

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin Stilwell, Circuit Court Judge

Appellate Case No. 2019-000965
Case No. 2008-CP-23-0231

Garry Hoyt,

Appellant,

v.

CollaborativeMed, LLC and
Richard L. Grounsell,

Respondents.

APPELLANT'S FINAL BRIEF

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Circuit Court erred in failing to find that Grounsell's breach of his fiduciary duty in failing to provide Hoyt notice of a meeting to conduct an interested director transaction caused damages to Hoyt.
2. Whether the Circuit Court erred in failing to find Grounsell breached his fiduciary duty in failing to abstain from an interested director transaction in violation of S.C. Code Ann. § 33-8-310(c).
3. Whether the Circuit Judge erred in making a credibility finding of a witness on remand based solely on a review of the witness' testimony where the Circuit Judge erroneously believed that he could not make a credibility finding that would be potentially be incongruent with the findings of a prior Circuit Judge.
4. Whether the Circuit Court erred in finding Dr. Bruce Bode not credible where his testimony, along with other evidence of record, supported Appellant's claim of damages.

II. STATEMENT OF THE CASE

On March 26, 2008, Appellant filed this action seeking to declare a March 28, 2006 stock transfer from GlucoTec, Inc., by Respondent Richard L. Grounsell to Respondent CollaborativeMed, LLC,¹ void. Appellant contended that as a stockholder in GlucoTec, the stock transfer voted on at a May 18, 2006 meeting of stockholders was invalid because Respondent Grounsell failed to provide Appellant notice of the meeting of shareholders as required by the corporation by-laws and South Carolina law. On August 23, 2012, Appellant

¹ Respondent Grounsell was an organizer and majority member of CollaborativeMed, LLC.

filed a Motion for Partial Summary Judgment. Following continuances at the request of Respondents of the hearing on the motion, the case was scheduled for a non-jury trial on September 30, 2013 before the Honorable W. Jeffrey Young.

At trial, the Court heard arguments on Appellant's Motion for Summary Judgment and deferred ruling until after trial. (R. at 34.) Following a three-day trial, the Honorable W. Jeffrey Young issued an Order on July 29, 2014, ruling in favor of Respondents. (R. at 9-18.) That Order failed to address Appellant's Motion for Summary Judgment and failed to address Appellant's first and primary cause of action for breach of fiduciary duty. Appellant timely filed a Motion to Alter or Amend and for New Trial pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on August 6, 2014. (R. at 358-366.) The Court denied that motion on May 5, 2015, finally addressing Appellant's breach of fiduciary duty claims, but again failing to address Appellant's Motion for Summary Judgment. (R. at 19-24.) Appellant timely filed a Notice of Appeal on May 22, 2015. This Court reversed the decision of the Circuit Court and remanded the case on the issue of whether Respondent's failure to notify Appellant of a shareholders' meeting constituted a breach of fiduciary duty, and if so, whether said breach caused Appellant damages.

On remand, the Circuit Court concluded that Respondent breach his fiduciary duty to Appellant but that said breach did not cause damage to Appellant. (R. at 2-5.) Appellant timely filed a Motion to Alter or Amend contending that the Circuit Court failed to consider the testimony of Dr. Bruce Bode in making his finding with respect to damages. (R. at 367-371.) The Circuit Court denied Appellant's Rule 59(e) motion. (R. at 6-8.)

Appellant timely filed a Notice of Appeal.

III. STATEMENT OF THE FACTS

This case involves the corporate formation of GlucoTec, Inc., a corporation initiated to market the Glucommander. Glucommander is a software program to regulate IV insulin delivery to control glucose. It was developed by R. Dennis Steed, MD (“Dr. Steed”) and Paul C. Davidson, MD (“Dr. Davidson”) in 1984, with small revisions to the programming in 1985 and 1986, and 1990. Dr. Steed programmed the Glucommander for manual IV insulin drip formulas to control blood glucose. Dr. Steed left the program with Dr. Davidson and Dr. Bruce Bode, for research. Starting in 1985, Dr. Bode and Dr. Davidson began using the Glucommander routinely for hospitalizes hyperglycemic patients while these patients were hospitalized. In 2005, Dr. Steed, Dr. Davidson and Dr. Bode published their Glucommander data based on research conducted from 1985 thru 1998. (R. at 35-37.)

Dr. Bode and Appellant Hoyt testified that following several meetings, Dr. Bode, Appellant Garry Hoyt and Respondent Richard Grounsell agreed to form GlucoTec for marketing of the Glucommander in hospitals nationwide and agreed to share ownership in the company in equal one-third shares. (R. at 39, 74.) Respondent Grounsell caused to be filed the articles of incorporation for a new South Carolina Corporation, GlucoTec, Inc., on or about March 28, 2006. (R. at 238.) Respondent Grounsell identified Dr. Bruce Bode and Garry Hoyt, and a number of employees as founding shareholders. (R. at 129-130.)

According to the testimony of both Dr. Bode and Appellant Hoyt, in May 2006, Respondent Grounsell informed Dr. Bode and Garry Hoyt that each (Dr. Bode, Garry Hoyt and Respondent Grounsell) would receive 250,000 founders’ shares in GlucoTec, Inc. In order to allow the employees to receive stock in GlucoTec, Dr. Bode, Appellant, and Respondent Grounsell agreed to change the ownership agreement and become one-fourth shareholders. In addition to

these founders' shares, employees of GlucoTec also received shares with Hank Durschlag receiving 60,000 shares, Robert Booth receiving 100,000 shares, Anthony Ethridge receiving 50,000 shares and Respondent Grounsell's two sons each receiving 50,000 shares. (R. at 40, 75, 238).

Notwithstanding the shareholders' agreement to each be one fourth owners of GlucoTec, on or about March 24, 2006, Respondent Grounsell caused to be transferred 18,129,066 shares in GlucoTec to Respondent CollaborativeMed, a South Carolina limited liability company controlled by Respondent Grounsell and his family. (R. at 134.) Dr. Bode explained that he understood that 14 million shares of the stock was for the intellectual property for the Glucommander, which was merely housed in CollaborativeMed, a shell company, while GlucoTec was formed. (R. at 46, 67.) While this transfer occurred in March, 2006, it was not ratified by the stockholders until a special meeting on May 18, 2006. At the time of this special shareholders' meeting, Respondent Grounsell was the president and sole director of GlucoTec. (R. at 266.) Respondent Grounsell testified that he did not abstain from voting on this interested director transaction. (R. at 161.) Rather, he stepped out of the meeting and directed Hank Durshlag to vote his shares. (R. at 161.) Likewise, Clark Grounsell was set to receive 20% of whatever stock CollaborativeMed received and both Respondent Grounsell and Clark Grounsell testified that he also voted his shares at the May 18, 2006 meeting in favor of the transaction. (R. at 157, 186.) Clark Grounsell also did not abstain from voting with respect to this interested director transaction.

This transaction was voted on at a shareholders meeting on May 18, 2006. The shareholders' meeting was invalid because neither Appellant Hoyt nor Dr. Bruce Bode received written notice of the shareholder meeting that took place on May 18, 2006. Moreover, neither received notice of the purpose of the meeting nor an opportunity to appoint a proxy. (R. at 47, 78.)

The bylaws, however, require written notice of a shareholders' meeting be provided. (R. at 248, 252.)

In his testimony, Respondent Grounsell confirmed that he did not have any record of written notice. Instead, initially Respondent Grounsell testified during the Appellant's case in chief that he assumed that notice was emailed by Lori LaPoint, secretary for GlucoTec. (R. at 133.) Lori LaPoint, however, testified that she did not send Appellant notice of the May 11, 2006 and May 18, 2006 meetings. (R. at 1921.) During his case in chief, Respondent Grounsell changed his testimony, stating that "Mr. Durshlag was in charge of that project to get in touch with them [Dr. Bode and Appellant]." (R. at 214.) Such a change in testimony seriously diminishes Respondent Grounsell's testimony. Also with respect to notice, Respondent Grounsell's son, Clark Grounsell testified that he did not know if he received notice of either the May 11, 2006 or May 18, 2006 meetings. (R. at 186.) While the Circuit Court on remand concluded that Dr. Bode was not credible, it made no mention of Grounsell's lack of candor and his change in testimony at trial as a negative to his credibility. Importantly, this lack of candor and attempt to persuade the Court that notice was issued is indicative of Grounsell's intent to hide the meeting from Dr. Bode and Appellant who would have voted against the transaction. Their votes, coupled with Grounsell and his son abstaining would have defeated the transaction.

Both Dr. Bode and Appellant testified that they would not have voted to give shares of GlucoTec to CollaborativeMed. (R. at 47, 67.) In defense, Respondent Grounsell repeatedly testified that neither Dr. Bode nor Appellant were shareholders at the time because they had not signed a non-compete agreement or written a check for their founder's shares. (R. at 134.) However, both Dr. Bode and Appellant were treated as shareholders on March 24, 2006 when Respondent Grounsell was elected as sole director of GlucoTec. (R. at 268.) In fact, according to

the minutes, Dr. Bode and Appellant authorized Respondent Grounsell to file the Articles of Incorporation. (R. at 267.) Additionally, Respondent Grounsell contention that the non-compete agreement was required to be signed based upon his decision as a director is controverted by the May 11, 2006 meeting minutes, which states that the shareholders approved a resolution that non-compete agreements must be executed. (R. at 266.) Again, neither Dr. Bode nor Appellant Hoyt was sent notice of the meeting as required by the bylaws.

Following the trial, the Circuit Court issued an order denying relief as to all causes of action. (R. at 9-18.) In that Order, the Circuit Court confirmed that at the May 11, 2006 stockholders' meeting, Appellant was not present and "[n]o notice was mailed to him and he maintained he had no notice of the meeting." (R. at 12.) With respect to the May 18, 2006 stockholders' meeting, the Court made no findings regarding providing notice to Appellant of said meeting. However, the Court found that the interested director transaction benefitted Appellant and other stockholders because without such transaction, the intellectual property that the corporation was to market would be titled to ColloborativeMed, LLC, as it has obtained FDA approval. (R. at 13.) In its May 5, 2015 Order, the Circuit Court confirmed its findings that Respondents efforts to acquire FDA approval constituted value to GlucoTec and to Appellant. (R. at 20.) The Circuit Court further stated that "[w]ithout Grounsell's efforts, money and time, the project would never have gotten started. . . .The Court finds these efforts and funds were devoted to a common goal of marketing the Glucometer [sic] successfully. In reality Hoyt benefitted from these efforts and the monetary advances of other people." (R. at 21-22.)

The original Circuit Court Judge did not make credibility findings or make any conclusions as to whether notice was provided under the bylaws. However, on remand, the Circuit Court found that "Grounsell did breach his fiduciary duty to Hoyt by failing to notify him of the stockholders

meeting in accordance with the established Bylaws.” (R. at 3.) The Order cites no evidence with respect to this finding. However, what was clear is that no notice was provided to any shareholders, including Hoyt and Bode, as required by the bylaws. However, the Circuit Court on remand concluded that Appellant was not prejudiced and ultimately concluded that Dr. Bode’s testimony was not credible, notwithstanding the consistency of his testimony with the other witnesses. The Circuit Court stated:

Further, Plaintiff states that a majority of the shareholders would have disapproved of the subject transaction. The evidence does not establish that proposition as a fact. It is purely speculative. This Court, upon review, does not find Dr. Bode’s testimony to be persuasive or credible as to whether he had notice of the meeting or how he may have voted. His testimony was, in a word, suspect.

(R. at 6.)

IV. ARGUMENT

Standard of Review

An action for stockholder oppression is one in equity. McDuffie v. 192 O’Neal, 324 S.C. 297, 302–03, 476 S.E.2d 702, 705 (Ct.App.1996). Therefore, this Court may find facts in accordance with its own view of the preponderance of the evidence. Inlet Harbour v. S.C. Dep’t of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). This Court, however, is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

A. The Circuit Court erred in failing to find that Grounsell’s breach of his fiduciary duty in failing to provide Hoyt notice of a meeting to conduct an interested director transaction caused damages to Hoyt.

Pursuant to S.C. Code Ann. § 33-8-310, interested director transactions require the interested director to prove one of the following:

a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors, and the board of directors or a committee authorized, approved, or ratified the transaction;

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

(3) the transaction was fair to the corporation.

Paragraph four of the official comments for section 33-8-310 discusses the “fairness” of a transaction and provides as follows:

The fairness of a transaction for purposes of section 8.31 (Section 33-8-310) should be evaluated on the basis of the facts and circumstances as they were known or should have been known at the time the transaction was entered into. For example, the terms of a transaction subject to section 8.31 (Section 33-8-310) should normally be deemed “fair” if they are within the range that might have been entered into at arms-length by disinterested persons.

The officers and directors of the corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts when entering into a contract with said corporation. Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967). The object of this rule is to prevent directors from secretly using their fiduciary positions to their own advantage and to the detriment of the corporation and of the stockholders. In Peurifoy v. Loyal, 154 S.C. 267, 151 S.E. 579, 586-587 (1930), and Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E. 141, 143 (1930), the Supreme Court established that a director may not participate in corporate action with respect to a transaction in which he has an interest adverse to the corporation. In fact, “[h]e may not even be counted to make a quorum at a meeting where the matter is acted upon, which is the general rule.” Talbot v. James, 259 S.C. 73, 82-84, 190

S.E.2d 759, 764–65 (1972). S.C. Code Ann. § 33-8-310(c) also recognizes the interested transaction must be voted on by only disinterested stockholders interested directors and cannot be counted for purposes of quorum. As set forth in section 33-8-310(c):

[A] conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

The purpose of the rules governing interested director transactions is one of fairness. While the Circuit Court tacitly stated that the interested director transaction benefitted Hoyt, it never addressed the true fairness of the transaction. Grounsell failed to provide notice of the shareholders meeting because he did not want Hoyt and Bode to participate in and vote to prevent this interested director transaction. Grounsell then attempted to skirt around the notice requirement testifying at trial that Lori LaPoint provided notice and then changed his testimony that Durshlag, another employee, was in charge of notice. Grounsell then failed to abstain from the shareholders vote. Further, his son Clark Grounsell, who stood to receive 20% of the shares to be transferred to CollaborativeMed, failed to abstain from the shareholders vote. The conduct of Grounsell demonstrates he never intended to be fair to the shareholders in his effort to diminish the value of their shares of stock. This conduct is part of the breach and caused Hoyt to have his one-quarter interest in Glucotec greatly diminished and devalued.

Both Dr. Bode and Plaintiff Hoyt testified that they would have voted against giving shares of GlucoTec to CollaborativeMed. (R. at 49, 80.) Further, had they been able to address the shareholder's meeting, it is highly likely that the transaction would have failed. This is particularly true since Bode and his group of investors were responsible for the algorithm used in the Glucommander. Because this interested director transaction diminished the value of Hoyt's stock, the Circuit Court erred in concluding that Hoyt failed to prove damages.

B. The Circuit Court erred in failing to find Grounsell breached his fiduciary duty in failing to abstain from an interested director transaction in violation of S.C. Code Ann. § 33-8-310(c).

While the Circuit Court found that Grounsell breached his fiduciary duty in failing to provide notice, the Circuit Court did not address whether Grounsell's failure to abstain from the interested director transaction also constituted a breach of fiduciary duty. As S.C. Code Ann. §33-9-310(c) requires interested directors to abstain from a transaction and that their shares cannot be counted for purposes of quorum, the failure to do so constituted a breach of fiduciary duty to Hoyt.

C. The Circuit Judge erred in making a credibility finding of a witness on remand based solely on a review of the witness' testimony where the Circuit Judge erroneously believed that he could not make a credibility finding that would be potentially be incongruent with the findings of a prior Circuit Judge.

In this case, the presiding Circuit Judge made pain-staking efforts to harmonize his findings with the prior Circuit Judge's finding that the shareholder meeting held to discuss and vote interested director transaction that Grounsell failed to provide notice to Hoyt and failed to abstain from benefitted Hoyt. In this regard, the presiding Circuit Judge found the testimony of Dr. Bruce Bode to be not credible with respect to his testimony that he did not receive notice and would have voted against the interested director transaction. First, the record is replete with evidence that no notice was provided as required by the bylaws with respect to the shareholders meeting. Thus, the presiding Circuit Judge erred in finding Bode not credible in this respect. Second, as to whether

he would have opposed the transaction, his testimony was not only consistent with Hoyt, it was consistent with Dr. R. Dennis Steed, Bode's partner, who stated that he never came to an agreement to sell the intellectual property to CollaborativeMed. (R. at 118, 122.) The presiding Circuit Judge missed this fact in his credibility determination of Bode.

It is clear that one circuit judge does not have the power to reverse an order of another circuit judge. See Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (reversing the appealed order because it "amounted to a review by [the issuing judge] of the order of another circuit judge"); Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct. App. 2013) (holding a pretrial court order from one trial judge denying a request for a non-jury trial could not be overturned by another trial judge who eventually tried the case). However, this rule does not require a presiding Circuit Judge to make factual findings not supported by the record solely to harmonize with other findings of a retired Circuit Judge. Moreover, application of this rule in the context of a case on remand where the prior Circuit Judge has retired should be revisited to allow a presiding Circuit Judge amend rulings to be consistent with the evidence.

D. The Circuit Court erred in finding Dr. Bruce Bode not credible where his testimony, along with other evidence of record, supported Appellant's claim of damages.

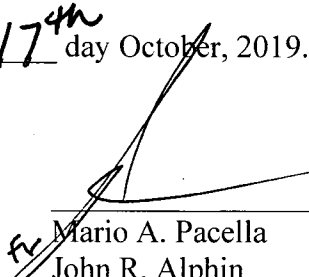
As set forth in subsection C, the Circuit Court erred in finding Dr. Bode not credible when he testified that he did not receive notice of the shareholders' meetings and would have voted against the transaction. First, Grounsell's testimony about notice was not credible. Even his son, Clark Grounsell, testified that he did not recall receiving notice as required under the bylaws. (R. at 186.) Grounsell first testified that Lori LaPoint provided notice (R. at 143) and when she testified she did not (R. at 182), Grounsell changed his testimony to say that notice was the responsibility of Hank Durshlag. (R. at 214.) Bode's testimony, coupled with the other evidence

of record demonstrates Bode was truthful regarding not receiving notice. The Circuit Court provided no reason for finding Bode not credible in light of the testimony of other witnesses. Moreover, Bode's testimony that he would have voted against the interested director transaction transferring stock to CollaborativeMed is supported by Steed's testimony that he never agreed to sell the Glucommander intellectual property to CollaborativeMed in the first place. (R. at 118, 122.) In this regard, the Circuit Court's credibility finding is in error. It is particularly important to note that the presiding Circuit Court judge did not have any opportunity to see the witnesses testify. Thus, this Court need not provide deference to the Circuit Judge.

V. CONCLUSION

For the above reasons, the Circuit Court's Orders and Judgments should be reversed, and this case should be remanded for further proceedings in the Court of Common Pleas.

RESPECTFULLY SUBMITTED, this 17th day October, 2019.



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