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,

v.

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,

v.

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 Wayne 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, In. are the 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 the Respondents.

RESPONDENT A & E CONSTRUCTORS AND CONSULTANTS, INC.'S FINAL BRIEF

Frank H. DuRant
SC Bar No. 1802
Frank@DuRantLawOffice.com

Julian W. DuRant
SC Bar No. 102420
Julian@DuRantLawOffice.com

DuRant & DuRant, P.A.
P.O. Box 960 (29578)
Myrtle Beach, SC 29578
T: 843-448-1541 F: 843-626-7431

Attorneys for A&E Constructors and Consultants, LLC

INDEX

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Other Authorities:

STATEMENT OF THE ISSUES ON APPEAL

1. Appellants did not timely file their Appeal and do not present sufficient Due Process concerns for any exception.

2. The Master-in-Equity didn't err in finding the expert CPA credible.

3. Appellants waived, abandoned, are estopped, or are precluded under preservation-of-error principles and traditional notions of judicial economy from asking for an appointment of an expert.

4. Appellants have waived any challenge to the Court's order sanctioning them for failing to comply with the discovery order and the Court's sustaining the objections to entering the expense evidence and may not claim the expenses now.

5. The Master-in-Equity was correct in awarding A&E prejudgment interest.

6. Appellants have waived any prejudgment interest challenge related to the alleged delay between the final day of trial and the Master-in-Equity's Order.

7. Both the Master-in-Equity and the expert CPA appropriately determined the pertinent time periods and the appropriate entries in those time periods for which this litigation related.

8. The Master-in-Equity was correct in disallowing any expenses relating to Appellants' attempted fraud on the Court.

9. Appellants were on notice of joint-and-several liability such that any pleadings attack is unsuccessful.

10. Piercing the corporate veil, amalgamation, and similar equitable doctrines were tried by consent and/or the Lower Court granted A&E's motion to amend.

11. Appellants were appropriately amalgamated.

12. Ms. Vereen is still responsible for the judgement under a piercing-the-veil theory.

13. Appellants are jointly-and-severally liable because they participated in a conspiracy to harm A&E.

14. There is not a "special damages" issue because there is no possibility of anyone double-paying for the same act.

15. This Court should overrule the "special damages" rule to the extent it finds that it bars any part of A&E's claim for the reasons stated in Chief Justice Pleicones' dissent in *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016).

16. If the Court is not inclined to award joint-and-several damages and/or overrule the "special damages" rule, A&E may still recover its expert accounting fees against all Appellants.

17. Appellants have waived any unclean-hands argument by failing to plead it below.

18. Appellants have waived any claim related to Mr. Smith's side jobs.

19. The Master-in-Equity's findings that Appellants failed to produce damages related to Mr. Smith's alleged acts is unchallenged in Appellants' brief, is law of the case, and may not be raised to this Court.

20. Mr. Smith had clean hands and did not harm A&E.

21. South Carolina equity jurisprudence didn't require Mr. Smith to stay at A&E when he learned that Appellants stole millions from the company and participated in paying kickbacks. It does not bar him from bringing any claims.

22. Appellants waived any punitive-damages argument as to anyone aside from Mr. Vereen.

23. Punitive damages are appropriate.

STATEMENT OF THE CASE

Near the end of 2007, Ellis Smith delivered a handwritten letter to his friend, Wayne Vereen. (R. p. 917). He wrote: "We have been friends for many years and helped each other out any way we could . . . . Now we own a co[r]poration together." Ex. 9 (R p. 8405). A&E Constructors and Consultants, Inc. is that corporation. Ex. 8 (R. p. 8401).[1] Mr. Smith was the President; Mr. Vereen, the Secretary and Treasurer. *Id.* (R. p. *). Mr. Vereen signed all checks on A&E's behalf. (R. p. 933).

Mr. Smith's letter recounted that Mr. Vereen told him in December 2006 that "we had made no money and it cost too much to run a company like ours." (R. p. 8405). Mr. Smith wrote that he'd investigated and "learned why . . . [T]here were substantial amounts of money channeled out of this company for payment[s] not associated with . . . this company. These were for your personal expenses and non[-]reimburs[able expenses] from companies that you control so they are not [A&E's] responsibility." (*Id.* at 8405–06). He provided some figures to Mr. Vereen, recognizing that he was "not an accountant." (*Id.* at 8407). He wrote that he "just want[ed] what is rightfully [his]" and mentioned that a lawsuit "could get very costly." (*Id.* at 8406–07). Unfortunately, the two shareholders couldn't resolve the matter informally and Mr. Smith filed a derivative action on A&E's behalf against Appellants. Compl. (R. p. 417).

A&E alleged that Mr. Vereen diverted A&E's assets to his family—either directly or through the entities that the family controlled. Compl. ¶¶ 2–4, 9, 11, 12 (R. pp. 422–430). The Complaint included a conspiracy claim and named the entities and Ms. Vereen because "they are family members of [Mr.] Vereen or companies controlled by the Defendants Vereen, who have conspired with and received benefits from the disbursements or wrongful expenditures made by [Mr.] Vereen." *Id.* ¶ 13 (R. p. 430); *see also id.* ¶ 18 (R. p. 432). The Complaint detailed over thirty unauthorized transactions, including expenses A&E paid related to the Vereen family home and the Vereens' use of a private airplane. *Id.* at ¶ 11 (R. pp. 425–430).

Appellants defended the case collectively, filing joint answers and interrogatory responses.

[1] A&E never elected statutory close corporation status.

They denied that Mr. Vereen "controlled the receipts and disbursements for A&E or that disbursements made by Vereen were not for the benefit of A&E." Answer ¶ 3 (R. pp. 439–440). They also denied every allegation related to the thirty transactions mentioned in the Complaint. *Id.* ¶ 12 (R. p. 441). Mr. Vereen, individually and on behalf of A&E and 29th Place Developers, Inc., filed claims against Mr. Smith and third-party defendants E. Smith and Sons, Construction LLC and EES Construction Consulting, Inc. (R. pp. 442–445). Arthur Vereen Construction Company, Inc. ("AVC") also filed a counterclaim against Mr. Smith. (R. pp. 445–47). Appellants didn't plead any affirmative defenses.[2]

Judge Hyman referred the action to the Honorable Cynthia Graham Howe, Master in Equity. (R. p. 9). A&E served interrogatories on Appellants and they answered them collectively. Ex. 28, "Interrog. Resp." (R. p. 12306). They admitted that Mr. Vereen "signed and/or authorized all checks payable from [A&E's] checking account." *Id.* ¶ 23 (R. p. 12331). But they swore that they never took a check due A&E and "endorsed, cashed, [or] deposited" into anywhere other than A&E's checking account. *Id.* ¶ 24 (R. p. 12335). They said that they hadn't identified a trial expert, but that accountants Richard Crumpler, Burt Huggins, Susan Brady, or Bart Buie (if called) "may be qualified as expert witnesses." *Id.* ¶ 3 (R. p. 12309). Appellants swore that the "full accounting now being performed" would prove that the disbursements or transactions identified by A&E were altogether appropriate. *Id.* at ¶¶ 10, 11 (R. pp. 12312–12314). Elsewhere they indicated that "[p]roof of this will be illustrated through testimony by [accountants] at Smith Sapp," that those accountants were aware of all of A&E's payments, and that they were aware of A&E's services for the Vereens' entities. *Id.* ¶ 12, 24.a., h., i., k. (R. pp. 12314–12315, 12336–12337).

The Master-in-Equity held a pretrial hearing. At that hearing, Appellants told the Court that "they ha[d] elected not to have an accounting or other 'expert' in this case . . ." Oct. 2010 Order (R. p. 13). Respondents "begged [Appellants] to get an accountant to go through the records," but the Master-in-Equity told Respondents that "I cannot make [Appellants] get an accountant." (R. p. 3178,

[2] Mr. Smith did not "compet[e] against" A&E. Br. 1; S.C. R. App. P. 208(b)(1)(C). We cite to Appellants' brief as "Br."

lines 7-8). Appellants "stated emphatically that no accountant was needed because the evidence was simply a matter of adding and subtracting, and certainly, 'rocket science' was not involved." April 25, 2016 Order (R. p. 67); May 2015 Tr. (R. p. 24, lines 9-16). The Court held that "[i]t is not in the province of this Court to require the Defendants to obtain expert accounting . . . witnesses as the CPAs for the Defendants . . . were present . . . and the Defendants did not desire to use them in the trial of this case." (R. p. 14). The Court let them try the case the way they wanted and "precluded from using an accounting expert." Oct. 2010 Order (R. pp. 13–14). At that same hearing, the Master-in-Equity found that Appellants hadn't responded to requests for production and set an absolute due date. She ruled that Appellants must "present evidence of the actual invoice or bill for services or labor rendered and the cancelled check for payment made pursuant to such invoice." *Id.* (R. p. 15) If that information was not timely delivered, it couldn't be presented at trial. *Id.* (R. p. 16).

The case was tried. Appellants consistently "referred to themselves as the 'Vereen Entities.'" (R. p. 23). Ms. Brady, a licensed CPA, testified as an expert on A&E's behalf. Ms. Sisson, the Vereens' daughter, "acted as Mr. Vereen's accountant" during the case. May 11, 2015 Tr. (R. p. 3227, lines 24-25). By the trial's end, most of Appellants' claims were dismissed on motions for directed verdict. The Master-in-Equity asked the parties to send a post-trial memorandum. May 11, 2015 Tr. (R. p. 3195, lines 10-25). Appellants never sent a memo. A&E did. A&E asked the Court to pierce the corporate veil, find that Appellants were all the alter egos of each other, and apply the amalgamation doctrine. (R. pp. 12541–42). Appellants didn't take issue with that until years later.

On March 23, 2015 the Court issued its order (the "Order"), finding that Appellants failed to meet their burden on any remaining claims. (R. pp. 23, 33–33). The Court ruled in A&E's favor, recognizing that it "established that Defendants conspired to convert [A&E's] assets to their own use with the intent to defraud." (R. pp. 24, 49). The Court credited A&E's expert, Ms. Susan Brady, and recognized that her "accounting task was complicated by [Mr.] Vereen's almost complete failure to maintain separate accounting records for [A&E] and the various Vereen Entities and his consistent commingling of the entities' income and expenses without documentation." (R. p. 24). The Court didn't believe Appellants' defense that they "put more money in than they took out." (R. pp. 36–38).

Instead, the Court found that "when confronted with proof of the misconduct, the[y] refused to accept the responsibility and engaged in a four-week trial where the proof of misconduct was all but absolute." (R. p. 56). The Court also sustained objections to Appellants' failure to comply with the discovery order and disallowed their claims for reimbursement. (R. pp. 45–46). Independently, the Court discredited the claims altogether, finding that Mr. Vereen "regularly sought reimbursement for expenses he paid on the Company's behalf, which were documented . . . and were immediately reimbursed." (R. pp. 30–31).

Finally, the Master-in-Equity found that Appellants attempted to commit a fraud on the Court by submitting claims for reimbursement for money paid from Park Place to A&E after 2007. (R. pp. 48–49). The Court found that the attempted fraud resulted from Appellants' starting a new company in 2008, Grand Strand Builders, putting all its receivables into Park Place, and then funneling the money into A&E to pay themselves salaries to later claim a credit in the litigation. (*Id.*)

The Order and the related Form 4 were filed on March 24, 2015. April 25, 2016 Order (R. p. 68). The Court's law clerk scanned and e-mailed those documents to all counsel of record. *Id.* The Court found that Counsel mailed a copy of those documents to Appellants on March 25, 2015. On March 24, 2015, the Court issued a *nunc pro tunc* Order, correcting the amount of prejudgment interest and adding a name to the Form 4. *Id.* At the end of the day, the Court found that Appellants misappropriated over two million dollars. March 24, 2015 *Nunc Pro Tunc* Order (R. p. 62). The Court awarded A&E prejudgment interest and costs for Ms. Brady's expert work, for a total judgment of $4,226,383.90. *Id.*

On April 6, 2015, Appellants wrote a letter to the Master-in-Equity stating that "I have not been served with a complete copy of the Order . . . filed . . . on 3/24/2015. Page 37 of the Order is missing from the filed copy served on me . . . I request that you send to me page 37 or a complete copy of the Order at your convenience so I can take steps to file a motion to reconsider." (R. p. 12537). Counsel supplied her with Page 37, and she filed a motion for reconsideration on April 20, 2015. That motion states that Appellants received a copy of the *nunc pro tunc* order on March 30, 2015. (R. p. 79).

The Master-in-Equity held a hearing on Appellants' motion and Counsel argued that it was untimely. May 11, 2015 Tr. (R. p. 3183, lines 9-14). At that hearing, Appellants tried to argue that piercing was inappropriate due to alleged pleading defects. *Id.* (R. p. 3170, lines 19-23). In response, Respondents argued that "the disregarding [of] the corporate entities was discussed and hammered through[out] . . . th[e] trial." *Id.* (R. p. 3197, lines 2-5). Respondents asked the Court to conform the pleadings to the proof, because Appellants "always considered themselves as one." *Id.* (R. p. 3197, lines 7-11). The Master-in-Equity agreed, "if there's ever been a case of amalgamation, this is one" and found that those issues were tried by consent. *Id.* (R. p. 3197, line 23–p. 3199, line 1) (It was "certainly tried that way.").

The Court's Order on Appellants' motion to reconsider found that Counsel, on March 27, 2015, mailed a copy of the *nunc pro tunc* Order and Form 4 to Appellants. (R. pp. 68–69). Accordingly, Appellants' motion to reconsider was untimely. *Id.* The Master-in-Equity left for this Court to decide the impact (if any) of the missing page. (R. p. 69). Consistent with its trial-by-consent ruling, the Court rejected Appellants' pleadings attacks, retained the joint-and-several judgment, and (by implication/if necessary) granted A&E's Rule 15 motion. (R. pp. 69–70).

Appellants filed their notice of appeal on May 19, 2016. A&E moved to dismiss the appeal on timeliness grounds, based on both the e-mail and traditional mail received by Appellants. (R. pp. 208–11). This Court granted that motion, relying on the e-mails and rejecting Appellants' argument that the notice was defective because a page was missing: "Rule 59(e), SCRP and Rule 201(b)(1), SCACR do not require Appellants to receive a copy of the underlying order, but rather to merely receive *notice* the order had been entered." (R. p. 73 at 2 n. 1). But the Supreme Court granted certiorari in *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, so this case was held in abeyance. The Court reinstated the appeal after the Supreme Court ruled that e-mail notice was effective prospectively, noting that "[n]othing . . . prevents the parties from arguing . . . timeliness in their briefs." (R. p. 76).

STANDARD OF REVIEW

A Master-in-Equity's finding on the timeliness of a Rule 59 motion is reviewed for abuse of discretion. *Green v. Green*, 465 S.E.2d 130, 132, 320 S.C. 347, 352 (Ct. App. 1995).

A shareholder's derivative suit seeking to remedy the wrongs visited on a corporation is equitable in nature. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978). The *de novo* standard "does not require an appellate court to disregard the findings below." *Pinckney v. Warren*, 544 S.E.2d 620, 344 S.C. 382, 387 (2001). Appellate courts "afford[] a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." *Sullivan v. Brown*, Op. No. 27804, at 2 (2018). "[A]ppellant[s] [are] not relieved of [their] burden of convincing the appellate court that the trial judge committed error in his findings." *Pinckney*, 344 S.C. at 387–88.

A trial court's award of prejudgment interest is reviewed for abuse of discretion. *Historic Charleston Holdings v. Mallon*, 673 S.E.2d 448, 458, 381 S.C. 417 (2009).

"The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765, 776 (Ct. App. 2011).

STATEMENT OF FACTS

Ellis Smith is not a Vereen. He wasn't a part of the entities that the Vereen family controlled (Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, or AVC). Interrog. Resp. (R. pp. 12311–12, 12338). He doesn't have a big house in Murrells Inlet, a Cockaboose, a vacation home in the Bahamas, or a way with accounting software. While Mr. Smith didn't have much in the way of finances, he knew how to get the job done, something Mr. Vereen had trouble accomplishing in the early 2000s. Smith Tr. (R. p. 872, line 15–p. 873, line 21). Working together seemed a good fit: Mr. Smith could "run the stuff in the field and [Mr. Vereen] could run the [business] in the office." *Id.* (R. p. 873, lines 1-3). So, in late 2003, Mr. Smith and Mr. Vereen created a construction company named A&E. Art. of Incorp, (R. p. 8401).

Mr. Smith did not join the Vereen family when he created A&E with Mr. Vereen. But A&E was welcomed into the Vereen flock like your grandmother who just moved back after winning the lottery. In Appellants' mind, A&E could work for the family without a contract and "at cost" to boot. Interrog. Resp. (R. pp. 12319–12322). More often than not, A&E would eat the cost and never send

an invoice for the expenses it paid on family jobs. Order (R. pp. 28–30).

Sometimes A&E let another member of the Vereen family collect the expenses it was owed. *Id.* (R. pp. 41, 43). Off-the-books transfers going every which way were never tracked. On that score, Mr. Vereen testified he just "made an invoice in [his] mind." (R. p. 536, lines 21-23). Elsewhere, he testified that he wrote "those numbers down on paper on my desk." (R. p. 3074). Of course, he never produced that on-the-fly, double-secret set of books. (R. p. 3075). The undocumented *intra*company transactions didn't bother Appellants, so long as the money, labor, or materials stayed in their hands.

Much of A&E's records were kept on the Peachtree accounting software. Smith Tr. (R. p. 922, lines 2-8); Brady Tr. (R. p. 739, line 9–p. 740, line 24). If A&E got a job, a new ledger would typically be created, which generated a number (say 27,000) for that job. Vereen Tr. (R. p. 2664); Brady Tr. (R. p. 742, line 1–p.743, line 2). Employees could then use Peachtree to code expenses, disbursements, and deposits to that job ledger. Brady Tr. (R. p. 740, lines 6-24; p. 743, lines 3-8; p. 1278, lines 2-23). The ledger tracked hard costs. (R. p. 741, lines 15-25). If used appropriately, you can use Peachtree to track A&E's disbursements and receipts on a job. *Id.* (R. p. 743, lines 3-18). The ledgers show the dichotomy: family jobs had large balances, other jobs didn't.

A&E had records supporting non-family jobs. That meant job ledgers, written contracts, invoicing, billing, and payment. Smith Tr. (R. p. 901, line 8–p. 903, line 25). Customers had to show they could pay (mainly through construction loans) and were invoiced directly or through draw requests sent to their lender. *Id.* Customers were charged for equipment that A&E used. *Id.* (R. p. 960, lines 8-18). Mr. Vereen agreed (at least for non-family jobs):

> Q: ". . . [I]f you were building 23 houses for a third party, not your wife, not your family, how often are you going to invoice them for this work that you do? Monthly?
> A: Yes, sir.
> Q: And you are going to give them an invoice?
> A: Yes.
> Q: A[nd] you going to expect payment or you are going to quit working, correct?
> A: Yes, sir.

Mr. Vereen Tr. (R. p. 524, line 19–R. p. 525, line 3).

A&E's recordkeeping applied to Mr. Smith too. From 2004 to 2005, Mr. Vereen and Mr.

Smith agreed that—in lieu of receiving a salary—Mr. Smith would invoice A&E through his old company EES for his time at $25 per hour and for the company's pro-rata expenses spent on A&E's business. Smith Tr. (R. p. 878, line 22–p. 879, line 16; p. 884, line 4–p. 885, line 24). Mr. Vereen reviewed and approved the documentation supporting Mr. Smith's requests before he wrote any check. Smith Tr. (R. p. 884, line 11–p. 885, line 9). If Mr. Smith didn't have the documentation, he wouldn't be reimbursed. *Id.* (R. p. 883, lines 15-21; p. 886, line 4–p. 887, line 14).

Invoicing had to be done from EES (in part) because that company's employees didn't want to work for Mr. Vereen and suppliers didn't want to open accounts for him. *Id.* (R. p. 878, line 22–p. 880, line 4). But it was also fair—Mr. Vereen knew that Mr. Smith had non-A&E jobs that he needed to complete. *Id.* (R. p. 885, lines 10-24). Mr. Vereen started to receive a $1,000 weekly salary in June 2004, Mr. Smith didn't receive a salary until mid-2005, but he showed up daily at the office as soon as the jobs started. *Id.* (R. p. 878, lines 18-21; p. 881, lines 1-6).

Mr. Vereen "told Smith that [A&E] would treat the family jobs just like any other job, and the Company would be paid overhead and profit." Order (R. p. 20); Smith Tr. (R. p. 898, lines 1-11; p. 931, lines 1-9). And that profit was to be split fifty-fifty. Mr. Vereen Tr. (R. p. 488, line 7). That split meant nothing if A&E was working for free for the Vereens. And it meant nothing if A&E was nothing more than a secret subsidiary of the larger Vereen family enterprise. But it was.

I. THE VEREENS AND THEIR EXTENDED FAMILY.

As the Secretary, Mr. Vereen was the "custodian of [A&E's] corporate records." Ex. 8, Bylaws, ¶ 7 (R. p. *). Mr. Vereen was also A&E's Treasurer, meaning he had control of the purse-strings. *Id.* at ¶ 8. Mr. Vereen was the only person at A&E who ever signed a check. Smith Tr. (R. p. 933, lines 12-16). He "exclusively handled the Company's finances" Order (R. p. 19). His Treasurer role required him to keep "receive and give receipts for moneys due and payable to [A&E] from any source whatsoever, and deposit all such moneys" in A&E's account. Ex. 8, Bylaws, at ¶ 8 (R. p. *).

Mr. Vereen also fully owns AVC. (R. p. 488, line 15). AVC lost its license to enter into any construction contracts after October 31, 2003. (R. p. 488, lines 18-21); Pl.'s Ex. 8. Mr. Vereen's letter to his insurer said AVC hadn't entered a contract or performed work since October 2002 or 2003. (R.

p. 12289).

Mr. Vereen and Ms. Vereen own Park Place Properties of Myrtle Beach, LLC. Mr. Vereen Tr. (R. p. 514, line 22–p. 515, line 4). Ms. Vereen is the President and 95% owner. Order (R. p. 19); Interrog. Resp. (R. pp. 12311–12). She received a weekly check for around $1,000 from Park Place that was "combined" or "commingled" with Mr. Vereen's salary. Ms. Vereen Dep. (R. p. 12372, line 15–p.12373, line 21). She has a Master's in mathematics, taught collegiate mathematics courses, and previously worked at A&E's accounting firm, Smith Sapp. *Id.* (R. p. 12357, lines 3-25). Ms. Vereen used to keep the books for AVC. *Id.* (R. p. 12359, lines 3-4). She has check-writing authority at Park Place and enough clout at her entities to wire $215,000 (even if it wasn't to A&E). Mr. Vereen Tr. (R. pp. 529, line 4; 553, line 23). Mr. Vereen made decisions related to Park Place with his wife's knowledge, consent, and authorization. *E.g.*, *id.* (R. p. 516, lines 3-23). Ms. Vereen testified that she didn't read the Complaint and—even after the lawsuit was filed—didn't discuss with her husband whether the Vereens and their entities actually took the amounts alleged. Ms. Vereen Dep. (R. p. 12355, lines 13-14; p. 12380, lines 19-25). The Master-in-Equity didn't believe that: "[h]er professions of ignorance are unconvincing[,] she either knew or should have known of her husband's misappropriations." Order (R. p. 48–49, 53).

Ms. Vereen is the sole owner and President of Parkway Offices, LLC. Interrog. Resp. (R. p. 12312). Parkway Offices owned office space, including a single office shared by A&E and the multiple Appellant entities. Order (R. p. 19). Even Appellants admit that Ms. Vereen personally negotiated with her husband for A&E to perform construction on Parkway's Grissom Parkway property. Interrog. Resp. (R. p. 12328). Ms. Vereen (as did all Appellants) knew that Parkway was never invoiced for the work and still owes over $100,000 to A&E for its work. Ex. 16 (R. pp. 8846, 8853). Mr. Vereen made decisions about Parkway with his wife's permission. Mr. Vereen Tr. (R. p. 531, line 12).

Elizabeth Sisson is the Vereens' daughter and a South Carolina lawyer. (R. p. 565, line 6). She worked at her own practice and for A&E, Parkway, and AVC. (R. p. 2043, line 8–p. 2044, line 14). She testified that sometimes Parkway would pay her when she worked for A&E. *Id.* She also testified that she had check-writing authority for Park Place. (R. p. 2092, line 22–p. 2093, line 17). A&E

continued paying Ms. Sisson a salary after she, her husband, and Mr. Vereen started a separate construction company named Grand Strand Builders, Inc. in 2008. Sisson Tr. (R. p. 2044, lines 3–5; p. 2074, lines 16-20); Ex. 10 (R. p. 8434). Ms. Sisson ran her real-estate practice out of A&E's office and performed numerous closings there while being paid by A&E. Smith Tr. (R. p. 1190, lines 3-8). A&E remodeled Ms. Sisson's home, but she wrote her final check to Park Place instead. (R. p. 566, line 11–p. 567, line 10).

A&E's employee, Ms. Drewett, performed tasks on behalf of Park Place, A&E, AVC, and Parkway at the Parkway's office. Drewett Dep. (R. pp. 6526, 6541, 6551–56, 6567–70); Ms. Vereen Dep. (R. p. 12372 line 20–p.12373 line 13). That office also kept Parkway's, Park Place's, and A&E's books and records. Drewett Dep. (R. p. 6632).

The Court granted A&E's motion to add the Vereens in their capacities as Trustees to allow A&E to proceed against the Trust because A&E alleged that its "assets . . . were diverted and commingled to such Trustees in the purchase and building of the" Vereens' residence. Oct. 15 2010 Order (R. p. 12). Mr. and Ms. Vereen began using A&E to build their home in the thick of the conspiracy. (R. p. 898, lines 1-11). They transferred it to the Trust at the tail end of the charged conspiracy.

II. IN A FEW YEARS, APPELLANTS STOLE MILLIONS FROM A&E.

We can't say for sure why the Vereens embraced A&E as one of their own while leaving Mr. Smith in the cold. Perhaps they believed they had a greater claim to A&E's assets because Mr. Vereen financed A&E at its inception. Smith Tr. (R. p. 874, lines 11-13) ("Mr. Vereen said capital was not a problem. He could put up all of it."). What we can say is that A&E was nothing more than a cost center for the larger Vereen family business. That didn't really start happening until 2004. The two shareholders agreed to finish any other contracts in the names of their existing companies and at their own separate expense. New contracts would be in A&E's name. Order (R. p. 19). Once things got ticking, A&E became very profitable. After all, this was the pre-Recession construction boom: "Opportunities for construction companies were numerous; construction companies were profitable." *Id.* (R. p. 20).

A. Right off the bat, A&E becomes the Vereens' piggy bank.

When we say that Appellants lived out of A&E's accounts, we're not using a figure of speech. During the construction of the Vereens' Murrell's Inlet home, A&E provided materials and labor. Appellants didn't see the need to invoice themselves or pay A&E. Later they admitted they should have. Ex 40 (Consented Amounts) (R. pp. 12460, 12463, 12467).

A&E remodeled the Vereens' daughter's (Ms. Sisson's) home. Some labor charges were never were included on her job ledger, so she never paid them. Mr. Vereen Tr. (R. pp. 2682–84). Ms. Sisson wrote her final check to Park Place. She said that a payment to Park Place (an entity owned by her parents) was a payment to A&E because her father told her that Park Place gave A&E money. Brady Tr. (R. p. 826, lines 16-34; p. 854, line 15–p. 855, line 7); Smith Tr. (R. p. 979, line 8–p. 980, line 23); Ex. 25 (R. p. 12284) ($35,803.10 check).

Appellants took A&Es assets in the very first month of its existence (Smith Tr., R. p. 1003, lines 16-25) and ended up stealing $600,000 from A&E in the first year it operated. Ex. 1 (R. p. 3360). The Vereens dipped into A&E's account any time they pleased. In 2004 alone, A&E paid $1,699.54 for Mr. and Ms. Vereen's dry-cleaning, $6,652.10 for Mr. Vereen's two life-insurance policies, $372.52 for the Vereens' daughter's college gas money, and $2,400.00 for the Vereens' personal warehouse. Ex. 1 (R. p. 3358); Drewett Dep. (R. p. 6580); Ms. Vereen Dep. (R. p. 12378). These sorts of expenses recurred year after year. For example, A&E made payments for the Vereens' Gamecock club memberships, Ms. Vereen's life insurance, their daughter and son-in-law's life insurance, their daughter's car payments, the Vereens' real and personal property taxes, AVC's taxes, Park Place's taxes, the Vereens' Sam's Club credit card, the Vereens' HOA payments, and materials for the Vereens' home in the Bahamas. (R. p. 599, line 1-25; p. 606, line 2–p. 607, line 12; p. 616, line 16–p. 617, line 24; p. 642, lines 8-16; p. 809, line 4–p. line 25; p. 2996); *see generally* Ex. 40 (R. pp. 12453–12534). Initially, Appellants swore that all these expenses were above-board and authorized. *See generally* Interrog. Resp. (R. p. 12306). But their own accountants at Smith Sapp charged some of them as personal expenses on their tax returns. (R. p. 788, lines 2-25); Ex. 36 (R. p. 12439).

Only much later did Appellants admit that most of the amounts were, in fact, unauthorized.

See generally Ex. 40 (R. p. 12454) "Consented Amounts." At trial, Appellants admitted that Mr. Vereen took $601,000 from A&E. (R. pp. 2487–88). And, at trial, Mr. Vereen admitted that he didn't ever tell Mr. Smith that he used A&E to pay certain of his personal expenses. *E.g.* Mr. Vereen Tr. (R. p. 633, line 8). For the life insurance and laundry expenses, Mr. Vereen testified—in what is surely a Freudian slip—"I told him that I was going to keep paying them out of my [meaning A&E's] account." (R. p. 600, lines 19-23). At the end of the day, he admitted that A&E never was supposed to pay for his life insurance and his family's laundry. *See generally* Ex. 40 (R. p. 12454) "Consented Amounts." He doubled-down on A&E's lease of his warehouse, testifying that it was oral. (R. p. 2759). But, as the Court found, there weren't any A&E materials there and Mr. Smith didn't authorize that expense. Smith Tr. (R. p. 939, line 12–p. 940, line 13); Order (R. p. 42). Instead, Mr. Vereen kept his vintage Model T there, along with other odds and ends. *Id.*; *See* Sisson Tr. (R. p. 2156, line 21–p. 2157, line 5)

But this case isn't limited to the Vereens' nickling and diming A&E for a thousand here, a hundred there. These early (and continuing) expenses are small potatoes of what was to come.

In 2004 alone, Mr. Vereen disguised $103,760.68 worth of payments to himself, many of which were accounted as "supervisor fees." Order (R. p. 42); Ex. 1 (R. p. 3374–75). As we've explained, supervisor fees were once given to Mr. Smith in lieu of salary, not in addition. Mr. Vereen was never entitled to any supervisor fees because he was receiving a salary. Smith Tr. (R. p. 935, line 2-25). He disguised these distributions by coding them as construction expenses on the Peachtree system. Smith Tr. (R. p. 933, line 17–p. 934, line 16; p. 944; Ex. 1 (R. p. 3358). Mr. Vereen didn't just cheat A&E. He only reported $53,095 of A&E income to Uncle Sam. Mr. Vereen Tr. (R. p. 2628); Ex. 27 (R. pp. 12291–94). As was common, Mr. Vereen spread the wealth around the family by paying his daughter an unauthorized $5,000 "commission" (also not reported to the Government). Feb. 2011 Brady Tr. (R. p. 807, lines 6-20). We'll hit the high points below:

B. The Plantation Lakes job.

One of A&E's first real jobs was on property Mr. Vereen owned in Plantation Lakes. Mr. Vereen Tr. (R. p. 538, line 19-p. 539, line 24); Mr. Vereen Tr. (R. p. 2692) 253; Ex 17 (R. pp. 8860–87). Initially, Appellants swore that A&E was listed as Mr. Vereen's general contractor, that they

couldn't find a written contract between Mr. Vereen and A&E, and that A&E spent $99,623.58 on the project. Interrog Resp. (R. pp. 12323–24). They said that the job ledger reflected $8,100.83 in payments, but that they should be credited an additional $102,000. They also said that Mr. Vereen obtained a construction loan from a bank and that loan disbursements were made to him. *Id.* They said that Mr. Vereen transferred the title to A&E on January 4, 2005 and that A&E transferred it to the buyers that same day. *Id.*

Here's what they admitted at trial: A&E never invoiced Mr. Vereen for the construction costs shown on the Peachtree system (Mr. Vereen Tr., R. p. 541, line 23–p.542, line 1), A&E paid over $130,000 on the project for labor and materials (R. p. 542, line 5; Ex. 17, R. p. 8887), Mr. Vereen "d[id]n't think that [he] ever told [Mr. Smith] specifically" what, if anything, A&E would receive for its work (R. p. 542, lines 5-6), and the contract to sell the property was between Mr. Vereen and the buyers, not A&E and the buyers. (R. p. 543, lines 3-6). Mr. Vereen said he got a $281,000 personal loan from the bank secured by a mortgage on the property to construct the home. (R. p. 543, lines 7-9). He gave A&E the property for $5 and assumption of his indebtedness. Ex. 17 (R. pp. 8863–66). Around five hours later, A&E (through Mr. Vereen) deeded the property to the buyers for $385,000. *Id.* (R. p. 8867) At the closing, money was disbursed to pay off Mr. Vereen's loan. *Id.* (R. p. 8876).

The Settlement Statement said that A&E should've been paid the remainder ($102,480.96). *Id.* (R. p. 8876). If that were it, then A&E would have only lost around $30,000 plus the costs it incurred for workers comp, social security, liability insurance, and overhead. Order (R. p. 35); Brady Tr. (R. p. 1552, lines 6-7).

But that wasn't enough—Mr. Vereen treated the $102,000 on A&E's books as a "capital contribution." Brady Tr. (R. p. 1299, line 19–p.1301, line 7); Ex. 35 (Smith Sapp work papers) (R. p. 12435). Mr. Vereen treated A&E like the cost center it was—A&E agreed to re-pay Mr. Vereen $120,000 in exchange for A&E's constructing his home. *Id.* Appellants weren't done yet, though. After the sale, A&E did additional work for the buyers. Vereen Tr. (R. p. 73, lines 11-250. The buyers wrote a $11,533.00 check to A&E, but Park Place deposited it. Ex. 32 (R. p. 12427).

C. The Kempe job.

A&E, through Ms. Sisson, certified to Georgetown County that it was the contractor building the Kempe's home. Ex. 13 (R. p. 8666). But Mr. Vereen signed the contract in AVC's name. *Id.* (R. pp. 8670–8677). The Kempes couldn't distinguish the two companies—they received invoices from AVC, but received a Change Order from A&E modifying the terms of the Kempe's contract with AVC. *Id.* (R. pp. 8678, 8680, 8682, 8684, 8685–86, 8688, 8692–93). A&E, under Mr. Vereen's direction, paid Park Place for materials that were purportedly provided to the Kempes. Brady Tr. (R. p. 834, lines 3-17) . The Kempes, however, were never charged for those materials. *Id.* The checks were written to AVC (R. pp. 8679, 8681, 8683, 8689–91), but Mr. Vereen admitted that they should've been A&E's. (R. p. 504, line 12). When asked how he kept up with the payments owed A&E if he didn't deposit them in its account, Mr. Vereen testified that AVC and A&E's records were "intermixed in our computer." (R. p. 505, lines 14-17). Otherwise he had no explanation for why there were no records evidencing the intracompany transaction involving this 200,000-plus dollar deal. (R. p. 504, line 4–p. 507, line 13).

D. The Willoughby job.

From 2004 to 2006, A&E built condos for Willoughby Family Investments. It was a four-million-dollar deal, but Appellants couldn't produce a written contract. Order (R. p. 36–37). At first, Appellants swore that A&E was just a subcontractor for AVC on this job. Interrog Resp. (R. p. 12320). That story changed later. Mr. Vereen Tr. (R. p. 493, lines 14-16)

Third parties involved in this construction (the lender and Willoughby) couldn't tell anyone apart. They wrote checks to AVC, A&E, and Park Place. (R. pp. 8456–8665). A&E obtained all the permits (*see* Ex. 11, R. pp. 8446–51), but AVC sent and obtained draws on Willoughby's construction loan. Ex. 12 (R. pp. 8456–8665). "Arthur Vereen Const. Co. dba A&E" also sent payment applications. *Id.* Other documents sent were from just A&E. The money mostly went to AVC and Park Place (some went to A&E) no matter the designated payee. Order (R. pp. 36–37). AVC deposited $113,480 in checks related to this deal in 2004 alone. Mr. Vereen Tr. (R. p. 604, lines 2-12); Ex. 1 (R. p. 3470–72). In 2006, Park Place deposited $62,250. Ex. 4 (R. p. 4185).

Twenty-two thousand dollars' worth of material paid for by A&E and sent to Park Place's

Pointe Marsh property was recorded on Willoughby's Peachtree job ledger because the Willoughby job was fixed price. Smith Tr. (R. p. 969, lines 2-24). That meant that A&E's books reflected a sunk cost for those expenses that would never be reimbursed. *Id.* Just another example of Appellants' keeping the Vereen family business's costs in A&E, while putting the profits elsewhere. At trial, Mr. Vereen admitted fault for that payment. (R. p. 638, line 6-17).

E. The Dr. Lale job.

On January 30, 2004, Mr. Vereen signed an $147,562 agreement with Dr. Lale to upfit his office. Ex. 14 (R. pp. 8694–8701). He did so in AVC's name, not A&E's. *Id.* Appellants originally swore that A&E performed the job at cost for AVC. Interrog. Resp. (R. p. 12320). At trial, Mr. Vereen testified that "if we . . . wrote this contract under [AVC] at our office, it was an error on our part, but we did that job under A&E." (R. p. 508, lines 9-19). But the job wasn't A&E's in Appellants' mind. They intentionally put the permits in A&E's name and made the applications for payment and charge orders from AVC. Ex. 14 (R. pp. 8702–08, 8711, 8714). Mr. Vereen had no explanation for his actions. (R. p. 511).

Appellants kept the payments and deposited them in whatever entity that suited them. Most went into AVC. For no rhyme or reason, checks were also deposited in Parkway's account. Ex. 31 (R. pp. 12413–14); Ex. 1 at Tab 11 (R. p. 3474) (Drewett's handwritten notes: "Received $57,562.00 from South Strand deposit into Parkway Office account per Wayne.").

F. The Grissom Offices job.

Ms. Vereen, Parkway's President, swore that she came to an unwritten agreement with Mr. Vereen for A&E to perform construction "at cost" on income-producing property that she and Parkway owned. Interrog Resp. (R. pp. 12311–12, 12320, 12328); Order (R. p. 38); Smith Tr. (R. p. 110, lines 3-13). A&E's books showed that it performed over $100,000 worth of construction and neither Parkway nor Ms. Vereen received an invoice. Ex. 16 (R. p. 8853); Order (R. p. 38). Mr. Vereen testified "I made an invoice . . . in my mind." (R. p. 536, lines 21-23). That invoice went unpaid. You don't need to write invoices or pay back an entity when they're all one and the same in your mind.

G. The Black Pearle and Pointe Marsh jobs.

In June 2004, the Vereens decided that they wanted to purchase a property on Sea Mountain Highway containing a putt-putt and go-cart tracks. Smith Tr. (R p. 897, lines 9–p. 900, line 10); Mr. Vereen Tr. (R. p. 2742). They bought the property in Park Place's name. Smith Tr. (R p. 897, lines 9–p. 900, line 10). They decided to upfit the putt-putt, tear down the go-cart tracks, and build twenty-three houses in what became known as the Pointe Marsh development and the Black Pearl Putt Putt. *Id.* Mr. Vereen discussed these projects with his wife and they chose A&E for the job. (R. p. 516, line 17–p. 517, line 2).

Mr. Vereen told Mr. Smith that A&E would be paid cost-plus 15% on those jobs. Smith Tr. (R. p. 898, lines 10-11). But Appellants swore that these jobs were performed for "cost only." Interrog. Resp. (R. pp. 12319–20). At trial, Mr. Vereen admitted that was false as to Pointe Marsh (R. p. 206, lines 1-12) and the Court did not find his testimony about the Black Pearle credible. *Id.*; Order (R. p. 39).

Mr. Vereen didn't tell Mr. Smith that A&E spent over $110,000 on the putt-putt project and that nothing was paid or even invoiced. Ex. 15 (R. p. 8780) (Job ID series 2200); Mr. Vereen Tr. (R. p. 527, line 11–p. 528, line 7). Mr. Vereen never told Mr. Smith that he didn't bill or invoice Park Place for the twenty-three homes built at Pointe Marsh or that the Park Place owed $446,993.72 in expenses alone just for 2005. Mr. Vereen Tr. (R. p. 643, line 17–p. 644, line 1); Brady Tr. (R. p. 787, lines 3-13).

When asked how Park Place knew how much to pay A&E, Mr. Vereen testified "We had a job ledger," referring to A&E's accounting software. (R. p. 2746). In other words, Park Place didn't need to be billed because it shared A&E's records.

Park Place had the money to pay. It obtained construction loans for this job, but must've used the funds for something else. Order (R. p. 40); Mr. Vereen Tr. (R. p. 2531–2532). Park Place sold the Pointe Marsh houses at prices between $550,000 and $650,000. (R. p. 3078). A&E also financed Park Place's venture by paying $100,000 in interest payments on those loans. *Id.* (R. p. 3079) Brady Tr. (R. p. 1291, line 24–p. 1292, line 10). In 2006, Mr. Vereen told Mr. Smith that those were "company expenses." Smith Tr. (R. p. 906, lines 17-19). In a manner of speaking, they were. In Appellants' minds, all of the Vereens' business expenses—no matter the entity—were owed by A&E.

III. MR. SMITH DISCOVERS APPELLANTS' FRAUD AND DEPARTS A&E.

In Fall 2006, Appellants' scheme began to unravel. A&E engaged CPA Susan Brady to do its taxes for 2004 (it had multiple extensions filed), but—instead of receiving returns—it received questions. Smith Tr. (R. p. 905, line 17–p. 907, line 9). Like why was A&E paying for a private plane? Why was A&E making interest payments to a bank where A&E had no loan? *Id.* Needless to say, Mr. Smith didn't know the answers and Mr. Vereen didn't supply any believable responses. For example, he told Mr. Smith that the private plane was a company expense. *Id.* A&E was successful, but it didn't need a plane to fly from Horry to Georgetown County. By Christmas 2006, Ms. Brady told Mr. Smith that, based on what she learned, she wouldn't have anything to do with A&E's tax returns. *Id.* In her words, there were "a lot of questions that needed to be answered." Brady Tr. (R. p. 751, lines 13-14). "[T]here was never an account that said, 'due to or due from any of Mr. Vereen's other entities, which in my accounting world . . . any time you've got an individual that owns four . . . [or] even two corporations, it's very important that you keep your accounting separate." *Id.* (R. p. 751, lines 16–p. 752, line 1). That didn't happen.

That's when Mr. Smith told Mr. Vereen he wanted to discuss the "bunch of money building up in the account." Smith Tr. (R. p. 907, lines 7-8). Mr. Smith thought the account had $2 million in it by then. *Id.* (R. p. 964, lines 11-12). Two weeks passed. Mr. Vereen was stalling. Eventually he reported that "there's not any money in the account. It takes a hell of a lot of money to run this company." *Id.* (R. p. 907, lines 21-23). Months later, Mr. Vereen told his Bank that his A&E stock was worth $340,000.00. Ex. 18 (Financial Statement) (R. p. 8888).

Mr. Smith knew that Mr. Vereen's statement about A&E not making any money couldn't be right. In January 2007, he started copying any A&E records that he could get his hands on. (R. p. 908, lines 1-16). He figured out how to print the Peachtree general ledger. *Id.* Mr. Smith spent the better part of that year trying to figure out what exactly happened. *Id.*

Around the same time, Mr. Smith learned that the Vereens were having problems at Pointe Marsh, even though it still hadn't paid A&E for its work. *Id.* (R. p. 908, lines 19–p. 909, line 10). The homes weren't selling. *Id.* But that changed after the Vereens hired Mike Green at Dunes Investment.

Id. (R. p. 909, lines 11-16). The attorney who had been handling Park Place's real-estate closings told Mr. Smith that he wouldn't work with Mike Green or Mr. Vereen anymore. *Id.* (R. p. 912, lines 1-18). The reason? A buyer came into his office after the closing complaining that she hadn't received her check. *Id.* The attorney told her that, as a buyer, she didn't get a check. *Id.* Her response: "I was supposed to get a check back from the developer." *Id.*

Mr. Smith confronted Mr. Vereen. *Id.* (R. p. 912, line 19–p. 913, line 9). Mr. Vereen dismissed him, "It's no big deal," "I'm just small potatoes, they will never do anything to me." *Id.* (R. p. 913, lines 11-2). But Mr. Smith saw the documents evidencing the kickbacks. *Id.* (R. p. 913, lines 16-23). They spoke more than Mr. Vereen ever would. After the closings finished and the money went into Park Place, Mr. Vereen would write a check back to Dunes Investment and the purchasers. *Id.* The kick-backs got up to $90,000 per closing. *Id.*; *see also* Order (R. p. 21). This involved at least eight houses and included not only Mr. Vereen and Park Place, but also his daughter, Ms. Sisson. Mr. Vereen Tr. (R. p. 589, line 1–p. 594, line 15); Exs. 24 (R. pp. 12281–83), 33 (R. pp. 12428–30), 34 (R. pp. 12431–44).

"It scared the life out of" Mr. Smith, he "didn't want to go to jail." (R. p. 914, lines 11-24). For good reason. *See* RESPA, 12 U.S.C. § 2601 *et seq.*

Business had slowed down at A&E. (R. p. 915, lines 5-8). Enough was enough. Mr. Smith decided to leave A&E. But, as the Court found, A&E owed him fourteen weeks of vacation. (R. p. 917, line 5–p. 919, line 4); Order (R. p. 34). Mr. Vereen knew that Mr. Smith was entitled to that time. He knew he wasn't at the office. And he wrote each and every check to him anyways. Mr. Vereen Tr. (R. p. 2740–41); Smith Tr. (R. p. 919, lines 5-11). Mr. Vereen knew that Mr. Smith wouldn't work with him anymore after receiving a letter accusing him of self-dealing. That's why he applied to be A&E's qualifying party (a position formerly held by just Mr. Smith) on October 2, 2007. Def's Ex. 102 (R. p. 3353).

Mr. Smith wanted to do the Condolux project for Martin Brown in North Myrtle Beach, Mr. Vereen didn't. (R. p. 916, lines 1-25). A&E would've had to submit a bid and Mr. Vereen didn't think A&E could make money competing against other construction companies. *Id.*; Order (R. p. 34).

("Vereen had previously rejected the construction proposal as not being profitable."). Mr. Smith decided to try. He purchased insurance in his new company's name (E. Smith and Sons) to cover the building and paid every expense from separate funds. Smith Tr. (R. p. 1021, lines 10-12); Smith Tr. (R. p. 1959, lines 4-5).

By 2008—after Mr. Smith's demand letter and exit—Appellants knew they were in hot water. A&E did no new jobs that year or any year after. Drewett Dep. (R. p. 6637). Early that year, Mr. Vereen, Ms. Sisson, and Mr. Sisson started a separate construction company named Grand Strand Builders. Ex. 10 (R. pp. 8433–34). Mr. Vereen was the qualifying party. *Id.* (R. p. 8439–40). They hatched a scheme to try to save some money at the trial they knew was coming. They would work for Grand Strand Builders and not receive any salaries. Smith Tr. (R. p. 996, line 2–p. 1001, line 12); Mr. Vereen Tr. (R. p. 571, line 10–p. 572, line 20). And they'd funnel Grand Strand's receivables through Park Place and into A&E. That way, they could continue paying themselves a salary from A&E—something that happened even after the litigation started (Ex. 27, R. p. 12305, & Drewett Dep. R. p. 6638)—and claim it as Park Place's loan.

Grand Strand was busy. In 2008 and 2009, it had permits issued for a $535,000, a $320,000, and a $490,000 job. Pl's Ex. 11 (R. p. 8453–55). A&E isn't claiming anything related to those jobs. But—at least on appeal—Appellants ask the Court to find that Mr. Smith, in 2008, did something wrong by working on a bathroom project permitted at $8,800 and a deck permitted at $1,500. Defs' Ex. 70–71. (R. p. 3329–30)[3]

IV. CPA SUSAN BRADY INVESTIGATES APPELLANTS' FRAUD.

A&E retained Susan Brady, a CPA since 1995, as an accounting expert. (R. p. 718, line 23). She's no stranger to the company. She audited A&E at its inception to get it a builder's license and was retained by A&E to be an expert in litigation involving Willoughby Place. (R. p. 732, lines 1-23; R. p. 736, line 10–p. 737, line 16).

Mr. Smith gave her a backup of the Peachtree accounting system to examine. (R. p. 739, line

[3] At trial, Appellants said they were "not claiming the $1,500" as a corporate opportunity. (R. p. 1868, lines 14-22).

9–p. 740, line 7). To say she was thorough would be an understatement—her firm spent over 800 hours on the engagement. Brady Tr. (R. p. 1276, line 5; p. 1609, lines 11-20). She reviewed A&E's checking accounts, statements, and records from 2004 to 2007. *Id.* (R. p. 744, lines 14-18). She verified every deposit that went into A&E's account and credited every payment into that account made by Mr. Vereen, AVC, Parkway, and Park Place. *Id.* (R. p. 744, line 19–p. 745, line 11; p. 754, lines 3-22; p. 837, lines 1-25; p. 1337, line 16–p. 1338, line 22; p. 1400, lines 3-9; p. 1586, lines 3-22 (initial $50,000 deposit); p. 1610, line 6–p. 1611, line 10).

She reviewed Park Place's and AVC's tax returns, along with A&E's records at the Smith Sapp firm that took over after her firm declined to file A&E's taxes. *Id.* (R. p. 738, line 17–p. 739, line 8; p. 748, lines 5-15; p. 752, lines 21-25). She also reviewed subpoenaed records produced by the other Vereen entities (R. p. 753, lines 1-21), but the Vereens didn't maintain proper records for those entities. Brady Tr. (R. p. 1281, lines 17–p. 1282, line 16). Ms. Brady did find, when looking through their bank records, checks Appellants deposited that were made payable to A&E. (R. p. 836, lines 9-25); (R. p. 1308, line 8–p. 1309, line 14, A&E's $49,000.00 worker's comp refund check deposited elsewhere). (Appellants swore that happened only four times, and by Mr. Smith's doing). Interrog. Resp. (R. pp. 12335–36).

She analyzed A&E's Peachtree accounting system.(R. p. 754, lines 3-17). Based on her training and experience as a CPA, she questioned certain entries. *E.g.* (R. p. 755, lines 3-18); (R. p. 771, lines 15-23) ("jobs with a substantial amount of expense," but "no income"); (R. p. 803, line 23–p. 804, line 15) ("Randy's truck" coded as "construction costs"); (R. p. 804, line 16–p. 805, line 24, p. 809, line 22–p. 810, line 2) (real estate taxes when A&E owned no property); (R. p. 342, line 9–p. 822, line 5) (HOA fees booked as "dues and subscriptions"); (R. p. 825, lines 19-25) (unpaid expenses for Mr. Vereen's sister); (R. p. 862, lines 11-22) (Ms. Sisson's seminar fees). One such dubious entry was Mr. Vereen's "supervisory fees" coded as construction expenses, but not reported in full on Mr. Vereen's tax returns. (R. p. 746, line 7–p. 748, line 4). Other things she examined were expenses not coded to a job or A&E's checks not referencing an invoice. (R. p. 755, lines 3-18; p. 779, lines 4-11). It wasn't a one-way ratchet—Ms. Brady adjusted Mr. Smith's entries, to his detriment, as well. (R. p. 795, lines

5-12; p. 815, lines 8-13).

South Carolina Rule of Evidence 703 entitled Ms. Brady to review all that evidence, and also facts "made known to [her] at or before the hearing." That included Mr. Smith's observation that A&E purchased equipment (a lull and skid) that was taken by Appellants and put to work on Appellants' Murrells Inlet house and used on their property at Pointe Marsh. Smith Tr. (R. p. 958, line 19–p. 961, line 21). A&E normally charged customers to use that equipment. *Id.* Appellants weren't charged and A&E had to rent substitute equipment to work on other jobs. *Id.* Mr. Brady credited Mr. Smith's testimony about the cost of renting that equipment. *Id.*; Brady Tr. (R. p. 791, lines 18-25).

Ms. Brady didn't check behind every little nook and cranny: If Mr. Vereen coded an expense to a particular job, she assumed it actually was a legitimate expense related to that job. (R. p. 779, lines 8-11; p. 782, lines 20-24). In that sense, her work was underinclusive: She took Mr. Vereen at his word when he coded expenses on Peachtree as associated with particular jobs, something that could only work in his favor. For example, she originally assumed that $20,000 check with a RE: line of "[p]ayback deposit on [p]re-engineered metal bldg. of Sue Mathis" was for a legitimate invoice of $20,000. (R. p. 832, lines 5-25); Ex. 4 (R. p. 4181). A week before trial, the Vereens gave the expert a $9,500 invoice to try to lower their balance due A&E. (R. p. 832, line 15–p. 836, line 8). Only then did Ms. Brady realize that the $9,500 invoice was associated with the metal building, but Appellants charged A&E $20,000 and pocketed the difference. *Id.*

Ms. Brady did not double-charge Mr. Vereen for personal expenses that A&E's accountants at Smith Sapp caught and put on A&E's books as an account receivable. Brady Tr. (R. p. 776, lines 5-14; p. 788, lines 6-25; p. 871, line 11–p. 819, line 20); Brady Tr. (R. p. 1291, line 11–p. 1293, line 24) (Smith Sapp re-classifying $100,000 bank payment as personal expense). She also didn't give Appellants double-credit for deposits that were accounted for by Smith Sapp. Brady Tr. (R. p. 1409, lines 3-23; p. 1429, lines 4-12) (Mr. Vereen depositing and being repaid $75,000).

Appellants disputed some expenses that Ms. Brady questioned. Brady Tr. (R. p. 767, line 7-11; p. 795, lines 13-24). If they had appropriate support and hadn't already been repaid that amount, she gave them a credit. *Id.* (R. p. 745, lines 1-11; p. 767, lines 1-11; p. 772, lines 5-8; p. 775, lines 15-24; p.

783, lines 22-24). That was still happening a week before the trial. Brady Tr. (R. p. 795, line 16–p. 796, line 16) ("After reviewing the information that [trial counsel] brought our office last week.").

But Appellants weren't using an accountant—they'd bring her expenses that A&E had already reimbursed. *Id.* They'd also try to claim credit for amounts they paid for work done on property they owned. (R. p. 1329, line 23–p. 1330, line 22). To give an example, the Vereens' daughter wanted A&E to pay for expenses Appellants incurred on Mr. Vereen's Plantation Lakes home or at Pointe Marsh. *Id.* A&E was never supposed to eat the costs on Appellants' property in the first place, though. *Id.*

Ms. Brady did not give Appellants credit for amounts they claimed they paid A&E's behalf when they provided no support to back up[4] their assertions. *E.g.* Brady Tr. (R. p. 830, line 19–p. 831, line 21). After the lawsuit's filing, Appellants created a $400,000 journal entry for expenses allegedly paid by them from 2003 to 2009. Brady Tr. (R. p. 1311, lines 6-23). But there was no support. *Id.* Those amounts weren't on the earlier tax returns. *Id.* (R. p. 1311, line 6–p. 1312, line 22). The Vereens' daughter simply created a list that was accepted *carte blanche* by A&E's accountants. *Id.* When Ms. Brady asked those accountants if they had any support (bills, invoices, receipts) for that late-filed entry, they said they didn't. *Id.* That was "unusual" to say the least, and a CPA should have scrutinized it. *Id.* (R. p. 1313, lines 6–p. 1314, line 1).

At his deposition, Mr. Vereen said he had the invoices and checks to support the after-the-fact entries. *Id.* (R. p. 1314, lines 2–17). Ms. Brady met with Appellants to see if that was true. *Id.* (R. p. 1315, lines 18–22). It wasn't. Most entries had no invoice and check to support them. *Id.* (R. p. 1315, line 23–p. 1316, line 1). Ms. Brady's expert opinion was that CPAs would not accept five-year-old credit card statements to substantiate a claim from a third-party for payment for a company's expenses. *Id.* (R. p. 1318, line 1-11). Particularly so when A&E's books and records didn't reflect any

[4] Ms. Brady had backup for most everything in her reports. Much of it was the checks Mr. Vereen signed. Brady Tr. (R. p. 1582, line 1-11). When Appellants say that she lacked "backup" (Br. 13), they are saying that she could've somehow determined that the unauthorized checks Mr. Vereen wrote were legitimate A&E expenses. That's something only Appellants could know and was their burden to show at trial. *See* S.C. Code § 33-8-310 (providing burden shifting); Brady Tr. (R. p. 1582, line 22–p. 1583, line 1) ("Mr. Vereen wrote the check. We have nothing to substantiate that it is a business expense.").

of those expenses. *Id.* (R. p. 1329, lines 9-22). And, particularly, when all of these entities were writing checks to "the same vendors" and there was "no way of knowing what those checks were for." *Id.* (R. p. 1417, line 22–p. 1418, line 1) And—assuming you had appropriate backup—the income you reported to the IRS would be overstated. *Id.* You've only got three years to amend to try to get more back from the IRS, and that those years had passed for some the of the claimed expenses. *Id.*

Mr. Smith accepted some of Appellants' claimed offsets, even though Ms. Brady didn't approve them. (R. p. 1316, lines 12-21). Ms. Brady's "Summary Analysis of Non-Corporate Activity" reflects those stipulations. *Id.* (R. p. 1317, lines 1-2); *see* Ex. 40 (Summary Analysis) (R. p. 12453–54). The Summary Analysis also reflects amounts that Appellants stipulated that they owed, called "Consented Amounts." *Id.* (R. pp. 12455–12460, 12463–64, 12467–68)

The Summary Analysis (Ex. 40) rolls up all Ms. Brady's work related to the yearly adjusted entries in 2004 (Ex. 1) (R. pp. 3357–3514), 2005 (Ex. 2) (R. pp. 3515–3704), 2006 (Ex. 3) (R. pp. 3705–4024) and 2007 (Ex. 4) (R. p. 4025–4215). Brady Tr. (R. p. 753, line 2–p. 755, line 2). Ms. Brady provided a Proposed Statement of Assets, Liabilities, and Equity ("Proposed Statement") for each year's end. *E.g.* Ex. 4 (R. p. 4030). If there were unpaid receivables for jobs that were done for the Appellants, she reclassified them in tabs on the yearly books. Brady Tr. (R. p. 799, line 9–p. 800, line 16). In other words, A&E's books showed a loss on most jobs that it performed for Appellants and Ms. Brady treated the outstanding amounts as an account receivable. *E.g. id.* (R. p. 771, lines 8-23). She also included tabs for checks that Appellants deposited into their own accounts, even though they were made payable to A&E. (R. p. 1290, lines 7-24); Ex. 4 (R. p. 4185–93). The yearly tabs also show other unauthorized expenses, like payments for the Vereens' dry cleaning. *E.g.* Ex. 2 (R. pp. 3557–58). Because Peachtree only shows expenses and not payroll costs, the cost of liability insurance, or profit, Ms. Brady performed those calculations and applied them as an adjustment on for-profit jobs. Order (R. p. 46–47); Ex. 4 (R. pp. 4194–98).[5] At the trial's end, Ms. Brady submitted an Amended Summary

[5] Ms. Brady used payroll percentages that both shareholders agreed on. Ms. Brady Tr. (R. p. 838, line 17–p. 839, line 20). Mr. Vereen told Mr. Smith that all jobs (save his home) would be done at cost plus 15% profit. Order (R. p. 46) ("Vereen conceded at trial that these entities should have paid the

Analysis reducing the amounts Appellants' owed by around $20,000, to a total of $2,712,503.31. Order (R. p. 24); Ex. 40-A (R. pp. 12525–12535).

After putting all this together, Ms. Brady had this to say: "Mr. Vereen is a partner in several different entities. Each one was a corporation or an LLC and the purpose of that is to keep each entity separate" but "these books were ran, as all these companies were, as one." Brady Tr. (R. p. 1296, line 9–p. 1297, line 7). It was hard to "track the income [that] was supposed to be at one company" versus another "because they ran it like they were paying out of all the different companies." *Id.* In Ms. Brady's professional opinion, A&E's books were "completely destroyed." (R. p. 1305, line 2). She'd never seen a company have this degree of transfers when the shareholders were not from the same family and had no other related companies. (R. p. 1341, line 22–p. 1342, line 2). There weren't even invoices sent from A&E to Appellants. (R. p. 1285, line 3). In Ms. Brady's expert opinion, a construction company should never perform services for a related entity without regular billing. (R. p. 1284, line 8–p. 1285, line 16; p. 1310, lines 12-21).

Ms. Brady's expert reports—along with all the credible testimony and records in the case—show that Appellants' trial posturing that the "Vereen entities put in more money in than they took out" was just as substantiated as the litany of intracompany transfers favoring them.

ANALYSIS

For the most part, A&E's appellate brief is an exercise in shadowboxing. Nowhere, for example, do Appellants challenge the Master-in-Equity's finding that they paid for construction on the Vereens' home with company funds or that A&E ate the cost on work it performed on property they owned. Order (R. pp. 37–39, 42–43). When you read their brief, you'll see that they don't dispute—let alone mention—the Master-in-Equity's detailed factual findings on any transaction aside for the hull and skid charges. Br. 14, 33. They complain about the expert's work, but don't even mention the detailed reports the Master-in-Equity found credible. Order (R. p. 24).

That's because there's nothing to challenge. Indeed, there's nothing for this Court to do at all.

---

payroll expenses, liability insurance, and expected overhead and profit of 15%); Mr. Smith Tr. (R. p. 931, lines 5-9).

Appellants failed to timely file their notice of appeal,[6] so this appeal must be dismissed. Not to say that this Court wouldn't otherwise find for A&E. The Master-in-Equity's judgment in A&E's favor is more than supported by the largely unchallenged record showing that Appellants used A&E as a cost center bearing the brunt of the Vereen family enterprise's expenses.

I. APPELLANTS DIDN'T TIMELY FILE THEIR APPEAL.

Under Appellate Rule 203, "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of the order or judgment." That period is tolled if a defendant files a "timely" Rule 59 motion. *Id.* Just this year, the Supreme Court reiterated "that the ten-day limit for serving a Rule 59 motion is an absolute deadline." *Overland, Inc. v. Nance*, Op. No. 27800, at 4 (May 23, 2018). "A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served . . . nor does a trial court have any power to grant the moving party an extension of time in which to file [that motion]." *Id.*

Rule 6(e) gives parties served by mail—like Appellants here—an additional five days to file their notices of appeal or motions to reconsider. Appellants admit that they were served with the Form 4 of both the original March 23 Order and the March 25 *nunc pro tunc* Order.[7] The Court below found that, at the latest, A&E "served notice of entry of the order on March 27, 2015." April 2016 Order (R. p. 68); *see also* Mar. 25, 2015 Cert. of Service (R. p. 12545–46); Apr. 2015 Cert. of Service (R. p. 12594–95); Mar. 25, 2015 Ltr. (R. p. 12544); Mar. 27, 2015 Ltr. (R. p. 12593) ("Enclosed please find a copy of the Nunc Pro Tunc Order . . . which is hereby served upon you by mail."). By operation of those rules, Appellants had to file a Rule 59 motion by April 13, 2015 (R. p. 69) or file an appeal by May 1, 2015. They filed too late. Their Rule 59 motion was filed on April 20, 2015 and their notice of appeal wasn't filed until 2016. The Master-in-Equity found the motion untimely and that "[t]heir only excuse was that they were waiting on the **Court** to send them page 37 of the Order before their ten days began to run." (R. p. 69) (emphasis in original).

[6] The Vereens retained the McNair Law Firm after the notice of appeal was filed.

[7] Appellants' Motion to Reconsider says they received the *Nunc Pro Tunc* Order—mailed after Counsel served the March 23, 2015 Order—on March 30, 2015. Mot. to Reconsider (R. p. 12608). Even using that date, Appellants' Motion to Reconsider would still be untimely.

They claim that their appeal is saved because the Court's law clerk (and, by extension, Counsel) missed page 37 of the Order when e-mailing and serving them.[8] But the order (including page 37) was only sent as a courtesy-copy and wasn't the triggering event for their Rule 59 motion. The issue boils down to this: Can a party who is properly served with notice of a filing wait (perhaps indefinitely) to file a Rule 59 motion because the courtesy-copy order they received had a page missing?

The answer starts and ends with the text of the Rules 59 and 203: both are tied to "receipt of written notice of the order" (*see* SCRCP 59; SCACR 203(b)(1)), not receipt of the order itself. To be sure, there are special rules that require service of the order itself. SCRCP 77(d). But that's only in post-conviction cases, where the drafters understood that prisoners can't just walk into the Clerk's Office and get a copy. *Id.*

The *Ackerman* case cited in Appellants' return to the Motion to Dismiss proves the point. The untimely appellant there had much less notice than Appellants here. It "received written notice of the entry of judgment" (Form 4) but "the written order did not accompany the judgment form." *Ackerman v. 3-V Chem., Inc.*, 349 S.C. 212, 213–14, 562 S.E.2d 613 (2002). The Court rejected the argument raised here: "There is simply no language in the rule permitting the motion to be served 10 days after receipt of the written order; it states 10 days after receipt of written notice of the entry of judgment." *Id.* at 215; Elizabeth F. Fulton & Edward K. Pritchard III, *Time is NOT on Your Side: Avoiding Pitfalls When Filing Motions to Alter or Amend Under Rule 59(e), S.C. R. Civ. P.*, South Carolina Lawyer (Mar. 2017) ("The deadline for serving a motion pursuant to Rule 59(e) begins to run upon receipt of the *notice* of the entry of the order sought to be altered or amended—not *receipt* of the actual order."). Because Appellants admit they received Form 4, *Ackerman* requires the Court to dismiss their appeal.

Appellants also argue that there was no final judgment because they were served with a missing page.[9] But they don't claim that the Order filed in the Clerk's Office had a missing page. *See* Br. at 3

[8] Counsel printed and served Appellants with that same order (again, with the missing page) on Appellants. Apr. 2015, Massimino Cert. of Service (R. pp. 12545–46); Mar. 25, 2015 Ltr. (R. p. 12544); Apr. 6, 2015 letter from K. Cook to Court (R. p. 12537) ("Page 37 of the Order is missing from the filed copy served on me by Frank DuRant.").

[9] Rule 59's timelines have no "finality" requirement, so their motion to reconsider was still untimely.

("On March 23, 2015, the court issued a forty-two 42 page order"). They can't. The Master-in-Equity initialed and numbered every page of the Order. To rule for Appellants, you'd have to assume the Lower Court missed page 37 and then concealed its insertion of page 37 in the Clerk's file when finding Appellants' motion untimely. *See* Apr. 2016 Order (R. p. 68) ("Instead of obtaining the missing page from the clerk's file, she requested it from the trial judge.").

Recognizing the problem, Appellants argue for a Due Process exception to these clear-cut rules, implying that they "did not have adequate notice that an appeal would be denied to them under the circumstances of this case." Return to Mot. to Dismiss at 10–11. Appellants were represented. *Ackerman* is notice enough that an attorney cannot receive notice of a judgment against his or her client (let alone one in the millions) and rest assured that can simply wait (perhaps indefinitely) to file a post-trial motion until a complete copy of the order relating to the judgment is delivered to them. What's more, *Ackerman* never announced a Due Process exception to the ten-day deadline and has never been cited by any Appellate Court to excuse a party's failure to comply with it. The *Ackerman* Court rejected the Due Process argument out of hand. In that case, the petitioners "argue[d] 'due process' problems in requiring an appeal to be taken when the party is not in receipt of the order." 349 S.C. at 215, 562 S.E.2d at 613. "The short and simple answer to this contention is that upon receiving written notice of the entry of an order or judgment, an attorney may immediately call and request a copy of the order." *Id.* That did not happen. Accepting Appellants' argument would turn *Ackerman* on its head and put the onus on judges—not even the Clerk's Office—to deliver copies of the orders they write, when all the rules require is receipt of Form 4.

Appellants admit that they received the amended *Nunc Pro Tunc* order detailing million-plus-dollar judgments against them. They decided to wait for a week to write the judge a letter to receive "a complete copy of the Order at your convenience." They have no evidence that they were denied access to the Order after calling or visiting the Clerk's Office (the judicial records custodian, *see* SCRCP 78) or responding to the Judge's law clerk's courtesy-copy e-mail. Simply put, "immediate" action was not taken. Appellants were on notice of the judgment, of Rule 59, and *Ackerman*. Due Process demands no more. The appeal should be dismissed.

II. THE MASTER-IN-EQUITY DIDN'T ERR IN RELYING ON THE EXPERT CPA.

Appellants repeatedly second-guess the expert's work, going as far to use bold, underlined font to claim that her work was "clearly not an accounting." Br. 30–32. Not once do they mention—let alone dispute—the expert's reports supporting the Master-in-Equity's findings and the expert's testimony, despite having the burden to convince the Court that there was some error below.

Rather than disputing the evidence, they make unsupported attacks on the expert's work and claim that "the Master-in-Equity should have appointed an independent forensic accountant to perform an accounting." Br. 30. But "[n]o accountant [is] needed because the evidence [is] simply a matter of adding and subtracting, and certainly, 'rocket science,' [is] not involved." April 2016 Order (R. p. 67). That's what Appellants told the Master-in-Equity below. Here's another: there is "no case in South Carolina that requires in a shareholder derivative suit where an accounting is being sought that [an] expert witness must be introduced in order to aid the Court." Oct. 11, 2011 Tr. (R. p. 2100, lines 20-25). Now, nine years after the fact, they want this Court to rule that Lower Courts must—at peril of reversal—second-guess a represented litigant's strategic decision not to use expert testimony and appoint (at the State's cost?) an expert if they feel that litigant needs one for the case.

A. Appellants can't fault the Lower Court for not hiring an accountant when they told the Master-in-Equity they didn't want one.

In mid-October 2010 (four months before the first day of trial), the Court held a hearing involving (in part) Respondents' request for "the Court to require that the Defendants' accounting expert(s) meet with the accounting experts' of the Plaintiff in an attempt to simplify the issues and resolve accounting issues." Oct. 2010 Order (R. p. 14). At that hearing, Appellants told the Court they weren't going to use an expert and "emphatically [said] that no accountant was needed because the evidence was simply a matter of adding and subtracting, and certainly, 'rocket science' was not involved." April 2016 Order (R. p. 67). The represented Appellants were allowed to try the case the way they wanted, with the Master-in-Equity finding that "[i]t is not the province of the Court to require the Defendants to obtain expert accounting . . . witnesses." (R. p. 14). But the Court wouldn't let Appellants spring a surprise on the eve of trial, so it barred them from introducing expert testimony.

(R. pp. 13–14).

Appellants' planned trial strategy was implemented. Here's what Appellants said about experts at the start of their case-in-chief: "I have found no case in South Carolina that requires in a shareholder derivative suit where an accounting is being sought that [an] expert witness must be introduced in order to aid the Court because . . . the ultimate issue in this case has to be decided by your honor." Oct. 11, 2011 (R. p. 2100, line 20–p. 2101, line 3). They repeated: This "is not a case that calls for expert testimony." *Id.* (R. p. 2105, lines 11-16).

There was no mention of the Court appointing any expert. "[T]hat's not what [Appellants] anticipated." May 2015 Tr. (R. p. 3221, lines 2–24). "[N]obody came . . . and said that's what [the Court] should have done." *Id.* Not until the verdict, that is.

On appeal, Appellants have reversed course again[10] and now argue that "the master-in-equity should have appointed an independent forensic accountant" because "the dispute . . . is quite complicated." Br. 30. But parties in litigation aren't politicians, they can't flip-flop. "[A] party may not complain on appeal of [an alleged] error or object to a trial procedure which his own conduct has induced." *Erickson v. Jones Street Publ.*, 629 S.E.2d 653, 670, 368 S.C. 444 (2006) (when Court employed procedure that both parties "requested and desired" there was no error). "[A] party [cannot] keep[] an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 422 (2000). In sum, Appellants can't ask for a new trial to add an expert when they "never actually requested one." *State v. Mitchell*, 330 S.C. 189, 193, 498 S.E.2d 642 (1998).

In *Erickson*, the parties "agreed upon and . . . understood" that a defamation case was going to be bifurcated on liability and damages. 629 S.E.2d at 661. The newspaper defendant chose not to put on any evidence at the liability stage, but when it received an unfavorable verdict (in part determined by the judge's finding the plaintiff a private figure), it moved for a mistrial because it didn't get to present a defense. *Id.* The judge reversed course, allowing the newspaper to present a defense

[10] In 2009 Appellants swore that a "full accounting" was "being performed," and that A&E's CPAs would testify that everything they did was above-board. *See* Interrog. Resp. (R. p. 12313).

by telling the jury that its earlier decisions were "advisory" and by dismissing the case by ruling that the plaintiff was a limited public figure who didn't prove actual malice. *Id.* at 663. The Supreme Court disagreed, holding that the plaintiff was a private figure. *Id.* at 670. The Court determined that a new trial on damages was necessary but resisted the newspaper's argument for a new trial absolute because the jury already found the newspaper liable and it chose "whether for tactical or other reasons, to acquiesce in bifurcation and not present a defense." *Id.* at 673. The Supreme Court concluded that "[i]t would be patently inappropriate and unfair to Appellant, as well as a violation of well-established preservation of error principles and notions of judicial economy, to give Newspaper a second chance . . . to present its evidence regarding liability to a different jury." *Id.*

So too here. Appellants "agreed upon and . . . understood" that the Court wouldn't employ an accountant. "[F]or tactical or other reasons" they backtracked on their interrogatory responses saying they'd use an accountant, told the Court that the case was simple and that an expert accountant wasn't needed or required by South Carolina law. They tried it the way they wanted: "[i]t would be patently inappropriate" to allow them a second bite at the apple now. *Erickson*, 629 S.E.2d at 673.

B. The Master-in-Equity didn't err by relying on expert testimony.

Ms. Brady submitted an Amended-Proposed Statement of Assets, Liabilities, and Equity based on A&E's accounting records, the Peachtree system, checking accounts, tax returns, and checks due A&E that were deposited elsewhere. Brady Tr. (R. p. 1276, line 5–p. 1277, line 24; p. 1280, line 23–p. 1281, line 22; p. 1287, lines 4-24; p. 1290, lines 7-24; p. 1293, lines 2-24; p. 1309, lines 3-14; p. 1332, line 20–p. 1333, line 14; p. 1337, line 16–p. 1339, line 18); Ex. 40-A (R. p. 12525). Her findings, according the Court below, were "fully supported by the evidence." Order (R. p. 24).

Her report established that the only real asset that A&E had on December 31, 2007 was an account receivable due from Appellants totaling the $2,712,503.31. Ex. 40-A (R. p. 12527). Appellants were given credit for every payment made into A&E on the accounts receivable balance. Brady Tr. (R. p. 1610, lines 7-21). If Appellants made a payment to A&E, that balance on A&E's books was credited (lowered) by A&E's accountants at Smith Sapp in the first instance (Ex. 35, R. p. 12435, Smith Sapp work papers) or by Ms. Brady in her report. Brady Tr. (R. p. 1291, line 11–p. 1292, line

22; p. 1556, lines 4-13; p. 1610, lines 6-21).

There were just over a $100,000 in remaining assets. There were $79,434.71 in current liabilities and $112,963.30 in long-term liabilities. Ex. 40-A (R. p. 12527). The Equity side detailed Mr. Vereen's $50,000 initial contribution (common stock and paid in capital), the remainder was retained earnings and profit. *Id.* (R. p. 12527); *see also* Brady Tr. (R. p. 1610, line 22–p. 1611, line 10). What these books mean is that, at the end of 2007, A&E only had $22,277.46 in cash and its value was dependent on unpaid accounts due from Appellants.

Having explained the reports, Appellants' criticisms can be quickly dismissed. First, they believe that there's something wrong with Ms. Brady's testimony that "If you have receipts, you take those receipts. You're not saying that you stand behind them . . . If . . . in your realm of experience . . .[it] looks like it could be an expense or if it could be a payable, you use your judgment." Br. 30 (citing R. p. 724, line 20–p. 725, line 4)). That just meant that Ms. Brady, using her judgment, took Mr. Vereen's coding of expenses to particular jobs on the Peachtree system as meaning that those expenses were actually A&E's expenses for that job (Brady Tr., R. p. 779, lines 4-11), something that could only work in his favor. To give an example, she assumed a $20,000 check written a RE: line of "[p]ayback deposit on [p]re-engineered metal bldg. of Sue Mathis" was for a legitimate invoice. *Id.* (R. p. 832, lines 5-25); Ex. 4 (R. p. 4181). She didn't discover that Appellants charged A&E $20,000 for a $9,500 invoice and pocketed the difference until they gave her the invoice a week before the trial started. *Id.* (R. p. 832, line 15–p. 836, line 8).

Second, they fault Ms. Brady for not being able to perform on-the-fly math to determine "how much was due each shareholder at the end of 2007." Br. 31. As she testified, her reports show the profit. (R. p. 1605, lines 19-21) ("I do have reports in each one of these files that tell you what the profit and loss should have been in that year at that time."). Also, her Amended Proposed Statement shows that if A&E paid its liabilities and Mr. Vereen his initial contribution ($50,000), each shareholder would be due over $1 million. Ex. 40-A (R. p. 12527).

Having solved that seeming problem with Ms. Brady's work, we've answered Appellants' next argument about whether A&E made or lost money. Br. 31. If A&E paid off its liabilities and

Appellants returned the money they stole, the company would've had over two million dollars in cash in the bank. Appellants' citation to page 240 (R. p. 1508) proves nothing. Ms. Brady testified that "I do not want to testify on [A&E's] profit is until I know what income and expenses are legally A&E's." Brady Tr. (R. p. 1508, lines 17-20). Ms. Brady recognized that it was the Court's prerogative to make that call, that's why she submitted a Proposed (not final) Statement of Assets, Liabilities, and Equity. Ex. 40-A (R. p. 12527).

Next, Appellants imply that Ms. Brady did not account for A&E's expenses. Br. 31. Her report accounts for every expense on A&E's books and for every check in and out A&E's bank account. Brady Tr. (R. p. 1277, lines 15-24; p. 1610, lines 6-21). Appellants wanted the Court and Ms. Brady to believe that they paid for A&E's expenses, didn't record them on the books, and failed to pay themselves back—even though Mr. Vereen wrote all A&E's checks. Both the Court and the expert accountant thought that made no sense. Appellants had the burden to prove their offset, and they didn't do it. As the Court found, Mr. Vereen "regularly sought reimbursement for expenses he paid on the Company's behalf, which were documented, charged to a job ledger on the Company's accounting system, and were immediately reimbursed to [him] by a Company signed check." Order (R. p. 31); *see also* Brady Tr. (R. p 1603, line 22–p. 1604, line 3) ("There are many, many, many checks on the company written to Wayne Vereen, Beth Sisson and Ellis. A lot of reimbursements . . . were coded to jobs."). Ms. Brady testified that, as a CPA, proper backup to claim reimbursement would be "an invoice or receipt and invoice for the bill" and a check that paid it. *Id.* (R. p. 1312, line 15–p. 1313, line 22). The CPA testified that it was "very unusual" to wait four years to ask for a reimbursement, given the tax implications. *Id.* She said that the records showed that "all of these related wrote checks to the same suppliers," so "to have a check written to one of those suppliers, [she] couldn't determine" on whose behalf it was paid without backup. *Id.* (R. p. 1327, lines 3-24). The same, she testified, goes for five-year-old credit card charges. *Id.* (R. p. 1327, line 3–p. 1329, line 22). That testimony went unchallenged because Appellants chose not to use an expert. The Court below found the testimony credible, (Order, R. pp. 30–31, 45–46), and it went unchallenged. This Court should find it credible too.

Independent of those findings, this Court should dismiss Appellants' argument because they failed to challenge the Master-in-Equity's sanctioning them for failing to comply with its discovery ruling. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160, 177 S.E.2d 544 (1970). Appellants have the heavy burden to show that the Master-in-Equity abused her discretion (*Mcnair v. Fairfield Cty.*, 665 S.E.2d 830, 379 S.C. 462 (Ct. App. 2008)) and that ruling remains unchallenged. After the lawsuit was filed, Appellants went to their accountants and tried to claim $400,000 in expenses they purportedly paid on A&E's behalf many years before. Brady Tr. (R. p. 1311, lines 6-25). But those expenses weren't on the tax returns for those years and they didn't have any supporting backup. *Id.* (R. p. 1312, lines 1-14).[11] During Mr. Vereen's deposition, he said he had invoices and checks to support the attempted credits. *Id.* (R. p. 1314, lines 2-17). Appellants never produced that claimed backup, *id.* (R. p. 1315, line 18–p. 1316, line 1), despite a Court order requiring them to "present evidence of the actual invoice or bill for services and the cancelled check" by December 1, 2010 or else be barred from presenting them at trial. Oct. 2010 Order (R. pp. 15–16). The Master-in-Equity found that Appellants frequently tried to violate that order, sustained objections to entering that evidence, and disallowed the claims altogether. Order (R. p. 30–31, 45, 48). There's not challenge to that ruling, so it's law of the case, and they can't argue the issue on appeal. *State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (When an appellate brief "does not dispute the correctness of the trial court's ruling" "that ruling is law of the case.").

Next, they argue that Ms. Brady did not "adjust her 'retained earnings' calculation to reflect Vereen's cash capital investment." Br. 31. For one, Mr. Vereen's $50,000 capital investment is not a retained earning. That account is kept under the Stockholder's Equity column as "Common Stock" and "Additional Paid in Capital." Ex. 40-A (R. p. 12527). Any other claimed injections were not capital investments, they were offsets to the amounts Appellants took from A&E, which is the same methodology Mr. Vereen's accountants at Smith Sapp used. *E.g.*, Brady Tr. (R. p. 1293, line 19–p.

[11] Ms. Brady met with Appellants and gave them credits for some amounts they claimed, and Mr. Smith consented to certain expenses that she wouldn't have. *Id.* (R. p. 1316, line 12–p. 1317, line 13; p. 1334, line 6–p. 1336, line 24).

1294, line 6; p. 1337, lines 4-15; p. 1409, lines 3-23; p. 1429, line 4–p. 1430, line 10).

They also argue that Mr. Vereen's alleged "in-kind contributions of heavy equipment and office equipment to the Company" aren't accounted for. They cite Ms. Brady's testimony to prove the point, but on the cited page she says the "equipment [is] on the books." Br. 31 (citing R. p. 1607, lines 14-15)). Indeed, it is. *See* Ex. 40-A (R. p. 12527) (two equipment accounts and one automotive account).

Appellants also claim that Ms. Brady erred by believing Mr. Smith's testimony about the lull and skid expenses and about whether some jobs were for-profit, "even though Mr. Vereen disagreed." Br. 33. Ms. Brady left it up to the Court to make those calls. Brady Tr. (R. p. 1508, lines 3-20; p. 1540, lines 6-17). The Master-in-Equity found Mr. Smith credible, not Mr. Vereen. Factfinders make those calls every day. Apart from calling it "unreasonable," Appellants can't articulate why the Master-in-Equity was wrong.

Appellants also want this Court to believe that "Brady required backup for all expenses Vereen attempted to take credit for, but she did not require the same from Smith." Br. 33. They omit that Mr. Vereen, as A&E's sole check-signer, required backup from Mr. Smith before giving him any reimbursement. Smith Tr. (R. p. 883, line 15–p. 887, line 14). And what they say about Ms. Brady is—at best—a half truth. Ms. Brady explained that she did not go through each and every check written to Mr. Smith or Mr. Vereen if they were coded to jobs on A&E's Peachtree system. Brady Tr. (R. p. 1604, lines 1-3). Appellants aren't really upset about that. They're mad that they didn't get credit for off-the-books expenses they purportedly incurred on A&E's behalf but never got around to asking for reimbursement until the litigation started. As we've already explained, Ms. Brady testified that CPAs wouldn't accept what they submitted, and the Court disallowed, independently, those claimed expenses because Appellants violated its discovery order.

Finally, Appellants argue that "Brady was not submitting that Vereen owed the Company or Smith that amount of money." Br. 32. That's exactly what she did. Her report quantified the amounts that Appellants stole and placed them as an account receivable. *See* Ex. 40-A (R. p. 12527).

III. APPELLANTS MUST PAY A&E PREJUDGMENT INTEREST ON THE

AMOUNTS THEY STOLE.

A&E sought to recover a sum certain—the amount the Vereens and their entities stole from the company. Because A&E's measure of recovery is fixed, it's entitled to prejudgment interest.

A. Appellants can't fault the South Carolina judicial system for their continued, unjustified retention of A&E's funds.

"[A] party who has had the use of money owed to another may justly be required to pay interest from the time the payment should have originally been made." *Jacobs v. American Mut. Fire Ins. Co. of Charleston*, 340 S.E.2d 142, 143, 287 S.C. 541 (1986). South Carolina courts recognize that only by awarding prejudgment interest can the damaged party "be restored to the position which it would have occupied absent the wrongdoers' action." *Id.*

That's why Appellants' argument that "[i]t is inequitable to charge [them] prejudgment interest from the end of trial to the date of the issuance of the order, as such delay was not caused by [them]" (Br. 29), holds no water. For one, they haven't cited any case law supporting it, so they've failed to preserve it for review. *Bean v. South Carolina Cent. R.R. Co.*, 709 S.E.2d 99, 113 (Ct. App. 2011) (issue deemed abandoned because litigant "cite[d] no case law in support of [it]."). For another, the Legislature didn't see fit to write Appellants' exception into the prejudgment interest statute, S.C. Code § 34-31-20. And South Carolina courts don't second-guess the Legislature's choice of words in clear-cut statutes. *Green v. Zimmerman*, 238 S.E.2d 323, 325, 269 S.C. 535, 538–39 (1977).

Accepting Appellants' argument would also turn traditional notions about prejudgment interest on their head. As Learned Hand said almost 100 years ago:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Procter & Gamble Dist. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924); *Vick v. S.C. D.O.T.*, 347 S.C. 470, 481, 556 S.E.2d 693 (Ct. App. 2001) ("prejudgment interest" accounts for "the time value of money that should have been received"). Appellants took and kept A&E's assets through trial, despite "proof of misconduct [that] was all but absolute." Order (R. p. 56). They aren't paying prejudgment

interest due to litigation delays, they're paying it due to their continued retention of A&E's property.

B. A&E's measure of recovery was fixed at the time its claim arose.

"The law allows prejudgment interest on obligations to pay money from the time when . . . the payment is demandable and if the sum is certain or capable of being reduced to certainty." *SmithHunter Const. Co. Inc. v. Hopson*, 616 S.E.2d 419, 421 (S.C. 2005). And "[t]he fact that the sum is disputed does not render the claim unliquidated." *Id.* "The proper test for determining whether prejudgment interest may be awarded 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.*

Here, the measure of recovery was ascertainable at the time A&E's claim arose. Appellants misappropriated A&E's funds and failed to pay (or even invoice) for A&E's work. At trial, A&E proved its case by pointing to the stolen checks, unauthorized expenditures, and unpaid invoices. No more is required for A&E to be awarded prejudgment interest.

The presence of similar pieces of information allowed the Supreme Court to affirm a trial court's prejudgment interest award in a construction case. In *SmithHunter v. Hopson*, a construction company sued a customer who didn't pay. The Court found that the construction company's invoices established its costs at the time the claim arose. "The mere fact that Homeowners disagreed with Builder regarding the amounts, which were stated in the invoices, representing completed work did not preclude an award of prejudgment interest." 515 S.E.2d at 421. So too here. A&E's records detailed the expenses that Appellants never paid and Appellants' checking records showed the stolen checks. *See also Butler Contracting, Inc. v. Court Street*, 631 S.E.2d 252, 259 (S.C. 2006) (contract amount and change orders established measure of recovery in construction dispute).

Appellants say "Smith did not seek a sum certain." Br. 24. But prejudgment interest was awarded to A&E. Order (R. p. 18, 57). They repeat arguments about Mr. Smith's purported fiduciary breaches. Br. 26–28. But Appellants' suggesting that Mr. Smith did anything improper (he didn't) has no bearing on A&E's entitlement to prejudgment interest. Br. 24, 27 (focusing on amounts that could be "due to Smith as a shareholder."). A&E's measure of recovery against Appellants is the only amount that must be ascertainable; there's no requirement that "amount of Company funds" or "the amount

due each shareholder" be "fixed." Br. 28. Even if this Court believes their arguments about Mr. Smith (it shouldn't), that purported wrongdoing has no impact on whether prejudgment interest is available: The "assertion of a counterclaim seeking an offset does not prevent an award of prejudgment interest because is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." *Butler Contracting*, 631 S.E.2d at 259.

Historic Charleston Holdings, LLC v. Mallon doesn't change the calculus. That case wasn't about a company (through a derivative suit) suing one of its shareholders for stealing company funds and misappropriating corporate opportunities. In fact, it wasn't a derivative action at all—the relief went to the member, not the entity. 673 S.E.2d 448, 459, 381 S.C. 417 (2009) ("[t]he relief granted by the master was entirely personal to HCH . . . instead of an initial return of the converted funds in whole to [the] entity."). In that case, HCH and Mallon were members of an LLC. *Id.* at 452. HCH wanted half of the proceeds from the sale of a property that had been escrowed and received that in its judgment against Mallon. *Id.* at 453–54. The master awarded prejudgment interest on the one-half distribution. *Id.* But the Supreme Court found that the members weren't necessarily contemplating the "standard fifty-fifty" distribution, so the "measure of recovery for prejudgment interest was unliquidated at the time the parties' claims to the proceeds arose." *Id.*

This case, unlike *Mallon*, isn't about a prejudgment-interest award tied up with escrowed funds and undecided future distributions. Instead, it's about Appellants putting back the money they stole from A&E in the first instance.

IV. THE MASTER-IN-EQUITY AND THE EXPERT WERE CORRECT IN DISBELIEVING APPELLANTS' ATTEMPTED FRAUD ON THE COURT.

Appellants argue that both the Master-in-Equity and the expert accountant "erred by ending their analysis" after December 31, 2007 (Br. 32–33, 39). The Order speaks for itself: the expert "properly disregarded all financial transactions after that date, *with the exception of accounts receivable and payments made for warranty work*." Order (R. p. 48) (emphasis added). Neither the Court's nor the expert's figures stopped in 2007. Appellants omit the Court's other post-2007 finding: "Defendants submitted fraudulent claims for reimbursement to the Court for [post-2007] expenses advanced by Park Place

to the Company." *Id.*

Ms. Brady's Summary Analysis of Non-Corporate Activity gave Appellants $134,855.72 in consented-to credits by Mr. Smith, which included payments made for materials at the Fountains and Willoughby and payments to subcontractors in 2008 and 2009. *See* Ex. 40, "Agreed upon expenses by Mr. Smith." (R. pp. 12454, 12478, 12487, 12490–12491, 12510–12512). What Appellants haven't done on appeal is name a single dollar that was missed. Instead, they cite to scattered transcript pages providing no amounts on which to reduce the judgment against them. That's because they can't dispute what the Lower Court found: Appellants doubled-down and tried to defraud the Court. Order (R. pp. 48–49).

Appellants started a separate company, Grand Strand, in 2008. In what is all-too-familiar, by and large, they didn't deposit what should've been Grand Strand's receipts into its own account; rather, they put them in Park Place. Order (R. pp. 48–49). Park Place then funneled the money into A&E, so that the Vereen family could pay themselves a salary from A&E that they could later claim as a loan from Park Place. *Id.*

Ms. Drewett—who worked for Park Place, Parkway, A&E, and Grand Strand out of the same office—testified that she answered the phone as "Grand Strand Builders" when people called in 2008 and 2009. (R. p. 6637). She also testified that A&E did no new jobs in those years. (R. pp. 6636–37). Mr. Vereen was the licensed, "qualifying party" for Grand Strand. Ex. 10 (R. pp. 8433–34, 8438–40); Sisson Tr. (R. p. 2046, lines 1-14). That meant he had to be a full-time employee "in a responsible management position." S.C. Code § 40-11-230(B)(3). Ms. Sisson spent much of her time as President of Grand Strand defending Appellants (whose ranks don't include Grand Strand) below. Order (R. p. 49); Smith Tr. (R. p. 1003, lines 2-12).

Grand Strand had permits issued for a $535,000 job in April 2008, a $320,000 job in June 2008, and a $490,000 job in January 2009. Pl.'s Ex. 11 (R. pp. 8444, 8453–55). It got the jobs (which involved the construction of several large houses) because Mr. Vereen was personally involved (as the statute required). Smith Tr. (R. p. 995, lines 7-13). Grand Strand paid no salaries to its employees. Aug. 2012 Mr. Vereen Tr. (R. p. 2588–89); Smith Tr. (R. p. 996, lines 1-9; p. 999, lines 1-15; p. 1001, lines

1-10). It only had minimal deposits; that money went to Park Place. Smith Tr. (R. p. 999, lines 3–p. 1001, line 10). Were Appellants working for free?

They weren't. A&E, through Appellants, continued to pay Mr. Vereen and his daughter a weekly salary all the way up to a couple months before the date of Ms. Drewett's deposition in late 2009. Drewett Dep. (R. p. 6638); Ex. 27 (R. p. 12295–12305). From 2008 to 2009, Mr. Vereen was paid at least $96,566.40, even though he was Grand Strand's full-time employee. Ex. 27 (R. p. 12305). The salary payments continued for over a year, even though, by and large, nobody was working. Drewett Dep. (R. p. 6639).

Why was A&E taking out loans from Park Place to pay salaries if its employees were working for a different construction company? The abridged version: Appellants knew they were in trouble when they received Mr. Smith's demand letter and were doing anything they could to reduce the judgment they knew was coming.

A&E, under Appellants' control, deposited checks it received from Park Place. Ms. Drewett would then cut the payroll to herself, Mr. Vereen, and Ms. Sisson, the President of Grand Strand. (R. p. 6639). Why did Park Place care if A&E could pay salaries? It didn't. It wasn't even Park Place's money. Appellants funneled money due Grand Strand through Park Place and then into A&E (Vereen Tr., R. pp. 2588–2590) so they could later claim it as a credit in the litigation. Order (R. p. 48–49). Mr. Smith never authorized A&E to pay Mr. Vereen, Ms. Sisson, or Ms. Drewett salaries for their work with Grand Strand. (R. p. 1002, lines 13-25). Mr. Smith never authorized A&E to pay Ms. Sisson to defend Appellants in a lawsuit A&E brought alleging that they stole its money. Smith Tr. (R. p. 1003, lines 1-12). Appellants' attempt to deceive the Court made it impossible to give them credit for any purported unaccounted-for legitimate activities they could've conducted on A&E's behalf.

V. JOINT-AND-SEVERAL LIABILITY IS APPROPRIATE.

In this attack on the judgment, Appellants aren't claiming that Mr. Vereen isn't responsible for what he did. *See* Br. 16. Instead, they claim that Mr. Vereen is the only one responsible, despite every other Appellant—entity or not—participating in the conspiracy and sharing in the spoils.

But A&E didn't sue just Mr. Vereen. It alleged a conspiracy and joint-and-several liability. The

pleadings detailed thirty-plus transactions showing that A&E was nothing more than cost center for the Vereens' family business. Compl. ¶ 11 (R. pp. 425–29). The evidence supported those pleadings: "the[] books were ran, as all these companies were, as one." Brady Tr. (R. p. 1296, line 9–p. 1297, line 7).The expert testified that tracking whose income was whose was difficult "because they ran it like they were paying out all the different companies." *Id.* The Court agreed: the Appellants and A&E were "treated . . . as if they were one large entity." Order (R. p. 47). Appellants don't even challenge its finding that they "commingled funds without regard to ownership or the taxation of funds to the recipient." (*Id.* at 49).

All the Appellants—the individuals and their entities—defended the case collectively, asserting that they "put in more money than they took out." Order (R. pp. 23, 30, 38). That wasn't true, and judgment was rendered jointly and severally. Now they want to be treated separately. But the facts show that they never attached legal significance to their alleged differences in the first place.

A. Appellants were on notice of joint-and-several liability.

A&E's complaint asked for a judgment against Appellants jointly-and-severally. *See* Compl. (R. p. 432). A&E alleged all Appellants conspired together to divert A&E's assets and that they, collectively, could not account for the thirty-plus transactions identified in the Complaint. *Id.* ¶ 12 (R. pp. 429–30)

In 2012, in response to the Trial Court's directive, Respondents filed a post-trial memo again repeating the request for a joint-and-several liability. (R. pp. 12538–43). The post-trial memo detailed why joint-and-several liability was appropriate, citing the very cases Appellants discuss in their brief. *See* (R. p. 12542) (citing *Mid South, Kincaid, Pope,* and *Magnolia North*). Years passed, and Appellants never objected to those arguments. Appellants knew the Court would consider equitable doctrines like piercing and amalgamation. They had the opportunity to be heard, but never filed a brief. Due Process requires no more.

B. If the Court finds that joint-and-several liability was not appropriately pleaded, the issue was tried by consent or the Court below granted a motion to amend.

At the motion-to-reconsider hearing, Counsel argued that "over the course of the case, the

disregarding [of] the corporate entities was discussed and hammered through[out]." May 2015 Tr. (R. p. 3197, lines 2-5). Counsel continued, arguing that, "the defendants always considered themselves one." *Id.* (R. p. 3197, lines 8-11) The Court agreed stating that "if there's ever been a case of amalgamation, this is one. I can't imagine there being a clearer case of amalgamation than this case." *Id.* (R. p 3197, line 23 to R. p. 3198, line 2). Counsel stated, "[W]e ask you . . . to amend the pleadings . . . I think Rule 15 allows the motion to be made after the judgment, *if that's an issue before the Court.*" *Id.* (R. p. 3198, lines 20-24). The Court agreed, indicating that "[i]t certainly was tried that way." *Id.* (R. p. 3198, line 25 to 3199, line 1). In her Order Disposing of the Post-Trial Motions, the Master-in-Equity found that Appellants did not timely file a motion to reconsider and held (in the alternative) that Appellants were responsible joint-and-severally under an amalgamation theory. Apr. 2016 Order (R. p. 69).

At the very least, the joint-and-several issues raised here were tried by consent or the Court granted A&E's motion for leave to amend the pleadings by finding on the amalgamation issue (inasmuch as that was required). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated be treated in all respects as if they had been raised in the pleadings." SCRCP 15(b). That motion can happen even after judgment and "failure to so amend does not affect the result of the trial of th[o]se issues." *Id.*

As the Lower Court found, the case was tried joint-and-severally. Why else would A&E put on un-objected-to testimony from its accountant that "these books were ran, as all these companies were, as one" and that they "ran it like they were paying out of all the different companies" (Brady Tr., R. p. 1296, line 9–p. 1297, line 7)? Why else would Counsel ask if the expert had "ever seen corporations that spend money on behalf of other companies and not report it in their business records" or if she saw "these types of interrelated transfers . . . when there's two separate shareholders that are not in the same family and have no other related companies?" (R. p. 1341, lines 5-25). Why else would Counsel ask Mr. Vereen how he kept up with checks being written to one entity and deposited into another's account? (R. p. 2519), how he kept up with money flowing back-and-forth between his various companies (R. p. 2544), or why the Appellant entities paid for expenses that

weren't (in Appellants' minds) their own (R. p. 3071). This pleadings dispute can't carry the day, particularly when there's no prejudice—Appellants stood united in trial in the face "proof of misconduct [that] was all but absolute." Order (R. p. 56).

C. Appellants Were Appropriately Amalgamated.

South Carolina didn't have a Supreme Court decision analyzing amalgamation before *Pertuis v. Front Roe Restaurants, Inc.*, where the Court recognized that:

> [C]ourts disregard the corporate fiction specifically because it has parted company with the enterprise-fact, for whose furtherance the corporation was created; and, having got that far, they then take the further step of ascertaining what is the actual enterprise-fact and attach the consequences of the acts of the component individuals or corporations to that enterprise entity, to the extent that the economic outlines of the situation warrant or require.

Op. No. 27823 at 11 (July 5, 2018) (citation omitted).

That decision announced a general rule; it didn't limit the doctrine to any specific set of facts. All that needs showing is entwinement and "evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 12. Neither *Pertuis* nor any other South Carolina appellate case (including *Magnolia North* and *Pope*) has adopted a test containing elements that must be found before the doctrine is applied.

Respondents agree that there's nothing "nefarious" in creating an LLC or corporation, but South Carolina—both its Legislature and judiciary—has no interest in allowing people to use its corporate law to perpetrate "fraud, justify wrong, or defeat public policy." *Id.* (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)). "[I]t would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." *Las Palmas Assoc. v. Las Palmas Center Assoc.*, 1 Cal. Rptr. 2d 301, 317 (Cal. App. 1991).

Pertuis calls this Court to determine if (1) Appellants blurred their legal distinctions; and (2) in doing so, did they commit fraud, abuse, wrongdoing, or some other injustice? Yes and yes.

1. Appellants were intertwined.

This is a case about a family (the Vereens) taking advantage of a man, Mr. Smith. The cast of

characters is not long—Mr. Smith, Mr. Vereen, and Ms. Vereen play the starring roles. The Vereens' daughter, Ms. Sisson, is a supporting actress. Mr. Smith and Mr. Vereen created A&E and owned it fifty-fifty. By the time A&E was created, Mr. Vereen controlled three other entities named AVC, Parkway, and Park Place. Mr. Vereen wholly owned AVC. Mr. Vereen Tr. (R. p. 488, lines 13-15). Mr. Vereen owned 5% of Park Place, his wife owned the other 95%. Ms. Vereen owns all of Parkway Offices. Parkway Offices owned office space, including a single office shared by A&E and the multiple Appellate entities. Order (R. p. 19). The same employee—paid by A&E—performed tasks on behalf of Park Place, A&E, AVC, and Parkway there. Drewett Dep. (R. pp. 6526, 6541, 6551–56, 6567–70); Ms. Vereen Dep. (R. p. 12372, line 20–p. 12373, line 13). That same office space kept Parkway's, Park Place's, and A&E's books and records. (R. p. 6632). Shared office space, shared owners, and identical operators point in favor of applying the doctrine. *Kincaid v. Landing*, 344 S.E.2d 869, 874, 389 S.C. 89, 96 (Ct. App. 1986) (individual was officer and shareholder in each entity, remaining shareholders were family members, and all corporate offices were in the same location); *Magnolia N. Prop. Owners' Prop. Ass'n v. Heritage Cmntys., Inc.*, 397 S.C. 348, 359–60, 725 S.E.2d 112, 118 (Ct. App. 2012) (shared officers, directors, and office space); *see also Green v. Champion Ins. Co.*, 577 So.2d 249, 257–58 (La Ct. App. 1991) (Factors No. 1, 2, 3, 12, 14, 15).

If that were all that happened, it might not be enough. *See Pertuis* at 13. But that wasn't it, not by a long shot. *Pertuis* teaches that a Court must consider the identity of the party sought to be amalgamated. *See id.* at 13. Here, we've got two LLCs and one S-Corporation, so a high degree of formality is not required. *Id.* But there is still is a basic, bottom line that must be followed for any business. Appellants didn't just tiptoe over that line. They sprinted past it and never looked back.

For one, Appellants failed to keep or make any records of their alleged agreements with A&E. And, for another, they failed to document the transfers between themselves and A&E or bother invoicing each other. Order (R. p. 49); Brady Tr. (R. p. 1285, lines 1-3). Mr. Vereen simply "made an invoice in [his] mind." (R. p. 536, lines 21-23). "There's no structure." Smith Tr. (R. p. 68, lines 2-3). Ms. Brady testified that the different parties in this case were supposed to be separate, but they weren't. Brady (R. p. 1296, lines 9-25). The Lower Court's conclusion that it was just "one large entity" is

correct:

- Willoughby and its lender couldn't tell anyone apart. They wrote checks to AVC, A&E, and Park Place, despite A&E obtaining all the permits for the job. Ex. 11 (R. pp. 8444, 8447–51), Ex. 12 (R. pp. 8456–8665). It didn't matter who got the check, because "Arthur Vereen Const. Co. dba A&E" sent payment applications. Ex. 12 (R. pp. 8456–8665). But some documents were from just A&E. *Id.* (R. pp. 8456–8665). If third parties can't make the distinction, why should the Court? Later, Appellants buried Park Place's expenses for material used on its property in the Willoughby ledger (Smith Tr., R. p. 969, lines 2-24). It didn't matter where the costs were recognized, so long as one of the litigants involved in this case made a profit and that profit went to the Vereens.

- The Vereens' daughter, Elizabeth Sisson, wrote a check to Park Place instead of A&E, for work A&E performed on her house. Order (R. p. 41); Ex. 25 (R. p. 12284). Mr. Vereen said that was OK because Park Place "had made deposits into A&E." Mr. Vereen Tr. (R. p. 567, lines 2-15).

- A&E certified to the Government that it would be the contractor on the Kempes's home. Ex. 13 (R. pp. 8666–87). But AVC signed the contract. *Id.* (R. p. 8670). The Kempes received invoices or change orders from both AVC and A&E. *E.g.* Ex. 13 (R. pp. 8678, 8685). The Change Order sent by A&E to the Kempes was faxed from a number associated with "Vereen Constr." and revised the contract that the Kempes had with AVC. *Id.* (R. p. 8685). Mr. Vereen didn't have a good answer for how he kept up with everything: "[AVC] and A&E were both intermixed in our computer." Mr. Vereen Tr. (R. p. 505, lines 14-17).

- Mr. Vereen testified that "if we . . . wrote th[e] [Dr. Lale] contract under [AVC] at our office, it was an error on our part, but we did that job under A&E." (R. p. 508, lines 13-19). Even if it's true that Mr. Vereen simply couldn't keep up with which company signed what (it wasn't), the fact remains that the money went to not just AVC, but also Parkway. Ex. 31 (R. p. 12414); Ex. 1 (R. p 3474).

- A&E was the payee on a $49,000 worker's compensation refund check, but the check was deposited into Park Place. (R. p. 2578–79). The reason: "I knew that I had put more money into A&E than I had gotten out." (R. p. 2705).

- A&E paid the bills on a Sherwin Williams account that was in AVC's name and deposited a credit issued to AVC. Sisson Tr. (R. p. 2426, line 17–p. 2427, line 9).

- Between the Pointe Marsh and the Black Pearl Putt-Putt jobs, A&E applied for and received over sixty permits from North Myrtle Beach, listing Park Place as the owner. Ex. 15. (R. pp. 8782–8845). There were no written contracts between A&E and Park Place. Invoicing was unnecessary because "[w]e had a job ledger." Mr. Vereen (R. p. 2746). That meant Park Place didn't need separate records, it could use A&E's. AVC received invoices from Stock Builders, but it was Park Place's materials. Ex. 39 (R. pp. 12442–43); Mr. Vereen Tr. (R. p. 637, line 1–p. 638, line 17). A&E paid for it and it was recorded as a Willoughby job expense. Mr. Smith Tr. (R. p 969, lines 4-24). Hundreds of thousands of dollars of A&E's costs went unpaid. Park Place had loans for the project; A&E paid the interest. Mr. Vereen Tr. (R. p. 3079). Mr. Vereen said the interest was a "company expense[]." Smith Tr. (R. p. 906, lines 17-19). Company expenses were kept at A&E, the Vereen family enterprise's profits were kept elsewhere.

These parties were one and the same (i) to the banks that deposited checks written to one entity into another's account; (ii) to the banks who accepted checks from one entity to pay down loans for another; (iii) to customers who wrote checks to different entities on the same job; (iv) to customers and lenders who received documents from any number of the litigants; (v) to the Vereen family, who gave checks to Park Place to reimburse A&E for its work, and (vi) to each-other, because they incurred a host of intracompany transfers, failed to send invoices for work performed by one for the other, failed to pay down intracompany debts, and failed to keep any records of their actions. *See also* Brady Tr. (R. p. 1276, lines 11-19) ("[T]he money went between several other companies and there was no documentation."); Smith Tr. (R. p. 945, lines 13-24) ("I guess Park Place Properties and Arthur Vereen are basically one and the same thing."). Neither Respondents, nor the Master-in-Equity, can "imagine there being a clearer case of amalgamation." (R. p. 3197, line 25–p. 3198, line 2). *Pertuis* at 10 ("typical" to pierce where "as a business matter, [Appellants are] more or less indistinguishable parts of a larger enterprise.") (citation omitted); *Pope v. Heritage*, 395 S.C. 404, 419, 717 S.E.2d 765, 773 (Ct. App. 2011) (considering representations made to third parties); *Kincaid*, 344 S.E.2d at 874, 289 S.C. at 96

(considering letterhead sent to third party); *see also Gr*

een, 577 So. 2d at 257–58 ("paying the salaries and other expenses or loss of another corporation," "undocumented transfers of funds between corporations," and "unclear allocation of profits and losses between corporations" favors amalgamation.).

2. **There was ample evidence of bad faith, abuse, fraud, wrongdoing, and injustice.**

Appellants do not challenge that they converted A&E's assets to their own benefit; that they built 23 homes and made $6 million without paying A&E's construction expenses; that they siphoned A&E's assets to pay for construction expenses on property they own; that they used A&E's funds to construct a garage on their home in the Bahamas; or that they deposited checks made out to A&E into their bank accounts. Nor do they challenge that most of the funds went to Park Place. Order (R. p. 49). And that Park Place further distributed A&E's funds to pay: Ms. Vereen—who allegedly didn't work—a "large salary," to construct the Vereens' personal home, and to pay the Vereens' personal expenses. *Id.* Appellants sucked the lifeblood right out of A&E, causing the very capitalization issues that they're trying to garner sympathy for now. *See* Br. 6 ("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."). If those facts don't represent bad faith, abuse, fraud, and wrongdoing, then the doctrine should be shelved for good. Particularly when dissembling the entity Appellants ran allows the profit centers with the assets to be separated from the middle-man conduit (Mr. Vereen).

In *Pertuis*, the Supreme Court commented in a footnote that "it is unclear under what circumstances, if any, this equitable veil-piercing remedy would be available or appropriate in an action among shareholders." *Pertuis* at 13, fn. 7.[12] Amalgamation should apply here, where a single entity became the cost center for the Vereens' family business. Equitable principles guide the decision (*Pertuis* at 12), and equity "applies substance over form." *Bank v. Wingard Prop. Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 352 (Ct. App. 2011). "[A]ll forms of equitable relief"—including this State's veil-piercing doctrines—"must be decided on [their] own particular facts." *Drury Dev. Corp*, 668 S.E.2d at 801.

[12] This is a derivative action, so it's debatable whether the footnote even applies.

These parties were one and the same. Order (R. p. 47) ("Vereen . . . treated the Defendants and Company as if they were one large entity."); Brady Tr. (R. p. 1296, lines 17-20) ("Each one was a corporation or an LLC and these books were ran, as all these companies were, as one."); Mr. Vereen Tr. (R. p. 693, lines 6-14) (Q: Are they all one and the same? A: Yes."). With no documentation, they cashed one another's checks, built houses for free (and at cost), paid off one another's loans or other expenses, collected checks from one another's customers, and revised each other's existing agreements with third parties.

Equity doesn't allow "an individual businessman [or family] . . . to hide from the normal consequences of carefree entrepreneuring by doing so through the corporate shell." *Multimedia Pub. of South Carolina v. Mullins*, 431 S.E.2d 569, 573, 314 S.C. 551 (1993) (piercing entity's veil where individual transferred over $100,000 in cash and other assets to his related entities). Far more than "carefree enterpreneuring" was proven. Appellants knew full well that money doesn't grow on trees and companies like A&E don't work for free. *Compare* Ms. Vereen Dep. (R. p. 12372–73) (testifying that she did not work but received a check from Park Place that was "commingled" with Mr. Vereen's check and placed in their joint bank account) *with* Order (R. pp. 48–49) (disbelieving Ms. Vereen's testimony that she didn't know anything alleged in the Complaint). Because they Appellants ran themselves as one large, intermixed entity, that entire entity—not just Mr. Vereen—must satisfy the judgment to A&E. Requiring A&E to recognize Appellants' distinctiveness when they don't themselves is the sort of fiction that has no place in this State's corporate law.

Mid-South doesn't answer the question. As explained by the Supreme Court, "the theory did not apply to the facts of that case because there was no evidence in the record that the corporate entities' identities or interest were blurred or confused with one another." *Pertuis* at 8. For good reason. This Court was presented with a much different case: "appropriate financial records," "no evidence that the [entity] was 'merely a façade'" and no evidence of improper transfers of "money, property, or other assets." 649 S.E.2d 135, 141, 347 S.C. 588 (Ct. App. 2007). The parties were distinct, so imposing liability on one for the another's act would be inequitable—the opposite is true here.

D. Ms. Vereen is responsible for the judgment under veil-piercing doctrines.

No matter the outcome of the amalgamation ruling, Ms. Vereen is still jointly-and-severally liable as the President of both entities, the sole owner of Parkway, and the 95% owner of Park Place. South Carolina courts use a two-prong test to determine whether piercing is appropriate, considering (1) eight factors comprising the entity's characteristics; and (2) "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." *C.T. Lowndes & Co. v. Suburban Gas & App. Co., Inc.*, 415 S.E.2d 404, 406, 307 S.C. 394 (Ct. App. 1991).

In this case, there was a total absence of records from any entity justifying the agreements with or amounts taken from A&E, siphoning of A&E's funds to the other entities, use of those same funds to pay Ms. Vereen a salary that was "comingled" with her husband's, and (as the Court found, R. pp. 49–50) use of those funds to build the Vereens' personal home. *Id.*

"[F]undamental unfairness," which encompasses situations where the "defendant was aware of the plaintiff's claim" is also present here. *Mullins*, 431 S.E.2d at 572. "[A] person is 'aware' of a claim against the corporation . . . if [s]he has notice of facts which, if pursued with due diligence, would lead to knowledge of the claim." *Id.* Here, Ms. Vereen can't claim that she "left the management of [Parkway and Park Place] to others" because that's "the equivalent of urging [her] own negligence and dereliction of duty as a defense." *Id.* Imputed knowledge isn't even required. The Lower Court found she was complicit in the conspiracy and authorized her husband's actions. Order (R. pp. 38–40). Appellants admitted that Ms. Vereen negotiated the agreement with A&E to perform construction for Parkway on Grissom Parkway. Interrog. Resp. (R. p. 12328). That agreement resulted in Parkway's not paying A&E for the construction or even being billed. If Parkway wasn't even being billed for work on that job, due diligence would've required her to at least check why and she would've discovered (if she didn't already know) everything that led to the lawsuit in this first place. Testimony from a company's President that "she had not read the complaint" (R. p. 12355, lines 13-14) isn't enough to limit her liability.

E. Appellants are jointly and severally liable because they conspired to harm A&E.

The Court found, and A&E alleged, that Appellants engaged in a conspiracy. Order (R. p. 49); Compl. ¶¶ 11, 18, 19. Each conspirator is liable for all damages naturally resulting from the acts of the

other co-conspirators. *Charles v. Tex. Co.*, 199 S.C. 156, 18 S.E.2d 719, 726 (1942); F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts*, 436 (4th ed. 2011).

"A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage." *Peoples Fed. Savings v. Resources*, 358 S.C. 460, 470 (2004). "Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances." *Id.* The Master-in-Equity had more than enough evidence to support her conspiracy finding: there were only a few individuals running these entities, all of them knew Mr. Vereen's duties to A&E, yet they went ahead and worked to treat A&E's assets as their own.

Appellants recognized the conspiracy issue (Br. 3, n. 3), but dismiss it by claiming that the Master-in-Equity didn't find a conspiracy and that the claim wasn't pleaded. (Appellants don't explain why, though). The Order speaks for itself. The Master-in-Equity found a conspiracy (*see* Order, R. pp. 24, 27)), which is more than supported by her findings showing how each of the Appellants worked together to fleece A&E. *Id.* (R. pp. 27–30, 43–50). Appellants didn't make any challenge to the Court's conspiracy finding in their Rule 59 motion. They only brought them up at the hearing. If Due Process allows the original motion (it shouldn't), the oral supplement is still untimely and can't be raised now.

There's also no damages problem. The findings below were specific to each transaction, so there's no possibility that anyone is double-paying "damages for the same act." *Peoples Federal Savings*, 358 S.C. at 476 (sustaining verdict where there was no possibility that appellant was "twice subject to payment for damages for the same act."). If Appellants raise a new argument (and if the Court deems it appropriate to do on Reply), this Court should adopt Chief Justice Pleicones' dissent in *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016). Even if this Court disagreed, A&E is still entitled to its expert accounting fees from all Appellants, which are pleaded in the Complaint. *See* Compl. at 12.[13]

VI. THE MASTER-IN-EQUITY'S DECISION TO FIND IN THE COMPANY'S FAVOR IS WELL SUPPORTED BY THE EVIDENCE.

[13] Separate and apart from this, Appellants haven't challenged the award of the expert's fees, so that ruling is law of the case. *See Fripp*, 396 S.C. at 441.

In their next challenge, Appellants fault Mr. Smith for (among other things) starting his own company, E. Smith and Sons, after discovering they stole millions of dollars from A&E and were writing kickbacks. No matter how it's framed—Appellants use two separate arguments (IV., V.)—the Master-in-Equity's conclusion that Mr. Smith harmed no one is well supported by the evidence.

A. Appellants can't fault the decision below on grounds they never raised, waived, or haven't challenged in their brief.

First, Appellants failed to plead any affirmative defenses, argue any affirmative defenses, or file a Rule 59(e) with respect to any affirmative defenses, so their unclean-hands argument is not before the Court. *Branche Builders, Inc. v. Coggins*, 686 S.E.2d 200, 202 n.4., 386 S.C. 43 (Ct. App. 2009).

Second, Appellants ask for a new trial because A&E didn't get paid for Mr. Smith's side jobs. But at trial Appellants conceded that "[w]e are not asking Mr. Smith for profit and overhead and payroll for all his side jobs." (R. p. 2363 lines 25–p. 2364, line 3). Accordingly, they've waived the ability to make that argument here or anywhere else. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 599 (1981); *Ex parte McMillan*, 319 S.C. 331, 335 (1995) (issue conceded "is procedurally barred.").

Third, the Master-in-Equity held that Appellants failed to show damages to support their assertions. Order (R. pp. 33–34). On appeal, they say that the Lower Court "fail[ed] to account" for the building Mr. Smith performed after he discovered their fraud. Br. 38–39. A&E had to prove its damages to the Lower Court. Appellants had the same burden. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012). The Court held that they "produced no evidence of damages sustained by the Company" for the items (a) through (k) in Paragraph 32 of their Counterclaim (Order, R. p. 33), which includes the Davis job (a), both Sealey jobs (b, k), and the Condolux job (d). *Id.*; Answer at ¶ 32 (R. p. 465). Mr. Vereen testified that he "ha[d] no answer" on how much he was claiming for Condolux job and he had "no idea" if Mr. Smith made any money off it. Mr. Vereen Tr. (R. p. 2839). They haven't challenged the Master-in-Equity's finding that they didn't meet their burden on appeal, so it's law of the case. *Fripp*, 396 S.C. at 441, 721 S.E.2d at 468.

Finally, and most importantly, Mr. Smith came to Court with clean hands and the Master-in-Equity had more than enough evidence to conclude that he's differently situated than Appellants.

Appellants' arguments center on two issues: (1) side jobs, and (2) E. Smith and Sons.

B. Mr. Smith's side jobs harmed no one.

Mr. Smith and Mr. Vereen "agreed that each would finish any pre-existing jobs under the names of their own separate companies and at their own separate expense." Order (R. p. 19); Smith Tr. (R. p. 877, lines 5–p. 878, line 21). Appellants list (1) building a fence, (2) working on Ms. Davis' home, (3) working on Mr. Sealy's office; (4) working on Ms. Mann's house; and (5) working on Mr. Perez' home. Br. 36. The fence Appellants complain about was constructed for Burroughs and Chapin by EES under an August 2003 contract. Smith Tr. (R. p. 1045, line 10–p. 1046, line 8; p.1160, lines 17-20). The permits for that fence were also obtained in EES' name (*id.*) and A&E didn't pay a dime for the construction. *Id.* (R. p. 1066, lines 1-11). As for the Davis home and Sealey office, the Court's finding that "the Company license was used with permission of Smith and Vereen, and no monies were paid to the parties and no expense paid by the Company" is supported by the evidence. Order (R. p. 33); Smith Tr. (R. p. 1062, line 16-24) (Davis home) (R. p. 1063, line 10–p. 1064, line 7; R. p. 1155, lines 16-19) (Sealey office), (R. p. 1066, lines 5-11). Ms. Mann's home was permitted in her own name. Smith Tr. (R. p. 1886, lines 1-4). Mr. Smith helped the Manns select subcontractors to build their house. Smith Tr. (R. p. 1886, line 11–p. 1887, line 4). He didn't take a dime from Ms. Mann, he did her a favor. *Id.* She didn't have the money to pay. *Id.*

The Perez house was never an A&E job, Mr. Perez submitted the building-permit application in his own name before A&E even existed. Defs' Ex. 55 (R. p. 3313); *see also* Smith Tr. (R. p. 1046, lines 9-14; p. 1060, lines 3-12; p. 1861, line 24–p. 1862, line 5; p. 1884, lines 10-15). Appellants recognized that when they omitted it from their pleadings and admitted at trial that they were not claiming it "as [a] corporate opportunit[y]." (R. p. 1867, line 11-13). A&E never paid a dime on the Perez construction or any of the other side jobs. Smith Tr. (R. p. 1920, line 23–p. 1921, line 6; p. 1937, line 1-4). Both Mr. Smith and Mr. Vereen were working on non-A&E jobs during the Perez job. *Id.* (R. p. 1937, lines 8-11).

Appellants can't achieve reversal by complaining about jobs, including those done for free, that Mr. Vereen was aware of, that were never A&E's in the first place, and that didn't harm A&E.

C. Appellants can't fault Mr. Smith for leaving, particularly when they rejected one of the very proposals they complain about on appeal.

Appellants argue that the Master-in-Equity "completely disregarded" Mr. Smith's time at E. Smith and Sons. Br. 35 (citing Order, R. p. 48). The Order speaks for itself; that's simply not true. *See* Order (R. pp. 33–34). The Master-in-Equity's decision is well supported, but we'd be remiss in failing to step back and look at implications of Appellants' argument. Boiling it down, they're saying that South Carolina equity jurisprudence requires a shareholder in a two-person company to keep working for that company, even though he knows that his fellow shareholder stole millions, lied about it when confronted, paid kickbacks on company-affiliated projects, and showed no sign of slowing down. Equity didn't require Mr. Smith to keep working so Appellants could continue lining their pockets.

The Lower Court found that Mr. Smith was entitled to the fourteen weeks of paid vacation leave. Order (R. p. 34). It believed Mr. Smith's testimony (*see* Smith Tr., R. p. 917, line 4–p. 919, line 11) not Mr. Vereen's. For good reason: Mr. Vereen wrote every check out of A&E. A&E paid Mr. Smith during that time. Vereen Tr. (R. p. 2740). Mr. Vereen knew he wasn't at the office. Smith Tr. (R. p. 917, lines 4-7). And by at least October 4, 2007, (a date mentioned in Mr. Smith's demand letter, Ex. 9, R. p. 8407), Mr. Vereen knew that Mr. Smith wouldn't work with him anymore. Smith Tr. (R. p. 918, lines 8-15). Why else would he apply to be A&E's qualifying party on October 2, 2007 (formerly only held by Mr. Smith)? Def's Ex. 102 (R. pp. 3353–54).

As for the Condolux project, the Lower Court found that "Vereen previously rejected the construction proposal as not being profitable." Order (R. p. 34). Mr. Smith and Mr. Vereen discussed the job and Mr. Vereen didn't want to do it. (R. p. 915, line 11–p. 916, line 9). Mr. Smith ensured that E. Smith and Sons maintained insurance and paid for every expense. (R. p. 1959, lines 4-5; p. 1021, lines 2-12). Mr. Vereen didn't want any part of that job, he can't change that now on appeal.

Appellants didn't plead anything about the two other jobs—Madison Drive and South Ocean Boulevard, so they can't fault the Master-in-Equity for not mentioning them. To put them in perspective, A&E spent more on the Vereens' dry cleaning over the years ($12,673.69; Ex. 40, R. pp. 12455–56, 12459–60, 12463–64, 12467–68) than the permitted cost (not profit) of those jobs. Def's

Ex. 70 (R. p. 3329) ($8,800), Ex. 71 (R. p. 3330) ($1,500). A&E paid nothing on those jobs; it did pay for the laundry. The jobs also occurred in 2008 (Defs' Exs. 70–71, R. pp. 3329–30), Mr. Vereen knew that the parties had parted ways by then—he had already formed Grand Strand. Appellants recognized as much below, when admitting that they were "not claiming the $1,500" as a corporate opportunity because it was in April 2008. (R. p. 1965, lines 4-7).

Finally, Appellants argue that the judgment is inequitable because Mr. Smith "invested nothing" in A&E. Br. 37. That's not true. Mr. Smith showed up to work every morning at the office, once the jobs started rolling in. Smith Tr. (R. p. 878, lines 18-21; p. 885, lines 17-25). That initial $50,000 contribution didn't give them the right to $2 million of A&E's assets.

VII. APPELLANTS' FRAUD WARRANTED PUNITIVE DAMAGES.

First, this issue is only preserved as to Mr. Vereen, the other Appellants didn't challenge the punitive-damages below. *See* Mot. to Reconsider (R. pp. 77, 81); *McMillan*, 319 S.C. at 337 (can't raise issue "for the first time on appeal."). Second, the Constitution is concerned about punitive-damage multiplication, not division. *E.g.*, *BMW of N. America v. Gore*, 517 U.S. 559, 580–81 (1996). The punitive damages awarded were 4% of the amount Appellants damaged A&E. There's no excessiveness argument here. Appellants just ask the Court to "reverse/vacate" because the Order didn't mention *Gore*. Of course, they are holding the Lower Court to something of a double standard—Appellants didn't mention *Gore* either. *Gore*'s omission was harmless at best. Setting aside the award on this sort of technicality wouldn't let Appellants off scot free. The issue would just be tried again. We haven't found a single case saying that reversal is required and the *de novo* standard suggests that form-over-substance approach isn't correct. *Mitchell, Jr. v. Fortis Ins.*, 686 S.E.2d 176, 183, 385 S.C. 570 (2009).

The *Gamble* factors, largely "duplicative" of *Gore*'s, were discussed below. *Id.* at 185; Order (R. p. 56). The Master-in-Equity discussed the reprehensibility of Appellants' conduct, the first *Gore* factor R. p. 56). The second weighs the disparity between actual and punitive damages. *Mitchell*, 686 S.E.2d at 184. The 4% ratio speaks for itself. This State allows far more in similar cases. *E.g.* S.C. Code § 39-5-140 (treble damages, unfair and deceptive trade practices). Finally, *Gore*'s third factor asks for a comparison between the punitive damages awarded here versus similar cases. *Id.* If anything, the award

was too lenient. *E.g. Brewer v. Insight Tech., Inc.*, 689 S.E.2d, 301 Ga. App. 694 (Ga. App. 2009) ($650,000 punitive and $395,000 actual damages when officer misappropriated corporate opportunities).

CONCLUSION

For the reasons stated, the Court should sustain the judgment. If the Court accepts Appellants' joint-and-several or punitive-damages arguments, it should remand for a damages hearing only. Also, if the Court accepts (in part or in full) Appellants' joint-and-several arguments, it still should rule that A&E is entitled to prejudgment interest so that it may proceed with collection efforts against Mr. Vereen and the other Appellants who remain jointly-and-severally liable.

Respectfully submitted on August 22, 2018.

DURANT & DURANT, P.A.
2407 Farlow St. | Myrtle Beach, South Carolina, 29577 | 843-448-1541

Frank H. DuRant (S.C. Bar No. 1802) Julian W. DuRant (S.C. Bar No. 102420)

Counsel for Respondent A&E Constructors and Consultants, Inc.

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,

v.

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,

v.

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 Wayne 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, In. are the 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 the Respondents.

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the final brief filed complies with Rule 211(b).

I certify that I have served the brief on all parties of record by mailing a copy to their respective counsel of record.

Frank H. DuRant
SC Bar No. 1802
Frank@DuRantLawOffice.com

Julian W. DuRant
SC Bar No. 102420
Julian@DuRantLawOffice.com

DuRant & DuRant, P.A.
P.O. Box 960 (29578)
Myrtle Beach, SC 29578
T: 843-448-1541 F: 843-626-7431

Attorneys for A&E Constructors and Consultants, LLC