THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael L. Nettles, Circuit Court Judge

Appellate Case No. 2019-001370

Walt Parker ..... Appellant,

v.

John C. Curl ..... Respondent,

v.

Palmetto Floor Covering Installation, LLC,
and Florence Custom Countertops, Inc., ... Third-Party Defendants.

BRIEF OF RESPONDENT

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Florence, South Carolina

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AS ADDITIONAL SUSTAINING GROUNDS, SHOULD THE APPELLANT PARKER BE BARRED BY HIS OWN LACHES IN NOT ASSERTING HIS STOCK CLAIM FOR YEARS ?

STATEMENT OF THE CASE

Appellant's action is one for specific performance of a stock incentive contract made between a corporate majority owner (the Respondent Curl) and the corporate minority owner (Appellant Parker). Pursuant to SCRCP Rule 39(b), the allegations set forth in the Appellant's Complaint were tried in the Circuit Court on March 20 and March 21, 2019. The parties agreed that the Respondent's counterclaims and third party complaint would be tried by jury at a later date.

After considering all the relevant and admissible evidence, the Circuit Court issued (25 April 2019) and filed (29 April 2019) its Order finding that Appellant Parker had unclean hands (specifically concluding that Parker had breached his fiduciary duty and duty of loyalty to corporate co-owner Curl, the Respondent) and holding that it would be inequitable to order the specific performance of the incentive ownership contract requested by Parker – a transfer of some Curl corporate ownership shares to Parker. The Court also denied Appellant Parker's request for a permanent injunction.

After the Court's ruling (Findings of Fact and Conclusions of Law), the Appellant Parker narrowly moved for reconsideration of a few select issues determined by the Court. Following briefing and argument, the Circuit Court issued its Order denying reconsideration (Order of August 6, 2019) and this appeal followed.

STATEMENT OF THE FACTS

Acquisition of A Going Business "FCT"

This is a dispute between the two sole shareholders in a small business. After being unemployed for over a year, R. p. 204 lines 2-5, the Appellant jumped on an opportunity to join with Respondent Curl in the acquisition of an existing business, Florence Carpet & Tile, Inc. ("FCT"). The purchase of this business was initiated by Curl through his knowledge of the prior owner. R. p. 295 lines 3-19. The stock purchase was bankrolled by Curl based upon the strength of his financial statements. R. p. 203 line 23 to p. 204 line 11.

A Performance Based Route To Equal Ownership

While Parker did also personally guarantee purchase debt, R. p. 204 lines 12-18, his real contribution to the endeavor was his availability and willingness to learn and run the business. R. p. 143 lines 9-14. It was not planned for Curl to be involved in day-to-day operations. R. p. 143 lines 15-20; R. p. 299 lines 11-14. Curl offered a stock incentive to Parker for performance goals in the initial five[1] years of their ownership. R. p. 436; R. p. 298 line 9 to p. 299 line 10; R. p. 307 line 23 to p. 308 line 3; R. p. 333 lines 7-9.

[1] There is a disagreement among the parties about whether these five years began in 2007 (a year partially owned by these parties and employing former owner in transition) or 2008 (first full year of Appellant management). The trial court found the contract timing ambiguous and construed the contract against the Respondent. However, when the Court refused Appellant specific performance, the Respondent elected not to appeal the issue of ambiguity. Moreover, the trial court's findings appropriately undermine the reliability of profit claims (in addition to precluding equitable relief) regardless of when the incentive contract window opened.

Parker's Failure To Replace/Maintain Inventory

In the initial years of the parties' investment, Parker attempted to qualify for greater ownership by creating the appearance(s) of corporate profit by not maintaining inventory. R. p. 679. R. p. 309 line 14 to p. 312 line 22; R. p. 367 line 21 to p. 369 line 19; R. p. 373 line 8 to p. 382 line 3.

The Drain Of Parker's Other Businesses

In addition to failing to maintain inventory, Parker chose to divert his attention to other unshared corporate opportunities including an installation business (Palmetto Floor Covering or "PFC"), R. p. 176 line 18 to p. 177 line 4, and a granite countertop business (Florence Custom Countertops or "FCC"). R. p. 235 line 16 to p. 236 line 7; R. p. 283 lines 8-21. Parker also used corporate space for his granite countertop business without any rent compensation to the corporation, even after Curl's request that he cease and desist. R. p. 323 lines 11-14 ("***Those businesses were a huge concern of mine [Curl] in that they were conflict of interest being operated out of Florence Carpet and Tile and not to the benefit of Florence Carpet and Tile.***"). Although Parker's testimony, R. p. 236 lines 4-7 and Brief (page 4) suggest in conclusory fashion that these diversionary activities were in the best interest of FCT, the Circuit Court did not agree after observing Parker first hand. R. p. 32-33 (Order of April 2019). In fact, Parker testified that profits from FCC were shifted to FCT after a meeting in which Curl raised the issue of self-dealing. R. p. 187 lines 3-21.

Parker's Failure To Manage Corporate Affairs

The Circuit court also found that Parker had failed to perform corporate duties reasonably attributable to him including paying rent, R.pp. 110 (¶ 10) and 113-117 (lease and sums owed thereunder), tax return filing, R. p. 211 lines 1-5 (admitting in 2019 non-filing of 2016 or 2017 returns), vendor payments, R. p. 244 line 22 to p. 245 line 1 (Appellant's wife, corporate employee, testified of taking calls from unpaid vendors), and loan documentation. *See generally* R. p. 313 line 8 to p. 315 line 14.

The Trial Court's Summary of Facts

Immediately upon conclusion of the testimony and trial, R. p. 404 line 2 to p. 405 line 10, the Circuit Court offered a succinct and accurate summary of the relevant facts of the case:

> And I specifically find after having listened to the evidence, observed the demeanor of the parties and their testimony, I find that it would be inequitable to decree specific performance.
>
> First of all, taking all of the facts and circumstances, I find that the plaintiff has breached his fiduciary duty to the corporation. In order ... in these circumstances, he has a duty of loyalty, and he is in this instance, I specifically find he has competed against the principal company by operating the granite business. He acted as a wholesaler to Florence Carpet and Tile which amounts to self-dealing. He has competed against his business by operating an installer business. He has allowed company and this is particularly important is that he's allowed company personnel who works for the company to also simultaneously work for competing businesses while paying them and specifically I'm talking speaking about Lisa Shelton. I think that's a breach of fiduciary duty and a breach of loyalty. And essentially I find that the plaintiff has usurped corporate opportunities and engaged in self-dealing. None of this is protected by the business judgment rule.

I also find that the plaintiff has breached his duty of care. He's failed to file corporate taxes. And there obviously some people could maintain that both of them have an obligation to do that, but given the nature of this arrangement, he was the one who was managing the business and he is the one who had the ability to provide the supporting documentation to file the corporate taxes. He did not do that. He's failed to provide the required documentation to corporate creditors and he's failed. And it's uncontroverted that he failed to pay vendors on a timely basis.

Essentially, the plaintiff has unclean hands.

ARGUMENT

I. APPELLANT PARKER'S CONDUCT WAS INEQUITABLE – AS FOUND BY THE TRIAL COURT.

A) MOST OF THE FACTS ARE UNCHALLENGED LAW OF THE CASE.

In its trial decision, R. p. 25 (Order of April 2019), the trial court listed the following areas of inequity in which it concluded (Conclusion of Law 12) that Parker had breached fiduciary duties and duties of loyalty owed to FCT and Curl:

a. Parker breached the fiduciary duty that he owed to his fellow shareholder Curl by operating FCC and Palmetto Floor Covering, competing businesses to FCT;
b. Parker usurped corporate opportunities available to FCT;
c. Parker and FCC acted as a wholesaler to FCT which amounted to self-dealing;
d. Parker allowed FCT's employee Lisa Shelton to work for FCC while FCT paid her;
e. Parker had his business Palmetto Floor Covering charge FCT for installation services that could have been performed by FCT employees.
f. Parker has failed to timely file the tax returns for FCT despite his position as the daily operations manager with the ability to provide the supporting documentation necessary for the preparation of FCT's tax returns. As of the day of the trial Parker had still failed to have the 2016 and 2017 tax returns prepared;
g. Parker has failed to provide required documentation to FCT's creditor Synovus Bank who has repeatedly requested that Parker provide FCT's tax returns;
h. Parker has failed to timely pay FCT vendors and its lessor Curl Properties, LLC while at the same time continuing to pay himself and his wife's salary and benefits.

In his Motion for Reconsideration, R. p. 126, Parker only sought a change specifically to subparts (a) and (g) of this list. (Items III and IV of that Motion, R. p. 127). Parker did not challenge the Court's conclusion that he engaged in "self-dealing" (subpart c) or the conclusion that Lisa Shelton worked for the competing company (FCC) whilst being paid by FCT (subpart d). ***Thus, these conclusions stand as the law of the case and are not preserved for appellate***

review.

While Parker's Motion did seek reconsideration generally of the finding that Parker's hands were "unclean", R. p. 127 (Item V), there is no specific challenge to the factual findings that he created a competing floor covering business (Finding of Fact 17)("PFF"), that he created and operated a natural stone countertop business ("FCC") from the FCT location, against shareholder Curl's objection and without Curl's participation (Findings of Fact 18 and 19), that Parker failed to have FCT's tax returns prepared for 2016 and 2017 (Finding of Fact 13) although this was his responsibility as the "daily operations manager" (Finding of Fact 11). ***These findings also stand as the law of the case unpreserved for appellate review and fully support the trial court's decision in the matter.***

While Parker's Brief (page 2) properly cites to the broad scope of appellate review generally applicable with regard to challenged facts in a matter of equity tried before a judge alone,[2] if the circuit court's factual findings are not challenged at all, then those conclusions stand as the law of the case and are not preserved for appellate review. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Such unchallenged grounds stand as a basis for affirmation of the trial court's decision. Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996).

Of course, the scope of this appeal is defined by the Notice of Appeal filed with the Court. That notice specifies that appeal is taken from the Order denying Parker's Rule 59 Motion to Reconsider. The Underlying Findings of Fact and Conclusions of Law issued by the trial court on April 25, 2019 and filed April 29, 2019 were not appealed and the Motion to

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[2] "In an appeal from an action in equity tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976). Of course, even with this broad scope of review, there is some deference to the trier of fact and the appellate courts "will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." Buffington v. T.O.E. Enters. , 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

Reconsider did not challenge most of the trial court's findings and conclusions.

B) PARKER STARTED MULTIPLE BUSINESSES COMPETING FOR HIS EFFORTS AND CREATING AN UNAUTHORIZED DRAIN ON CORPORATE RESOURCES.

As well documented in the record and summarized above, Appellant Parker started both and installation business (PFC) and a countertop business (FCC) without Respondent Curl's involvement and with Curl's subsequent objection. These businesses were a drain on FCT resources – time, attention, employees, space. Funds from these businesses were not properly accounted for at FCT until Respondent Curl discovered them and made his objections known.

C) PARKER FAILED TO CARRY OUT SHAREHOLDER RESPONSIBILITIES.

Again, as well documented in the record and summarized above, Appellant Parker, despite his agreed and acknowledged role in FCT as the day-to-day shareholder, failed to attend to the most fundamental of business responsibilities – paying vendors, paying rent, maintaining corporate books and records, preparing and timely complying with taxing authorities and lenders.

II. APPELLANT PARKER'S INEQUITABLE CONDUCT DOES BAR THE EQUITABLE RELIEF HE SEEKS AS DETERMINED BY THE CIRCUIT COURT COURT.

A) THE LAW OF THE CASE AND EVIDENCE SUPPORTS A FINDING OF PARKER'S INEQUITY.

See Argument I above.

B) PARKER'S INEQUITY WAS PLEADED AND PROVEN THROUGH THE FRONT DOOR.

While Parker's Brief suggests the Court relied upon some "backdoor" to raise the issues of Parker's inequity in circumvention of South Carolina law, nothing could be further from the truth. The issues of Parker's inequitable conduct were raised early and often beginning with Curl's Answer to the Complaint which raised the issues of Breach of Fiduciary Duty, "mismanagement, misappropriation, self-dealing, and unjust personal enrichment," and Misappropriation of Corporate Opportunity in its fourth, fifth, and sixth defenses which were pleaded as both affirmative defenses and as counterclaims. (see Answer filed December 13, 2018). Moreover, at the trial of this matter on March 21-22, 2019, both witnesses Parker and Curl were examined about these issues by both counsel without objection. The trial court's findings of fact track these defenses of inequitable conduct and support the trial court's use of "unclean hands" to describe Parker's position and conduct. Parker's real objection appears to be the trial court's nomenclature – specifically the trial court's characterization of his inequitable conduct as "unclean hands" when those two words were not used in Curl's Answer which clearly put Parker on notice of all the inequitable conduct that Curl intended to raise at trial; it is this red-herring objection to the trial court's nomenclature that is inconsistent with South Carolina law.

C) PARKER'S INEQUITY DIRECTLY UNDERMINES HIS CLAIM TO FULFILLMENT OF THE STOCK INCENTIVE CONTRACT.

Ignoring that he chose to pursue an equitable remedy, the Appellant argues that he is simply entitled to a legal declaration of equal ownership as a matter of law. (Appellant's Brief, pages 6-7). But of course, the Appellant did pursue an equitable remedy – the specific performance of the incentive ownership contract with the transfer of corporate ownership shares to Parker. It is precisely this equitable remedy that led the Court to focus on the ancient maxim that one seeking equity must also do equity.[3]

Both in his Motion for Reconsideration, and in his Brief, Parker seeks to put distance between his clear inequity and his incentive contract. Parker seems to suggest an entitlement to 50% of the stock that vested immediately upon creation of the Contract on April 30, 2007 -- divorced from any inequitable conduct that might follow – such that he is now being "deprived of his property." (Brief page 8).

Thus, Parker continues to misconstrue the applicability of the equitable defenses. It isn't that inequity tainted the formation of the incentive contract; it is that inequity will not allow for the trial court to provide an equitable remedy for the alleged enforcement of that contract. In addition, it does not matter if the inequitable conduct directly or indirectly impacted Curl as "the equitable defense of unclean hands is available in a shareholder derivative action." Straight v. Goss, 678 S.E.2d 443, 458, 383 S.C. 180 (Ct. App. 2009).

Moreover, inequity taints the claimed fulfillment of the incentive contract. Parker's claimed fulfillment of the profitability preconditions to the incentive contract are inherently

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[3] "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945).

suspect given the trial court's unchallenged findings of distracted employees, free use of space, unfulfilled responsibilities, self-dealing, and unpaid rent.

To the contrary, the evidence supports the Court's finding that Parker acted inequitably toward his Florence Carpet & Tile, Inc. and to his fiduciary co-shareholder in that business and some of this unclean conduct occurred in the first five years following the incentive contract that Parker now seeds to enforce.

While Parker points to the actual formation of problematic businesses (Florence Custom Countertops and Palmetto Floor Covering) occurring late in the year 2011 – even this is during the key first 5 years of the incentive contract Curl seeks to specifically enforce.[4] Moreover, other testimony presented by Curl supported other inequitable self-serving conduct relating to the potential profit (or inflation thereof) during the 5 years of the incentive agreement.[5]

D) PARKER'S RED-HERRING PLEADING ISSUE WAS NOT TIMELY RAISED OR PRESERVED.

In his Brief (page 7), Parker asserts that his Motion for Reconsideration argued "that the Doctrine of Unclean Hands had never been pled by the Respondent." Again, while inequity most certainly had been raised in the Answer, this alleged pleading deficiency was not timely raised in the Rule 59 motion filed May 8, 2019 (within 10 days of the Court's April 29th filing of

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[4] Again, Curl does not agree with the Court that the year 2007 was eligible to be considered as part of the five-year incentive contract, but, even if considered, the year 2011 falls in the relevant fifth year of that contract window.

[5] In his motion filed May 8, 2019, Parker urges the Court to delete Conclusions of Law 12(a) (his motion item IV) and 12(g) (his motion item III) *which did have evidentiary support* including the testimony of John Curl. This evidence and the Court's supported conclusions relate precisely to the detrimental impact of Parker's self-serving conduct upon Florence Carpet & Tile, Inc.

its Order). It was not until the supplemental memorandum filed May 10, 2019 – outside of Rule 59's strict 10 day jurisdictional window that this pleading issue was raised. [6]

III. SCACR 220(c) OTHER SUSTAINING GROUNDS: APPELLANT PARKER BARRED BY HIS OWN LACHES AND STATUTORY TIME LIMIT.

In this case, Appellant Parker seeks specific performance of an incentive contract that he contends was satisfied by the end of 2011. Again, Respondent contends the incentive condition of three years profitability was never satisfied and would have involved the years 2008-2012 and not 2007-2011; but, regardless of when the window was open and whether the contractual preconditions were actually satisfied, this action was not brought until November 8, 2018, nearly 7 years after the end of 2011 and 6 years after the end of 2012. In his role as the corporate President and day-to-day operations manager, Appellant Parker should have known by the end of those respective years whether the stock incentive benchmarks had been met. It was Appellant Parker who signed the tax returns that were prepared and had the day-to-day responsibility for the financial reports and records.

Respondent Curl raised the failure to timely file and the statute of limitations in his Answer. R. p. 95 (¶ 14 Third Defense). In addition, Respondent's counsel raised laches in the trial court by moving, without objection, to further amend the Answer to assert laches. R. p. 393 lines 4-15. Specifically, Respondent Curl argued that Appellant Parker had three years and repeated opportunities to assert his claim to stock transfers but waited 6 or 7 years and filed this

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[6] Rule 59(b) provides, in part, "In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered." Our Supreme Court has called this an "absolute deadline" beyond which the trial court loses jurisdiction. Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018). While unable to find precedent on the precise point of whether a Rule 59 motion raising only some matters (e.g. issues A, B, and C) would create extended jurisdiction for additional matters (e.g. issues X,Y, and Z), based upon South Carolina's general jurisprudence, this seems highly unlikely. *See discussion in* Heins v. Heins, 543 S.E.2d 224, 344 S.C. 146 (Ct. App. 2001).

Complaint instead.[7] R. p. 287 line 13 to p. 292 line 6. The trial court considered Respondent's Rule 41(b) motion based on Parker's delay but denied to grant the requested non-suit. R. p. 394 lines 3--8.

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[7] Counsel for Appellant argued that Parker's Breach of Contract claim would not arise until he asked for specific performance and it was refused. This is not the law (an objective "reasonable discovery" standard is used) and would result in unfulfilled contracts having an indefinite limitations period subject only to the whimsical subjective timing of a claimant's assertion. This would completely defeat the legislative purpose of statutory periods. *Accord* Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994)(it "requires very little to start the clock" of South Caroina's statute of limitation) . As recognized by this Court in City Of North Myrtle v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462 (S.C. App. 2004),

> "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000).
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> Statutes of limitation evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.
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> Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct.App.1999).
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> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. 54 C.J.S. Limitations of Actions § 2, at 16-17 (1989). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. 51 Am.Jur.2d, Limitation of Actions § 18, at 603 (1970). One purpose of a statute of limitations is "to relieve the courts `of the burden of trying stale claims when a plaintiff has slept on his rights.'" McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App.1989) (quoting Burnett v. New

Whilst the remedy sought by Appellant Parker was an equitable one (specific performance) requiring that he have clean hands, it is a requested remedy predicated upon contract theory thereby subject to the legislature's clear directive of a three-year limitation. S.C. Code § 15-3-530 (1) ("action upon a contract").[8] Rule 220(c) of the South Carolina Appellate Court Rules provides that "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See also* I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The issues of laches and the lapsed statute of limitation were raised below and appear clearly in this record. These grounds also support the affirmation of the trial court's judgment in this matter.

York Cent. R.R., 380 U.S. 424, 428, 85 S.Ct. 1050 1054, 13 L.Ed.2d 941, 945 (1965)). Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. 51 Am.Jur.2d Limitation of Actions § 17, at 602-03 (1970).

[8] An action for declaratory judgment is a statutory action that may sound in either law or equity or both. *Accord* Noisette V. Ismail, 299 S.C. 243, 384 S.E.2d 310 (1989). While the contract theory relied upon by Appellant Parker is one at law, the trial court correctly noted that the remedy sought of specific performance is an equitable remedy.

CONCLUSION

Most of the trial court's facts have not been preserved for review and fully support the Circuit Court's decision not to award equitable relief. Even those factual findings subject to review – a broad review – should be considered in deference to the trial court's first-hand experience of the evidence. Finally, this Court can also reach the same result by application of the legislature's specific limitation period applicable to contract theory.

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May 1ST, 2020

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief filed with the Court on or about this date complies with Rule 211(b), SCACR.

May 1ST, 2020

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