R. p. 1607)**. Brady did not adjust her "retained earnings" calculation to reflect Vereen's cash capital investment or in-kind contributions of heavy equipment and office equipment to the Company. **(R. p. 1607; R. p. 2761)**.

At trial, the master-in-equity accepted Brady's compilation as gospel, adopting it "as conclusive evidence of the actual damages sustained by [Smith] as a result of [Vereen's] actions." **(R. p. 24)** The master-in-equity awarded Brady's "retained earnings" calculation to Smith. **(R. p. 24)**. The master-in-equity held the Other Appellants liable for the judgment against Vereen under veil piercing and alter ego theories. **(R. p. 53)**.

Ultimately, in the Post-Trial Order, the master-in-equity reversed the theory in which she held the Other Appellants liable for the judgment against Vereen. **(R. p. 69)**. In the Post-Trial Order, the master-in-equity held the Other Appellants liable for the judgment "under an amalgamation of interest or blurred identity theory." **(R. p. 69)**.

In sum, the master-in-equity entered a judgment against the Appellants in the amount of $4,226,383.90, which included over $1 million dollars for prejudgment interest and $100,000 for punitive damages. This appeal followed.

STANDARD OF REVIEW

"A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." Ballard v. Roberson, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (internal quotation

[15] When the Order was issued, Brady's "retained earnings" calculation was $2,712,503.31. **(R. p. 24)**.

marks omitted). "In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." Mason v. Mason, 412 S.C. 28, 48, 770 S.E.2d 405, 415 (Ct. App. 2015).

ANALYSIS

I. AMALGAMATION

The master-in-equity erred in finding the Other Appellants liable for the judgment against Vereen under an amalgamation theory because: (A) Smith neither pleaded amalgamation in the Complaint, nor asserted facts necessary to support such a finding; and (B) South Carolina law does not allow for the amalgamation of individuals, trusts, and corporations together to be responsible for a judgment against an individual.

A. Smith Did Not Plead Amalgamation

In the Complaint, Smith neither pleaded a cause of action for amalgamation, nor did he allege any of the facts necessary to hold the Other Appellants liable for the judgment under an amalgamation theory.

The Court of Appeals requires the following elements before finding an amalgamation of interests ***among corporations***[16]: (1) shared owners/shareholders among the corporations, (2) shared officers by the corporations, (3) shared office location by the corporations, (4) shared employees among the corporations, and (5) evidence that the corporations present themselves to the public as sharing common interests. Magnolia North Prop. Owners Ass'n v. Heritage Cmntys.,

[16] No South Carolina case has ever used amalgamation as the master-in-equity did here, to hold individuals, trusts, and corporations liable for a judgment against an individual.

Inc., 397 S.C. 348, 360, 725 S.E.2d 112, 118 (Ct. App. 2012); Pope v. Heritage Cmtys., 395 S.C. 404, 417, 717 S.E.2d 765, 772 (2011).

South Carolina law is clear that a party cannot ordinarily receive relief which was not requested in the pleadings. See, e.g., Gainey v. Gainey, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983). This tenant of state law is rooted in the Constitution. See U.S. Const. amend. XIV ("No State shall .... Deprive any person of life, liberty, or property, without due process of law ...."); see also Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) ("Due process requires that a litigant be placed on notice of the issues which the court is to consider."); Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review.").

In the Complaint, Smith neither asserts a cause of action for amalgamation, nor does he allege any of the elements necessary to support a finding of amalgamation. The Complaint makes no mention of the words "amalgamation" or "blurred identity." The Complaint does not allege that any of the corporate entities, individuals, or trusts who make up the "Other Appellants" were formed and/or were operated in such a manner so as to blur their legal distinction with one another or with Vereen. Without such allegations, the Other Appellants were not on notice that a judgment could be entered against them based upon an amalgamation theory. The master-in-equity therefore erred in relying on an amalgamation theory to hold the Other Appellants liable for the judgment, because Smith did not seek such relief in the Complaint.

The South Carolina Court of Appeals has recognized the doctrine of amalgamation in only four (4) reported cases.[17] Magnolia North, *supra*; Pope, *supra*; Mid-South Mgmt. Co., Inc. v.

[17] The Supreme Court of South Carolina has never applied the doctrine of amalgamation. In fact, the Supreme Court mentioned the concept of amalgamation in two (2) cases, both of which involved the analysis of whether a lender could be held liable for construction defects. Kirkman

Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007); Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). In Magnolia North and Mid-South, the plaintiffs requested relief against the defendants based upon an amalgamation theory. Phillips L. McWilliams, Note, Magnolia North v. Heritage Communities: The South Carolina Court of Appeals' End Run Around the Necessity of Equitable Justification When Disregarding the Corporate Form, 64 S.C. L. Rev. 825, 836 (2013) (citing Eighth Amended Complaint at 1-7, Magnolia North, 397 S.C. 348, 725 S.E.2d 112); Mid-South, 374 S.C. at 595, 649 S.E.2d at 139.

Magnolia North and Mid-South represent half of the reported case law on amalgamation in South Carolina. There are two (2) other reported cases on amalgamation—Pope, *supra*, and Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). The opinions in Pope and Kincaid are silent as to whether the plaintiff sought the relief of amalgamation in their complaint, but based on the requirement that a party cannot receive relief he does not request in his pleading, it stands to reason that such theory was either pleaded or was not raised as a ground for appellate review.

Accordingly, because Smith did not seek a judgment against the Other Appellants in his pleading based upon an amalgamation theory, the master-in-equity erred in relying on amalgamation to hold the Other Appellants liable for the judgment against Vereen. This Court should therefore, vacate the judgment against the Other Appellants in its entirety.

B. Cannot Amalgamate Individuals, Trusts, & Corporations To Be Responsible For Judgment Against Individual

South Carolina law does not allow for the amalgamation of individuals, trusts, and corporations together to be responsible for a judgment against an individual; instead, the

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v. Parex, Inc., 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989).

amalgamation doctrine merely allows for the amalgamation of sibling corporations together in certain limited circumstances.

South Carolina law has only applied the doctrine of amalgamation against sibling corporations, which act together to develop, construct, and sell residential property and which present themselves to purchasers as sharing common interests. See Magnolia North, 397 S.C. at 358-60, 725 S.E.2d at 118; Pope, 395 S.C. at 417, 717 S.E.2d at 772; Kincaid, 289 S.C. at 96, 344 S.E.2d at 874. No appellate court in South Carolina has used the amalgamation doctrine outside of the construction defect context. South Carolina law has never amalgamated corporations, trusts, and individuals together and held them liable for a judgment against an individual, as the master-in-equity did here. In Mid-South, this Court explicitly refused to use the amalgamation doctrine to hold one corporation liable for the debts of another corporation, finding that the amalgamation doctrine has never been used outside of the context of holding "sibling companies jointly liable for negligent construction." 374 S.C. at 605, 649 S.E.2d at 144. The amalgamation doctrine should not be expanded in this case.

In Kincaid, the plaintiffs purchased a lot to build their single-family home from the defendant developer. Id. at 92, 344 S.E.2d at 871. A sister corporation of the developer, the defendant sales and marketing agent, sold the home to the plaintiffs. Id. The developer subsequently contracted with another sister corporation, the defendant construction company, for the construction of the home. Id. After finding construction defects in the home, the plaintiffs brought suit against all three corporations for negligent construction and breach of warranty. Id. at 91-92, 344 S.E.2d at 871-72. The court of appeals noted the three corporations: (i) had the same corporate officers, shareholders, and location; (ii) distributed literature that described the sales and marketing company as a company that developed, sold, and managed property; and (iii)

customers could contact any one of the three corporations to register a complaint. Id. at 96, 344 S.E.2d at 874. Based on these factors, this Court affirmed the trial court's ruling that the "evidence revealed an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." Id.

Magnolia North also involved three corporate entities, which were sued after Magnolia North began to experience water intrusion issues. 397 S.C. at 358-61, 725 S.E.2d at 118-20. Heritage Communities, Inc. ("HCI") was the developer of the condominium project named Magnolia North and the parent corporation of the other corporate entities. Id. at 356 n.2, 725 S.E.2d at 117 n.2. Heritage Magnolia North, Inc. ("HMN") was a subsidiary of HCI and sold the condominiums at Magnolia North to buyers. Id. Buildstar Corporation ("Buildstar"), another subsidiary of HCI, was the general contractor in charge of construction at Magnolia North. Id. This Court found HCI, HMNI, and Buildstar shared the following: (i) a location, (ii) a telephone number, (iii) board members, (iv) officers, and (v) employees. This Court further found that HCI held itself out as the corporation responsible for construction defects in the warranty manual distributed to homeowners. Id. at 360, 725 S.E.2d at 118. Based on the foregoing, this Court found an amalgamation of interests between HCI, HMNI, and Buildstar.

The facts in Pope mirror Magnolia North. In Pope, two of the three defendants were the same corporations as those in Magnolia North, and the third defendant was the project-specific developer. Pope, 395 S.C. at 410, 717 S.E.2d at 768. The three corporations: (i) shared a location, (ii) shared a telephone number, (iii) shared board members, (iv) shared employees, and (v) the overall developer held itself out as responsible for construction defects through its warranty. Id. S.C. at 417, 717 S.E.2d at 772. On these facts, this Court upheld the trial court's ruling that the legal distinction between the corporations was blurred. Id.

In Mid-South, the Court of Appeals was asked to extend the amalgamation doctrine beyond its traditional contours. 374 S.C. at 604-05, 649 S.E.2d at 144-45. In Mid-South, the appellants sought to hold a principal corporation liable for the debts of a subsidiary corporation under an amalgamation theory. Id. This Court refused to use the amalgamation doctrine to make one corporation liable for the debts of the other, finding that "[i]n In Kincaid, this court found sibling companies jointly liable for negligent construction." Id. at 605, 649 S.E.2d at 144. The Court continued, "***Kincaid was not a situation in which one company owed a judgment and the court imposed liability upon the parent company or a shareholder.*** Thus, Kincaid is inapplicable to the present action." Id. (emphasis added). This Court further noted that there was no evidence in the record that appellants could confuse the principal corporation with the subsidiary corporation. Id. at 605, 649 S.E.2d at 145.

The master-in-equity erred in holding the Other Appellants, consisting of individuals, trusts, and other corporations, liable for the judgment against Vereen. In Mid-South, this precise issue was presented, and this Court refused to use amalgamation in a manner so as to make one corporation liable for the debts of another. 374 S.C. at 605, 649 S.E.2d at 144. Mid-South should control the analysis here, and based on Mid-South alone, this Court should reverse the master-in-equity's order holding the Other Appellants liable for the judgment against Vereen. The master-in-equity used amalgamation in the exact manner prohibited by Mid-South (*i.e.* to hold another party liable for the judgment against another).

Additionally, under the established amalgamation framework, it is impossible to hold the Other Appellants, consisting of individuals, trusts, and other corporations, liable for the judgment against an individual, Vereen. South Carolina law requires an examination of the following interests "among corporations" to find them amalgamated: (1) shared shareholders among the

corporations, (2) shared officers by the corporations, (3) shared office location by the corporations, (4) shared employees among the corporations, and (5) evidence that the corporations present themselves to the public as sharing common interests. Magnolia North, 397 S.C. at 360, 725 S.E.2d at 118; Pope, 395 S.C. at 417, 717 S.E.2d at 772. Based on these elements, it is clear amalgamation is only meant to cover those situations where the actions of more than one "corporation" creates a blurred identity with another corporation. This analysis cannot be used among disjointed entities to find individuals, trusts, and other corporations amalgamated with an individual. This is exactly what the master-in-equity did in this case.

It is impossible to conduct any type of amalgamation analysis to determine whether one individual, Linda C. Vereen,[18] should be amalgamated with another individual, Vereen. Individuals have no shareholders; they have no officers; they have no office location; they have no employees. Likewise, it is impossible to determine whether a trust, whether it be the Arthur W. Vereen Residence Trust or the Linda C. Vereen Residence Trust,[19] should be amalgamated with an individual, Vereen. Again, trusts and individuals have no shareholders; they have no officers; they have no office location; they have no employees. Also, it is impossible to determine whether corporate entities, Park Place Properties, Parkway Offices, 29th Place Developers, and/or Arthur Vereen Construction, should be amalgamated with an individual, Vereen.[20] One cannot compare corporate entities with an individual to determine whether they share shareholders, share officers, share an office location, or share employees. The amalgamation analysis does not work

[18] Linda C. Vereen is part of the group collectively identified as the Other Appellants.
[19] The Trusts are part of the group collectively identified as the Other Appellants.
[20] Park Place Properties, Parkway Offices, and Arthur Vereen Construction are part of the group collectively identified as the Other Appellants.

among disjointed entities. Again, the analysis only provides a framework to determine whether the identity of one corporation is blurred with another corporation.

The master-in-equity set forth no basis for how she came to conclude that the Other Appellants should be amalgamated with Vereen. Accordingly, based on the foregoing, this Court should vacate the master-in-equity's order amalgamating the Other Appellants with Vereen.

Lastly, if the master-in-equity's ruling were to stand, it would greatly erode the public policy of the State of South Carolina of treating separate corporations, separate trusts, and separate individuals as separate and distinct legal persons, with their own liabilities. See, e.g., S.C. Code Ann. § 33-3-102 (making each properly formed corporation a separate jural person—separate from its shareholders and separate from its affiliates, both horizontally and vertically). If the master's ruling were to stand, "A plaintiff no longer has to prove each individual claim against each individual defendant. Rather, a plaintiff can lump all defendants together through amalgamation, prove one claim as to one defendant, and collect damages from all the defendants." McWilliams, *supra* 64 S.C. L. Rev. at 844. The master-in-equity's ruling not only marks a stark departure from the amalgamation jurisprudence in this State, but also erodes the General Assembly's express statutory intent to encourage business growth when it conferred limited liability on corporations. See generally S.C. Code Ann. § 33-3-102 (establishing the corporation as a separate legal entity); see also Stephen B. Presser, Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics, 87 Nw. U. L. Rev. 148, 155 (1992) (asserting that, in the nineteenth century, state legislators viewed limited liability as a way to fuel economic growth); see McWilliams, *supra* 64 S.C. L. Rev. at 830 (Courts should not depart from the General Assembly's public policy choice of limited liability without substantial justification.). This Court should not allow such a ruling to stand.

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

II. PREJUDGMENT INTEREST

The master-in-equity erred in awarding prejudgment interest to Smith because: (A) Smith did not seek a sum certain; and (B) the award of prejudgment interest was inequitable where the master-in-equity did not issue a written order until two and one-half years after the last day of trial.

A. Smith Did Not Seek Sum Certain or Fixed Amount

This court should reverse the award of prejudgment interest to Smith because he did not seek a sum certain.

"The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009). "Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006). "The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest." Historic Charleston Holdings, 381 S.C. at 435, 673 S.E.2d at 457. "Rather, the proper test is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Id. (internal citations and quotations omitted).

Historic Charleston Holdings is the most instructive case in analyzing whether Smith sought a sum certain. Like this case, Historic Charleston Holdings was an accounting case (although a much simpler one), where members of a limited liability corporation disputed the amount of corporate funds owed to each member. 381 S.C. at 424-25, 673 S.E.2d at 451-53. Historic Charleston Holdings, LLC ("HCH") was one member of Dixie Holdings, LLC and Gerard Mallon was the other. Id. at 423, 673 S.E.2d at 451. Prior to suit, HCH and Mallon agreed to, and did in fact, split the net proceeds of all real estate sales of Dixie Holdings on a fifty-fifty basis. Id. at 436, 673 S.E.2d at 458. A dispute between the parties arose, when Mallon expressed his disagreement with HCH's accounting of corporate funds. Id. Because of this disagreement, Mallon withheld fifty percent (50%) of the net proceeds from the sale of a property located at 15 Felix Street from HCH. Id. Thereafter, HCH brought suit against Mallon, seeking a full accounting of Dixie Holdings and a determination of the amount owed to each member. Id. at 425, 673 S.E.2d at 452.

HCH prevailed at trial, and the master-in-equity awarded prejudgment interest to HCH, reasoning the sum sought by HCH was certain, because HCH sought fifty percent (50%) of the proceeds from the sale of 15 Felix Street. Id. at 435-36, 673 S.E.2d at 458. The Supreme Court reversed, finding the measure of recovery was unliquidated at the time the parties' claims to the proceeds of 15 Felix Street arose. Id. at 436, 673 S.E.2d at 458. The Supreme Court found the record reflected a "disagreement" between HCH and Mallon as to HCH's method of accounting. Id. This disagreement led to Mallon withholding fifty percent (50%) of the funds from the sale of 15 Felix Street from HCH. Id. The Court stated, "the logical conclusion to be drawn from this pattern of events is that the members of Dixie were contemplating a future distribution of the escrowed funds, that depending on the outcome of a complete accounting, may not have been the

standard fifty-fifty split." Id. Under these circumstances, the Court found that HCH sought an unliquidated sum and reversed the mater's award of prejudgment interest. Id.

Smith did not seek a sum certain, when his claim arose against Vereen. As Historic Charleston Holdings instructs, the proper test in determining whether a plaintiff seeks a sum certain is whether the amount of damages "***is fixed by conditions existing at the time the claim arose.***" Id. at 435, 673 S.E.2d at 457 (emphasis added). Like Historic Charleston Holdings, the dispute in this case was between shareholders of a company concerning the accounting and allocation of corporate funds. Smith's "claim arose" against Vereen in September 2007, as this is the time when Smith testified he quit working for the Company and sent his First Demand Letter to Vereen. (**R. p. 917**). In analyzing whether prejudgment interest should have been awarded, the critical inquiry is whether Smith's claim for damages was fixed in September 2007. The answer to this question is clearly no for three (3) reasons: (1) The Company continued to operate after September 2007, and this continued operation affected the Company funds, which, in turn, affected any amounts potentially due to Smith as a shareholder; (2) By forming his own competing construction company, Smith's disloyal acts caused damage to the Company, which affected Company funds and affected any amounts potentially due to Smith as a shareholder; and (3) After September 2007, Smith engaged in new construction in the name of the Company, exposing it to potential liability.

1. The Company Continued to Operate After September 2007

The Company did not cease its operations in 2007, when Smith, left the Company and formed his own competing construction company. (**R. pp. 2590-94; R. pp. 2789-93**). As Vereen put it, after Smith left, "someone had to keep finishing up [the Company]." (**R. p. 2591**). Vereen was that somebody. After Smith left the Company, the Company had existing jobs to finish, had to fix problems with completed construction projects, and had to resolve legal claims against it for

completed construction projects. (**R. pp. 2590-94; R. pp. 2789-93; R. pp. 2911-14; R. p. 1015**). These problems continued, even after the filing of this lawsuit on January 23, 2009. (**R. pp. 417-35; R. pp. 2590-94; R. pp. 2789-93**). All of these issues that occurred after September 2007 affected the amount of Company funds available and affected the amount due each shareholder in this accounting action. Therefore, the amount sought by Smith from Vereen was not "fixed ... at the time the claim arose." Historic Charleston Holdings, 381 S.C. at 435, 673 S.E.2d at 457.

2. Smith's Disloyal Acts in Competing against the Company

Smith's disloyal acts in competing against the Company affected the amount potentially due to him in this accounting action. Prior to September 2007, Smith set the stage for his disloyal acts, when he formed his own competing construction company, E. Smith and Sons, on April 3, 2007. (**R. p. 1030**). In mid-September 2007, Smith testified he began working for E. Smith and Sons in competition with the Company. (**R. pp. 916-17; R. p. 994; R. p. 1030**). Smith testified that he was still a shareholder of the Company at this time, and he was still receiving a salary from the Company. (**R. p. 1032; R. p. 2740**).

By competing against the Company while still a shareholder, Smith breached the fiduciary duties he owed to the Company and Vereen. See S.C. Code Ann. § 33-8-310 (identifying the circumstances when an officer of a corporation has a conflict in interest). Smith's breach of fiduciary duty harmed the Company and potentially affected the amount of money he was owed as a shareholder. Because of Smith's disloyal acts, his damages were not fixed in September 2007.

3. Smith Performed Construction work Under the Company's Name After September 2007

After leaving the Company, Smith, unbeknownst to Vereen, pulled construction permits in the Company's name so E. Smith and Sons could perform work on the Condolux project, the

warehouse on Madison Drive project, and a deck project on South Ocean Boulevard in Windy Hill. **(R. pp. 1021-23)**. Smith testified he did not tell Vereen about these jobs. **(R. p. 1032; R. p. 2797)**. Because Smith pulled permits for these projects in the Company's name, the Company remained potentially liable for these projects for eight (8) years. **(R. p. 2797)**. Smith's acts of performing construction in the name of the Company after September 2007 affected the Company's liabilities and the amount due each shareholder in this accounting action.

Accordingly, after Smith left the Company and his claim allegedly arose against Vereen, neither the amount of Company funds, nor the amount owed to each shareholder was fixed. Therefore, the master-in-equity erred in awarding prejudgment interest to Smith. This Court should therefore reverse the master-in-equity's award of $1,395,990.00 in prejudgment interest to Smith.

B. Imposition of Prejudgment Interest Inequitable Where Delay Caused by Master

The master-in-equity erred in awarding pre-judgment interest to Smith for the time in which it took to issue the order. The last day of trial was on August 30, 2012. The master-in-equity did not issue a written order until March 23, 2015, some two and one-half years later after the last day of trial. It is inequitable to charge Vereen prejudgment interest from the end of trial to the date of the issuance of the order, as such delay was not caused by Vereen, and it is inequitable that he should pay for it.

Accordingly, this Court should, at the very least, reduce the prejudgment interest charged to Vereen.

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

The master-in-equity erred in failing to order an accounting in this case, and the master-in-equity erred in relying on the Brady compilation.

If the court finds that a shareholder violated section 33-18-400 of the South Carolina Code of Laws, the court can order an accounting. S.C. Code Ann. § 33-18-410(a)(5). In Historic Charleston Holdings, the Supreme Court analyzed whether it was appropriate to order an accounting in a dispute between two members of a limited liability corporation. 381 S.C. at 429, 673 S.E.2d at 454. In that particular case, the Court reasoned that the dispute between the members was "simple" and that the parties' dispute was over a "small sum of money." Id. Under these circumstances, the Court found a full accounting was unnecessary. Id. "[A]n accounting is an appropriate remedy when the accounts at issue are complicated or mutual. Id. (citing 1 Am.Jur.2d Accounts and Accounting § 56 (2005)).

In contrast to Historic Charleston Holdings, the dispute between Smith and Vereen is quite complicated and is over a very large sum of money. Additionally, Smith, in the Complaint, and Vereen, in his responsive pleading, both requested an accounting. **(R. p. 429-30; R. pp. 438-47)**. Under these circumstances, the master-in-equity should have appointed an independent forensic accountant to perform an accounting.

Instead of appointing an independent forensic accountant, the master-in-equity relied on a "compilation" prepared by Smith's expert, Susan E. Brady. **(R. p. 718; R. pp. 724-25; R. p. 727; R. p. 769; R. p. 771)**. The master-in-equity erred in relying on the Brady compilation because: (A) It is not an accounting; (B) It ends in 2007, before the Company ceases operations; and (C) It unreasonably relies on Smith and holds Smith and Vereen to double standards.

A. Brady Did Not Perform an Accounting

Brady **did not** endeavor to perform an accounting of the Company in this case. Brady performed what she called a "compilation." **(R. p. 718; R. p. 725; R. p. 769; R. p. 771)**. Brady explained the hierarchy, from most stringent to least stringent, of services an accountant could

provide in these type of cases. (**R. pp. 723-24**). Brady testified that an audit would be the most stringent, followed by a review, and then followed by a compilation. (**R. pp. 723-24**). Brady described a "compilation" as follows:

> A compilation is you are compiling a client's information, putting it together .... You don't go in and audit. If you have receipts, you take those receipts. ***You're not saying that you stand behind them.*** This is an expense or this is a legitimate expense .... If it looks like it could be an expense or if [it] could be a payable, you use your judgment.

(**R. pp. 724-25**) (emphasis added).

Brady has never performed an "accounting" of a business, an accounting review of a business, or a forensic audit for a company. (**R. p. 725; R. p. 727**). Brady did not perform an accounting of the Company in this case. Brady's compilation runs through 2007. (**R. p. 1545; R. p. 1563**). If Brady performed an accounting, she would have been able to testify how much was due each shareholder at the end of 2007. Brady could not. Brady testified she was not rendering an opinion as to how much money was owed each shareholder, either Vereen or Smith. (**R. p. 1508; R. p. 1607**). Brady testified "that would take some time because there's notes on the books. You would have to go through the notes. Like you said, the capital accounts and to clean out all of that ... you got equipment on the books. You have to clean it all out." (**R. p. 1607**).

If Brady performed an accounting, she would have been able to testify whether the Company made or lost money. However, Brady explained that her compilation did not allow her to testify whether the Company made or lost money. (**R. p. 1508**).

If Brady performed an accounting, she would have accounted for all expenses. Brady did not. Brady's compilation did not account for whether Vereen or any of the Other Appellants paid expenses for the Company. (**R. p. 1417**). Brady explained it was not in the scope of her job to

determine "whose job was whose," " whose income was whose," "who paid the expenses" or "what the expenses really are." (**R. p. 1508**).

If Brady performed an accounting, she would have accounted for Vereen's capital contributions. Brady did not. Brady did not adjust her "retained earnings" calculation to reflect Vereen's cash capital investment or in-kind contributions of heavy equipment and office equipment to the Company. (**R. p. 1607; R. p. 2761**).

Brady contends she determined the amount of "retained earnings" Vereen kept from the Company. (**R. p. 1581; R. p. 1608**). Brady testified Vereen "retained earnings" from the Company of over $2.8 Million Dollars. (**R. p. 1581; R. p. 1608**). As set forth above, Brady was not submitting that Vereen owed the Company or Smith this amount of money. (**R. p. 1607**). Brady testified she was not rendering an opinion on how much money was owed each shareholder, either Vereen or Smith. (**R. p. 1607**). Brady testified she did not even know whether the Company made or lost money. (**R. p. 1508**).

In sum, Brady's compilation was clearly not an accounting and it failed to do what this lawsuit sought to do, both in the Complaint and in the responsive pleading, which is to account for the amount owed each shareholder and/or the Company. The master-in-equity erred in relying on the Brady compilation to award damages to Smith.

Accordingly, this Court should reverse the master-in-equity's order and remand this case for a new trial.

B. Brady's Compilation Ends in 2007

The master-in-equity erred in relying on Brady's compilation because it ends in 2007, when the Company was still operational. (**R. p. 1545; R. p. 1563**). The Company did not cease its operations when Smith left the Company and formed his own competing construction company.

(**R. pp. 2590-94; R. pp. 2789-93**). After Smith left the Company, the Company had existing jobs to finish, had to fix problems with completed construction projects, and had to resolve legal claims against it for completed construction projects. (**R. pp. 2590-94; R. pp. 2789-93; R. pp. 2911-14; R. p. 1015**). These problems continued, even after the filing of this lawsuit on January 23, 2009. (**R. pp. 417-35; R. pp. 2590-94; R. pp. 2789-93**). Brady did not consider any Company liabilities after 2007 or any contributions made by Vereen to the Company after 2007. (**R. pp. 2716-17**).

Accordingly, the master-in-equity erred in relying on Brady's compilation because it ends in 2007, when the Company was still operational.

C. Brady's Compilation Unreasonably Relies on Smith & Holds Smith & Vereen to Double Standards

The master-in-equity erred in relying on the Brady compilation because it unreasonably relies on Smith and holds Smith and Vereen to double standards.

The Brady compilation relies exclusively on Smith and is biased in his favor. (**R. p. 814; R. pp. 841-43; R. p. 862; R. p. 958; R. p. 3070**). For example, Brady relied on Smith's assertion as to whether the rental of certain construction equipment (a lull and skid) was a Company expense, even though Vereen disagreed. (**R. p. 814; R. pp. 958-59; R. p. 2878**). Brady also accepted Smith's word over Vereen's about whether certain jobs were at cost or for profit. (**R. pp. 841-43**). If a job was for profit, Brady added fifteen percent (15%) to the total job costs. (**R. p. 841**). Brady added fifteen percent (15%) to every job Smith determined to be a for profit job, even if Vereen disagreed. Furthermore, Brady held Smith and Vereen to different standards. Brady required backup for all expenses Vereen attempted to take credit for, but she did not require the same from Smith. (**R. p. 1581; R. p. 1603**). Brady testified she did not require backup from Smith because "he was my client." (**R. p. 1603**).

In sum, Brady's compilation is not independent and is biased in favor of Smith. The master-in-equity erred in relying on the Brady compilation and in failing to appoint an independent forensic accountant for this case. Because of the master-in-equity's error, this Court should reverse the master-in-equity's order and remand this case for a new trial.

IV. FAILURE TO CONSIDER UNCLEAN HANDS OF SMITH

The master-in-equity erred in completely disregarding the unclean hands of Smith and the inequity of her award.

"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." Mason, 412 S.C. at 54–55, 770 S.E.2d at 419 (quoting Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005)). "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." First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). The doctrine of unclean hands provides, "[h]e who comes into equity must come with clean hands." Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. pp. 2004). The doctrine of unclean hands "is a self- imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Id. "[T]he equitable defense of unclean hands is available in a shareholder derivative action." Straight v. Goss, 383 S.C. 180, 207, 678 S.E.2d 443, 458 (Ct. App. 2009).

A. Unclean Hands in Forming E. Smith and Sons and Competing Against Company

The evidence is uncontroverted that Smith, while still a shareholder of the Company, competed against the Company and usurped corporate opportunities from the Company, by

forming his own construction company—E. Smith and Sons. The master-in-equity erred by failing to take these facts into consideration.

Smith formed his own construction company, E. Smith and Sons, on April 3, 2007 while still a shareholder of the Company. **(R. p. 1030)**. Smith did not tell Vereen he formed E. Smith and Sons. **(R. pp. 1890-91)**. According to Smith, he stopped working for the Company in September 2007 and began competing with the Company through E. Smith and Sons. **(R. pp. 916-17; R. p. 994)**. Smith was still receiving a salary from the Company at this point in time. **(R. p. 1032; R. pp. 3038-39)**. Because E. Smith and Sons did not have a general contractor's license to perform construction work, Smith, without telling Vereen, pulled permits in the name of the Company for the jobs E. Smith and Sons performed. **(R. p. 1024)**.

E. Smith and Sons performed at least three (3) jobs while Smith was still a shareholder of the Company: the Condolux project, the warehouse on Madison Drive project, and a deck project on South Ocean Boulevard in Windy Hill. **(R. pp. 1021-23)**. Smith testified he did not tell Vereen about these jobs. **(R. p. 1050; R. p. 2797)**. The Condolux job was a $1.3 million dollar job, and the Company and Vereen received no money for any of these jobs. **(R. p. 1023; R. p. 2797)**.

Smith was the President and Chairman of the Company when he committed the acts set forth above. **(R. p. 422; R. p. 2009; R. p. 2715)**. The master-in-equity completely disregarded this evidence. **(R. p. 48)**. Smith cheated on the Company plain and simple by forming E. Smith and Sons and working on competing construction projects. In doing so, Smith breached the fiduciary duties he owed to Vereen and to the Company, and he usurped corporate opportunities belonging to the Company. See S.C. Code Ann. § 33-8-310 (identifying the circumstances when an officer of a corporation has a conflict in interest). The master-in-equity erred in failing to consider the fact that instead of working for E. Smith and Sons, Smith should have been working

for the Company. However, Smith worked against the Company, all the while he remained a shareholder of the Company and continued to receive a salary from the Company.

In issuing her ruling, the master-in-equity failed to consider Smith's disloyal acts. Because of this failure, this Court should reverse the ruling of the master-in-equity and remand this case for a full and complete judicial accounting.

B. Unclean Hands in Keeping Jobs For EES After Company Became Operational

Additionally, when Smith and Vereen agreed to form the Company, they agreed that any new job would be a Company job. (**R. pp. 2642-43; R. pp. 876-77**). Vereen brought several jobs to the Company; Smith brought none. (**R. pp. 2731-35**). Smith, through EES, performed work on a fence project at Grande Dunes in 2004, after the Company became operational. (**R. pp. 1061-1062; R. p. 1837**). The contract price for the fence job was $290,000.00. (**R. pp. 2989-92**). The Company did not receive any money for the fence job. (**R. p. 2992; R. pp. 1045-46**). Smith also performed work on the following construction projects for EES after the Company became operational: Cari Ann Davis' home, an office up-fit for Robert Sealy, the Perez house, and the Selena Mann house. (**R. pp. 1837-38**). The Company did not receive any money for these jobs; instead, EES did. (**R. pp. 1850-53; R. pp. 88-93**). The master-in-equity erred in failing to consider Smith's unclean hands in refusing to bring these jobs to the Company.

Accordingly, the master-in-equity erred in completely disregarding the inequities of Smith. This Court should reverse the ruling of the master-in-equity and remand this case for a full and complete judicial accounting.

C. Inequitable Result

The master-in-equity created an inequitable result, when she awarded $4,226,383.90 to Smith.

Smith worked for the Company for a very short period of time. Smith testified he did not begin working "full time" for the Company until March 2005. **(R. p. 1074)**. Smith left the Company in June 2007, under the guise of a vacation, and never returned. **(R. pp. 2739-40)**. According to Smith, he received $117,235.51 from the Company. **(R. pp. 8405-12)**. Smith invested nothing in the Company. **(R. p. 2753)**. Smith neither invested money, nor equipment or jobs in the Company. **(R. p. 2753)**. Smith took from the Company by keeping jobs for EES and by forming E. Smith and Sons and performing competing construction work. **(R. p. 2734; R. pp. 2989-92; R. pp. 1045-46; R. pp. 1021-23)**. Under these circumstances, it is inequitable for Smith to receive a judgment in the amount of $4,226,383.90.

Accordingly, this Court should reverse the ruling of the master-in-equity and remand this case for a full and complete judicial accounting.

V. MASTER HELD PARTIES TO DOUBLE STANDARD

The master-in-equity erred in holding Smith and Vereen to different standards, and because the master-in-equity did so, this Court should reverse the master-in-equity's order and remand this case for a new trial.

The standard of review in this case allows this Court to view the record and make findings in accordance with its own view of the evidence. Historic Charleston Holdings, 381 S.C. at 426, 673 S.E.2d at 453 (stating that an action for an accounting sounds in equity; therefore, this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence); Mason, 412 S.C. at 55, 770 S.E.2d at 419 (finding the Court may take its own view of the evidence in a case where shareholders dispute amounts due).

A. Conflicts of Interest

The master-in-equity found Vereen engaged in multiple conflicts of interest while a shareholder of the Company. **(R. pp. 25-26; R. p. 36,; R. p. 39)**. However, the master-in-equity completely disregarded the uncontroverted fact that Smith also engaged in multiple conflicts of interest while a shareholder of the Company. **(R. pp. 916-17; R. p. 994; R. p. 34)**. Smith did so in September 2007, when he suddenly stopped working for the Company, and unbeknownst to Vereen and while receiving a salary from the Company, formed his own competing construction company. **(R. pp. 916-17; R. p. 1032; R. pp. 2998-99)**. Smith performed at least three (3) jobs during this time. **(R. pp. 1021-23)**.

The master-in-equity erred in failing to account for the fact that Smith engaged in egregious conflicts of interest while a shareholder and President of the Company.

B. Failure to Have Contractors License

The master-in-equity found it significant that Vereen engaged in construction without a license. **(R. pp. 37-38)**. However, Smith engaged in work without a contractor's license in 2007, when he left the Company to form his own competing construction company. **(R. p. 1024)**. Also, prior to joining the Company, Smith engaged in construction without a contractor's license for eight (8) years. **(R. p. 1887)**.

The master-in-equity erred by holding the Parties to a different standard in issuing her ruling. Because of this error, this Court should reverse the ruling of the master-in-equity and remand this case for a full and complete judicial accounting.

VI. MASTER ERRED IN ENDING HER ANALYSIS IN 2007

The master-in-equity erred by ending her analysis of this case in 2007. **(R. p. 48)**.

The Company neither ceased operations in 2007, nor dissolved with the Secretary of State. **(R. pp. 2589-94; R. pp. 2789-93; R. pp. 2911-14)**. The master-in-equity's decision to end her

analysis of this case in 2007 greatly advantaged Smith and greatly disadvantaged Vereen. The master-in-equity disregarded Smith's disloyal acts in 2007 and thereafter and also disregarded Vereen's expenditures of time and money in to the Company after 2007. **(R. pp. 2589-94; R. pp. 2789-93; R. p. 2911-14; R. p. 1015)**.

The master-in-equity erred in arbitrarily ending her review and analysis of this case on December 31, 2007. Because of the master-in-equity's error, this Court should reverse the master-in-equity's order and remand for a new trial.

VII. PUNITIVE DAMAGES

The master-in-equity erred in awarding punitive damages without consideration of the constitutionality of the punitive damages award. Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (citing BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996)).

The master-in-equity only considered the factors set forth in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) in awarding punitive damages to Smith. In Mitchell, the Supreme Court of this State held that a trial judge **must** review the constitutionally of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 385 S.C. at 587-88, 686 S.E.2d at 185-86; Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 150–51 (2010). The master-in-equity failed to do so and thus violated the Constitution in awarding punitive damages to Smith.

Accordingly, this Court should reverse the award of punitive damages against the Appellants, as such award violates Mitchell and the Constitution.

CONCLUSION

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

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

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

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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