THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-002223

H. Hugh Andrews ..... Respondent,

v.

Quentin S. Broom, Jr. .....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

This case needs finality. The question for this appeal is what should be the finality for Appellant Quentin S. Broom, Jr. ("Broom") and Respondent H. Hugh Andrews ("Andrews"). Their gaming business, Tri-Star Communications, Inc. ("Tri-Star"), was shut down in 2005 when the Dominican Republic unexpectedly banned all gaming in the country. Andrews' brief mentions this Dominican action only once in passing, but it was the death blow to Tri-Star that caused the loss of all assets and eliminated the significant monthly revenues.

While Andrews was incapacitated during this time, Broom operated the business and made all the efforts to collect what was owed to Tri-Star and capture some value for the gaming machines that could no longer be used in any way in the Dominican Republic. (Trial Tr. 175, 199, 202-03.) As the trial court recognized, the U.S. Bankruptcy Court found in 2006 that Broom paid all debts of the company, wound up the business, and distributed the proceeds to the two Tri-Star shareholders equally. (Trial Ex. 11; Order at 10-11, 17.)

This case should never have gone to trial. Broom voluntarily dismissed his claims that had been filed in 2006. The trial court had dismissed with prejudice all Andrews' counterclaims in 2011 long before trial, and Andrews unsuccessfully appealed that decision without any relief. The trial court erred in trying Andrews' same claims that were dismissed with prejudice because of the law of the case. Even so, the trial court's findings on Broom's salary payments were also unsupported by the weight of the evidence. Thus, the result of the trial was a travesty of justice and should be reversed based on the clear errors of law in permitting Andrews' claims to go to trial and the findings from the evidence at trial.

ARGUMENT

I. The Trial Court's 2011 Order Dismissing with Prejudice all of Andrews' Counterclaims is the Law of the Case.

A. The law of the case doctrine applies to interlocutory orders from which an unsuccessful appeal is taken.

Andrews' attempts to circumvent the law of the case doctrine must fail. While Andrews directs this Court to focus on the interlocutory nature of the 2011 order, such effort is merely a game of semantics. The law of the case applies to interlocutory orders from which an appeal is able to be taken or is unsuccessfully taken, including the 2011 order. *See Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 542, 201 S.E.2d 245, 247 (1973) (holding that an unappealed order sustaining demurrers to counterclaims was the law of the case on a subsequent demurrer to "amended" counterclaims that were substantively the same as the earlier counterclaims).

In the 2011 dismissal order, the trial court held that Andrews' claims were derivative and that he could not obtain an individual recovery based on the "ALI exception" to the rule of derivative recovery. (11/1/2011 Order at 8, "[T]his case does not support the application of the exception for closely held corporations.").) The trial court dismissed all of the claims *with prejudice*. *See RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) ("A case that is dismissed 'with prejudice' indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication." (internal quotations omitted)).

Andrews appealed that order for the purpose of challenging that decision but failed to obtain a ruling reversing the decision on the appeal. Thus, the 2011 dismissal order became the law of the case, and the trial court then lacked authority after that appeal to inexplicably reverse his earlier decision and decide that Andrews was permitted to obtain an individual recovery on his derivative claims.

B. The law of the case doctrine applies here because Andrews failed to obtain a ruling in his appeal of the trial court's decision.

Andrews also mischaracterizes the result of his appeal of the trial court's 2011 dismissal order. He erroneously claims the Supreme Court remanded the case to permit Andrews to "obtain a ruling on [Andrews'] motion to amend his pleadings." (Resp. Brief at 9, 14, 35.) In fact, the Supreme Court specifically held that the "Court of Appeals erred in remanding the case for a ruling on [Andrews'] Rule 15, SCRCP, motion because the issue on appeal – whether the trial judge erred in dismissing [Andrews'] counterclaims without allowing [Andrews] to amend his pleadings – was not preserved for review." (9/30/2015 Supreme Court Order.) Thus, following remittitur to the trial court, Andrews obtained no relief from the dismissal with prejudice, not even a remand to consider leave to amend.

While Andrews suggests a remittitur is analogous to a remand, such a position confuses the Court's administrative tools and the procedural posture of this case. A remand directs a lower court to take further actions, whereas a remittitur ends the jurisdiction of an appellate court signaling the appellate matter is finished.

Following review, the Supreme Court reversed the Court of Appeals' decision on preservation, finding that the issues previously raised by Andrews in the first appeal were ripe for review. Instead of sending the case back to the Court of Appeals, the case was erroneously remitted. In so doing, the appellate courts did not give Andrews any relief on his original issues on appeal. There is no question Andrews was aware of the Supreme Court's mistake and was given guidance to file a motion to address any problem. (Andrews Letter, 12/10/15 (explaining "I believe normal procedure would be to remand to the Court of Appeals"); Supreme Court response letter, 1/6/2016.)

In sum, Andrews failed to avail himself of the procedural mechanism to obtain a ruling. Likely strategically, Andrews chose not to pursue the appeal further with the error and instead attempted to get a second chance from the trial court to amend his complaint. By choosing to accept the remittitur without any relief, the trial court's 2011 dismissal order became the law of the case.

C. The trial court's post-remittitur decision to grant Andrews leave to amend is irrelevant to the law of the case inquiry.

Andrews attempts to shield himself from the law of the case by relying on a subsequent ruling by the trial court to amend. (Resp. Brief at 10-11.) That cannot prevail. Once an issue is bound by the law of case, the issue is finally decided for the parties in the litigation. *See Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) ("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order."). The doctrine preserves finality and avoids the inconsistent rulings and multiple appeals of the same issue—the very harms implicated by the trial and this appeal.

II. Andrews' Second Amended Counterclaims Could Not Relate Back to His Earlier Pleadings.

Andrews argues that his claims filed in 2016 were not barred by the statute of limitations because they related back to his earlier pleadings under Rule 15(c), SCRCP. (Resp. Brief at 13-14.) That cannot be. The Supreme Court's issuance of the remittitur made final the trial court's 2011 dismissal with prejudice of Andrews' claims. Practically, Andrews had no affirmative pleading in 2016—the claims filing upon which Andrews now relies. In the absence of a lawsuit, all claims made in 2016 are barred by the statute of limitations.

Andrews misses the point when he argues that his Second Amended Answer and Counterclaims "allege substantially the same misconduct by Broom" as his earlier pleading. The

identical nature of the claims is the problem. The claims are the same claims that were dismissed with prejudice by the trial court and which Andrews appealed without success. That ended Andrews' case against Broom, and thus there was nothing to which the Second Amended Counterclaims could relate back.

III. The Trial Court Improperly Awarded Andrews a Direct Recovery for Admittedly Derivative Claims.

Andrews' claim for direct recovery relies solely on the law of foreign jurisdictions and contradicts well-settled law and policy of this State. (Resp. Brief at 21-26.) Additionally, an exception is unwarranted when the General Assembly expressed its intent to guard individuals by statutory protections. Even if the trial court had the authority to adopt and impose an exception to South Carolina law on derivative claims, such an exception would be improper in this matter.

At the outset, South Carolina has determined that individual shareholders may not sue corporate directors directly for corporate losses. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) (holding "that it is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation" and recognizing that the "ALI" or "*Thomas*" exception was merely an alternative holding for its ruling: "Assuming we should adopt the *Thomas* exception, these defendants would not be entitled to its benefit."). While Andrews suggests that the ALI provision is allowed and necessary, such exception is unwarranted because of South Carolina's statutory scheme. Specifically, shareholders of qualified small corporations have the option of forming under the Statutory Close Corporation Supplement in order to obtain additional shareholder rights. S.C. Code Ann. §§ 33-18-400, 410; *see also Mason v. Mason*, 412 S.C. 28, 55, 770 S.E.2d 405, 419 (Ct. App. 2015) ("An individual shareholder may bring a direct suit against the corporation only when his or her 'loss [is] personal and not a loss of the corporation.' However, [u]nder [sections 33–18–400 to –430 of the South

Carolina Code (2006)], in closely held corporations, a minority stockholder can maintain an action for managerial misconduct and other forms of oppression by majority stockholders." (internal quotations and citations omitted)).[1]

If this Court were inclined to agree with the ALI adoption, despite statutory and policy reasons,[2] the record does not support an exception in this case. Andrews failed to demonstrate (1) that Tri-Star had no corporate creditors at the time it was administratively dissolved, (2) that "the corporation technically could not recover the losses due to Broom's unilateral actions by his dissolving of the same," or (3) that Andrews "could not expect recovery by and through the corporation and thus his only remedy was and is through direct action." (Resp. Brief at 26-28.) In fact, his legal assertions are not supported. *See, e.g.*, S.C. Code Ann. §§ 33-14-105(4); 33-14-210 (noting that "[a] corporation dissolved administratively continues its corporate existence" and may carry on any business necessary to wind up and liquidate its business and affairs, including "distributing its remaining property among its shareholders according to their interests").

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[1] Indeed, *only after trial* Andrews claimed that even he had such rights because Tri-Star was a statutory close corporation, yet he chose not to plead for relief under the Statutory Close Corporation Supplement or offer evidence at trial to obtain such relief. *See infra*, part VI.

[2] Carving out exceptions to well-established rules carry significant and obvious disadvantages, particularly in the field of corporate law. As one court noted in rejecting the "ALI" exception:

> Corporations are *not* partnerships. Whether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors and other participants to vary the rules by contract if they think deviations are warranted. So it is understandable that not all states have joined the parade.

Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 384 (7th Cir. 1990) (emphasis in original) (applying Delaware law).

In sum, Andrews failed to meet his burden for the standard for application of the "ALI" exception to the derivative claim requirements. For all of these reasons, this Court should reverse.

IV. Andrews' Arguments in Support of Liability Are Based on Speculation and Are Contradicted by the Undisputed Evidence.

The trial court erred in finding that Broom breached his duties to Tri-Star by taking a reasonable salary payment when Tri-Star became profitable. The trial court based its decision on speculation and unreasonable inferences. Andrews defends the judgment with the same speculative arguments and highlights the absence of evidence by ignoring the most importance circumstances that arose unexpectedly and doomed the business. Significantly, Andrews does not dispute the fact that Broom fully disclosed to Andrews all the salary payments he received. Evidence in the record demonstrates that Andrews was fully informed of the decision and all transactions related to the payments, along with evidence that Andrews expressly ignored information he received regarding Tri-Star's financial transactions and condition. (Trial Tr. 355-362, Ex. 32, 36 at 2, 37, 49.)

While Andrews' main allegation was that Tri-Star was not financially sound to support salary payments, he failed to offer any expert witness to review the company's books and opine on that issue. Expert testimony was warranted because such any opinion about Tri-Star's financial health that was contrary to the company's CPA's undisputed testimony requires knowledge of a company's line of business, transactions, and overall financial situation. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which . . . do not require special knowledge, skill, experience or training.") This is particularly so for an atypical company such as Tri-Star that was operating a volatile gaming business in a third-world county and that was required to repatriate

revenues through receiving and making payments from and to related companies and associated individuals using loans and other financial transactions.

While Andrews directs this Court to rely on the existence of loans as evidence, the mere existence of such debt is insufficient. Simply put, a loan does not determine health of a company. Companies use loans and lines of credit in standard business operations and to manage cash flow. Debt is simply a tool that all companies manage and use to manage capital flows, and debt in the right circumstances (interest rate, loan terms) can be advantageous. If Andrews believed this position to be true, it required more than mere speculation to advance this argument.

Most importantly, the one expert who did testify at trial, Tri-Star's CPA Tim Russell, testified that the salary payments Broom received were reasonable. (Trial Ex. 57.) There was substantial and unrebutted evidence at trial about Tri-Star's need to manage cash flow issues through loans, particularly to repatriate revenues due to the regulatory and currency exchange issues arising from operating in a foreign country. (Trial Tr. 239-240, 252-53, 348.) Finally, it could not have been a surprise that Tri-Star was receiving loans from persons and entities related to Broom. Tri-Star received and distributed payments frequently throughout its corporate life from persons and entities related to both Andrews and Broom. (Trial Ex. 12; Trial Tr. 187-89, 310.)

In sum, no evidence supports the trial court's inference that the existence of loans from persons and entities related to Broom demonstrated that the salary payments Broom received constituted a breach of Broom's fiduciary duties.

Andrews' remaining arguments in support of the trial court's judgment are even more speculative. For example, Andrews asks the court to infer that Broom behaved improperly based on Broom's purchase of a home in Florida in 2015. (Resp. Brief at 16, 19.) However, Andrews presents no factual support or explanation that would support such an inference. Andrews'

argument that the home purchase was the motive for Broom's decision to take a salary is rank speculation and, more importantly, irrelevant. Even if Broom did use his salary payments to pay a mortgage, that has nothing to do with whether it was a breach of his fiduciary duties to take a salary.

Andrews' arguments based on Broom's sale of the gaming machines suffers from the same infirmities. As Andrews concedes in a footnote, "the trial court largely agreed" with Broom "that the involuntary bankruptcy action foreclosed all claims Andrews had related to the sale of the video poker games." (Resp. Brief at 17 n.2.) For this reason, it is not clear why Andrews argues that Broom's sale of the gaming machines is a basis on which to affirm the trial court's judgment. (Resp. Brief at 16-18.) In fact, it is not because the trial court "based Andrews['] recovery as to [the salary payments] alone." (Resp. Brief at 17 n.2.) This is also true with respect to Andrews' arguments about the income Broom received in his ventures after Tri-Star. (Resp. Brief at 18; Order at 12, "Even though this Court does find the Defendant liable under the theories offered by Plaintiff for the payment of salary, the same theories are not support[ed] by the facts presented to reach into the Defendant's subsequent gaming venture.")

Andrews' efforts to defend the trial court's judgment based on arguments that the trial court rejected shows the absence of evidence to support the judgment regarding Broom's salary payments. All Andrews offered to support his argument was the existence of loans that fail to support any reasonable inference about the financial health of Tri-Star. Andrews also failed to offer any expert evidence to support this issue, and the judgment should be reversed.

V. The Trial Court Erred in Awarding Punitive Damages.

Andrews recycles all the arguments he made in support of the trial court's liability findings as a basis for also upholding the trial court's decision to award punitive damages. Andrews' arguments fail for the reasons noted above. *Supra* part IV. Nonetheless, Andrews' inability to

provide any additional basis for the punitive damages award also demonstrates that he did not meet his burden to "prove[] by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007) (internal quotations omitted).

Furthermore, both Andrews' and the trial court's confused theories of alleged wrongdoing show that an award of punitive damages was not appropriate. The trial court found that the money loaned to Tri-Star as part of its repatriation of revenues from the Dominican Republic while Broom was receiving a salary "evidence a clear intent to conceal the truth from Andrews." (Order at 17.) As noted previously, the loans do not show that the salary Broom received was illegitimate or unwarranted. Even if the loans did show the salary payments were improper, though, they would not support a finding of *concealment* of the salary payments. To the contrary, the record at trial was clear that Broom forwarded all financial information about his salary to Andrews and his agents and (2) that Andrews was completely uninterested in reviewing that information. (Trial Tr. 355-362, Ex. 32, 36 at 2, 37, 49.) Thus, the finding of concealment of the salary is not supported.

VI. The Trial Court Erred in Awarding Attorneys' Fees.

The trial court's award of attorneys' fees was erroneous for three reasons. First, the award of fees was based on a cause of action – S.C. Code Ann § 33-18-410 – that Andrews did not plead and was not tried. (Trial Tr. 8-26.) It is undisputed that Andrews did not bring a cause of action against Broom under the South Carolina Statutory Close Corporation Supplement, S.C. Code Ann. §§ 33-18-101, *et seq.*, which was the sole legal basis for the trial court's award of fees. Andrews is not entitled to obtain fees based on a legal claim he never brought.

Andrews suggests that his boilerplate claim for "costs and attorney's fees" in his answer to Broom's causes of action against him was sufficient to put Broom on notice that he was seeking attorneys' fees for his counterclaims. That is not so, and it was not Broom's obligation to find out

on what legal basis Andrews was seeking fees through discovery, as Andrews argues in a footnote. (Resp. Brief at 33 n. 6.) But, that issue is also irrelevant because Andrews never sought or obtained relief under the only statutory basis on which attorneys' fees were awarded.

Andrews' failure to plead for relief under the South Carolina Statutory Close Corporation Supplement is sufficient to reverse the award of attorneys' fees on that sole basis. However, the award should also be reversed because Andrews failed to offer any evidence at trial – or even with his petition for fees – that Tri-Star was organized under the Statutory Close Corporation Supplement. It was only at the hearing on the fee petition, long after the trial record was closed, that Andrews' counsel belatedly offered to the trial court a Tri-Star stock certificate that contains the statutory language in S.C. Code Ann. § 33-18-109 that suggests that Tri-Star was a close corporation at the time the certificate was issued. This was just too little, too late. Andrews could have easily filed Tri-Star's articles of incorporation prior to his attorney fee petition or sought to elicit testimony at trial as to whether Tri-Star was a statutory close corporation, yet he chose not to do so. Thus, he failed his burden of proof at trial that S.C. Code Ann § 33-18-410 was a valid basis for an award of attorney's fees in this case.

Finally, Andrews' efforts to defend the substance of his plainly deficient attorney fee petition also fail. Andrews makes much of the fact that the case had been pending for many years and that the trial court judge knew the case well, but he has not and cannot defend his failure to provide adequate support for the amount requested in the petition. (Resp. Brief at 34-35.) Andrews did not provide billing records with detailed time entries in support of the petition. Rather, he only submitted affidavits of about one page in length from his attorneys attesting to the total time they spent and that the time was reasonable. (12/15/2017 Attorney fee Petition and Affidavits in Support.) Other factors necessary for any award of attorney's fees against an

opposing party were not supported by any evidence. Thus, the attorney fee award must also be reversed and remanded based on this failure of proof.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,

May 6, 2020
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PROOF OF SERVICE

Pursuant to Appellate Case Order No. 2020-000447, the undersigned hereby certifies that on May 6, 2020, he served counsel for Respondent with the *Appellant's Initial Reply Brief* in this matter by sending the document via email to the email listed in the Attorney Information System as follows:

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Respectfully submitted,

/s/ James E. Cox, Jr.
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