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.

APPELLANT'S FINAL OPENING BRIEF

Whitney B. Harrison (# 100111)
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201
(803) 779-0100

Matthew T. Richardson (# 15647)
James E. Cox, Jr. (# 103886)
Wyche, P.A.
807 Gervais Street, Suite 301
Columbia, SC 29201
(803) 254-6542

ATTORNEYS FOR APPELLANT

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II. Whether Andrews' claims are barred by the statute of limitations because his 2016 complaint does not relate back to the prior pleading that was dismissed with prejudice?

III. Whether the trial court erred in finding Andrews had met his burden of proof that Broom violated fiduciary duties as an officer and director of Tri-Star?

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STATEMENT OF THE CASE

This dispute between two video gaming business partners has a protracted and cumbersome history spanning more than fourteen years and two previous appellate decisions. Appellant Quentin Broom initially filed a lawsuit in 2005 alleging a variety of claims against Respondent Hugh Andrews in connection with being equal shareholders in Tri-Star Communications, Inc. ("Tri-Star"). In 2006 Andrews alleged direct and derivative counterclaims on behalf of Tri-Star. Broom moved to dismiss the counterclaims primarily because Andrews failed to comply with Rule 23, SCRCP, requirements for a derivative suit. Following a hearing, the Honorable J. Mark Hayes dismissed with prejudice Andrews' counterclaims for failing to comply with Rule 23(b)(1) for derivative actions by shareholders. (R. pp. 1-9) Andrews then moved for reconsideration and moved to amend the counterclaims. The trial court denied the motion for reconsideration, but did not rule on the motion for leave to amend. (R. pp. 10-11)

Andrews appealed the dismissal of his counterclaims, arguing for the creation of a new rule for an exception to the derivative suit filing requirements when a corporation only has two shareholders and that he should have been given an opportunity to amend the pleadings before their dismissal. (R. pp. 2542-2551) Broom responded, arguing that the claims were derivative not direct, and clear precedent required the special pleading rule for derivative claims. (R. pp. 2571-2582) Broom also pointed out Andrews' last argument about an amendment was not preserved for review. (R. pp. 2583-84) Following oral argument, the Court of Appeals entered an unpublished opinion that "did not address these issues and, instead remanded the case to the [trial] court so the trial judge could rule on [Andrews'] Rule 15, SCRCP, motion to amend the pleadings." *Broom v. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at *1 (Sept. 30, 2015). (R. pp. 12-14)

Broom appealed the remand to the Supreme Court, which issued an unpublished opinion reversing the Court of Appeals because the issue raising the amendment to Andrews' pleading was unpreserved for appellate review. *Id.* (R. pp. 15-17) The matter was then remitted, instead of being returned to the Court of Appeals to address Andrews' remaining issue on appeal. (R. pp. 2604) No motion to cure the direct remittitur to the trial court was made.

Upon return of the matter to trial court[1] in December 2015, Andrews again moved to amend his dismissed pleading. The trial court granted the motion, and Andrews then filed a second amended answer, asserting the same direct and derivative counterclaims as in his previous pleading. Broom moved to dismiss the counterclaims under the law of the case doctrine based on the trial court's prior judgment and Andrews' failure to obtain a reversal on appeal. The trial court denied the motion to dismiss, and the matter was scheduled for a bench trial. (R. pp. 38-40) In addition, Broom filed a motion for summary judgment and a motion to establish facts, both of which were never ruled upon. (R. pp. 154, 171-72, 2623-2657) Shortly before trial, Broom dismissed all his claims as plaintiff; thus, leaving only Andrews' counterclaims from the second amended answer.[2] (R. pp. 41-43) The parties were realigned, and the matter was recaptioned with Andrews as the plaintiff for trial. (R. pp. 44-45)

In June 2017, a three-day bench trial was held with just three fact witnesses and one expert witness. The trial court issued an order in November 2018 finding in favor of Andrews on only one of his ten causes of action. Specifically, the trial court awarded $1,020,000 for willful breach

[1] This matter was returned to the Honorable J. Mark Hayes, II.

[2] These claims included (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S. C. Code of Laws §33-8-300; (7) Violation of S.C. Code of Laws §33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation.

of fiduciary duty by Broom paying deferred salary payments to himself in late 2004 and the first part of 2005. (R. pp. 49-67) The damages represented one-half of the $1,020,000 total salary that Broom received from Tri-Star for 7 years of work, and another $510,000 in punitive damages. Broom moved for reconsideration, and Andrews petitioned for attorneys' fees. A year later, the trial court denied Broom's motion for reconsideration and granted Andrews' motion for attorneys' fees. (R. pp. 68-75) This appeal followed.[3]

FACTS

In the 1990s, Broom and Andrews began several business ventures, including Tri-Star Communications, Inc. ("Tri-Star"), a South Carolina Corporation, to own and operate video gaming machines. Andrews and Broom were the only two shareholders with each owning fifty percent of the shares. (R. p. 316, line 5-p. 321, line 12) Broom served as Tri-Star's sole director and sole officer overseeing and running Tri-Star's business operations. (R. pp. 316-321, 455-57) Andrews did not pay much attention to Tri-Star's operations but contributed video gaming machines on credit with a promissory note from Tri-Star to one of his gaming machine companies, Drew's Distributing. (R. pp. 453, 456, 950-955) Both shareholders also advanced a series of loans to Tri-Star each totaling over $1 million through other promissory notes. (R. pp. 333-35, 456, 1438-39) As more capital was needed over time, Andrews provided additional loans, and Broom continued to provide all the sweat equity. (R. pp. 456-57, 1438-39)

[3] Following the denial of Broom's motion to reconsider, Broom filed a motion to stay the execution with the trial court. Before the trial court ruled, Broom filed the notice of appeal and a petition for supersedeas to stay the execution of judgment. This Court held this appeal in abeyance until the trial court ruled on the motion to stay. Eight months later, in August 2019, the trial court denied the motion to stay.

Tri-Star operated a variety of video gaming machines, which Tri-Star would supply to various locations like restaurants and gas stations. Tri-Star enjoyed financial success until the state-wide ban of video gaming in 2000. (R. pp. 482-483) Following the South Carolina ban, Andrews and Broom explored moving operations to other states and abroad. (R. pp. 322-25, 1466-67) In 2004, Tri-Star ultimately decided to begin operating in the Dominican Republic. (R. pp. 322-325, 482-83) One critical condition of establishing operations in the Dominican Republic, which differed greatly from operating in the United States, was that the Dominican government mandated legal title of all machines be held by the government. (R. pp. 490, 1499-1503)

Through this restructuring process, Tri-Star's business operation began providing consulting services because it could not own and operate the machines directly. (R. pp. 328-29, 712-19) Andrews already had legal counsel for some of his other businesses and arranged for that same counsel, Ten State Street, LLP and attorney Timothy D. Scrantom (collectively "Ten State Street"), to also assist with the transition of Tri-Star operations to the Dominican Republic and Tri-Star's general business needs. (R. p. 325, lines 13-18; p. 457, lines 15-24) These efforts included representing Tri-Star in structuring and entering into an operating agreement with World Wide, a Dominican company which could provide the local support needed to operate video gaming there. (R. p. 325, lines 6-18; p. 326, line 19-p. 328, line 14) Pursuant to the agreement, World Wide would operate the machines in the Dominican Republic while Tri-Star would provide the services of Broom, in his capacity as Tri-Star's officer, and other employees as consultants. (*Id.*) These consulting services included marketing, set up and lay out, and general direction and instruction on the gaming operations. (*Id.*) In connection with these changes, Tri-Star sold its remaining inventory of gaming machines to a Dominican gaming entity. (*Id.*)

Not surprisingly, following the South Carolina ban in 2000 and during the restructuring and relocation to the Dominican Republic during 2001-03, Tri-Star experienced significant revenue reductions. Both Broom, as an officer and shareholder, and Andrews, as a shareholder and one of Tri-Star's largest creditors, were aware of Tri-Star's financial circumstances.[4] This included both Andrews and Broom being aware that neither Broom's salary nor the shareholders' promissory notes could be paid during this transition time. The largest Tri-Star promissory note was owed to one of Andrews' other business ventures—Drews Distributing—for the initial inventory of gaming machines. (R. pp. 950-51, 1114-15, 1124-25, 1135-36) Andrews faced a lawsuit for personal liability related to another gaming business and wanted to take advantage of Tri-Star's inability to pay the note during this time. In 2002, Andrews assigned the Drews Distributing note to himself personally and cancelled this indebtedness of Tri-Star.[5] (R. pp. 956-971, 1476-77) In similar fashion, Broom continued to defer all his salary payments until Tri-Star was cash flow positive. (R. pp. p. 276, line 25-p. 278, line 5) Both shareholders agreed that, based on the revenues and their desire to satisfy outstanding debt and grow the company, Broom's work efforts would be compensated with a reasonable salary for each year of work, once Tri-Star was financially stable. (R. p. 281, lines 17-22; p. 336, line 11-p. 337, line 11; p. 462, line 5-p. 463, line

[4] Access to Tri-Star's revenues, during this time, encountered varying degrees of difficulty because of Dominican Republic banking crises and other currency transfer regulations. As a result, personal loans to Tri-Star were used on several occasions to transfer funds in U.S. dollars to Tri-Star in the United States, while equivalent amounts were repaid in full from Dominican operations to keep Tri-Star functioning. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23) No money from these transfers or additional transactions were unaccounted for or ever missing from Tri-Star's ledger.

[5] This, in turn, allowed Andrews to recognize the loss and deduct it from his income that year. (R. p. 454, line 23-p. 456, line 3; pp. 1373-75, 1506-08) The assignment of debt also permitted Andrews to reduce the assets of Drews shortly before Drews was subjected to a $1.5 million adverse judgment in an arbitration with a competitor. (R. p. 1403)

12) As a result, from inception in 1997 to the positive cash flow from operations in the Dominican Republic in late 2004 Broom did not receive any salary. (R. p. 276, line 25-p. 278, line 5)

In 2004 and early 2005, Tri-Star's finances not only stabilized but became very profitable with Tri-Star receiving $180,000 per month from Worldwide. (R. p. 345, lines 1-13; p. 480, line 19-p. 482, line 3; pp. 1606-1622) In May 2004, Broom, Andrews, and Tri-Star's attorneys and its CPA, Tim Russell, met to discuss Tri-Star's finances, which included Broom's deferred salary payments. (R. p. 337, line 9-p. 344, line 24; p. 454, lines 9-22; pp. 2462-63) Broom and Andrews, with the CPA's guidance, determined Broom was entitled to a fair and reasonable deferred salary of $100,000 per year for his work from 1997-2000, $110,000 per year from 2001-2004, and $20,000 per month going forward in 2005. (*Id.*) At trial, Tri-Star's CPA, Russell, testified by deposition that the salary amounts were reasonable. (R. p. 2471)

Pursuant to this agreement, Broom received deferred salary payments of $400,000 in December 2004 for the first 4 years of 1997-2000; and further payments of $130,000 in January 2005, $130,000 in February 2005, $185,000 in March 2005, and $75,000 in April 2005. (R. pp. 1541, 1555) These payments were placed in Tri-Star's ledger, and copies of financial statements showing all payments and amounts were provided monthly to Andrews' agents, including his bookkeeper Claudia Humphries and attorney Curt Stodghill. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622) Andrews' and Tri-Star's attorneys, Ten State Street, issued statements and reports confirming their receipt of these material payments. (R. p. 2462) Andrews admitted that he didn't review or understand the financial records and counted on his agents in that regard. (R. p. 503, lines 5-18)

Tri-Star's operations in Dominican Republic remained intact until June 2005 when without notice, the Attorney General of the Dominican Republic directed all gaming machines had to be

removed from use by consumers. (R. p. 345, line 17-p. 347, line 17; pp. 972-985) Failure to remove the machines would result in confiscation and destruction. (*Id.)* In response, Broom on behalf of Tri-Star, along with the assistance of Tri-Star's Dominican business joint venture World Wide, removed the machines to a warehouse to comply with the mandate. (R. p. 346, lines 12-23, pp. 986-87)

Less than a week later, the Attorney General issued a second directive that all machines had to be "retired" or removed from the Dominican Republic within twenty days. (R. p. 342, line 23-p. 346, line 5; pp. 988-989) Being initially hopeful that operations would resume based on a change in the local law, Broom thought operations would resume and made efforts to manage the uncertain and changing circumstances and improve the political situation through lobbying efforts. (R. p. 346, line 12-p. 348, line 20) Revenues had ceased, but expenses were continuing. (R. p. 347, line 25-p. 349, line 24) World Wide still owed Tri-Star for operations before the ban, and Broom secured payments to Tri-Star from World Wide's Dominican owner. (R. p. 390, line 6-p. 392, line 6)

Andrews kept abreast of developments through his agents and Tri-Star's legal counsel. During this time, Broom made requests for capital contributions to keep the business efforts funded while Tri-Star's revenue stream was stopped. (R. pp. 993-997) Despite these documented requests, Andrews refused to provide capital contributions for Tri-Star. (R. p. 509, line 6-p. 510, line 24) Instead, he traveled to the Dominican Republic and confirmed the uncertain political and financial circumstances. (R. p. 501, lines 5-17) As in the past when money needed to be transferred between Tri-Star and World Wide, money was moved between the companies and across borders through a series of transfers. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; R. p. 494, lines 15-23)

In the absence of financial resources and dwindling time to remove the machines from the country to avoid confiscation, Broom, on behalf of Tri-Star, undertook efforts to have the machines sold and money returned to Tri-Star to avoid a total loss. He received two bids and selected the only viable one. (R. p. 1440) Broom's counsel kept Andrews updated throughout this process. (R. p. 501, lines 1-22; p. 509, line 6-p. 510, line 6; pp. 986-1008) At the end of 2005 during the wind down, an equity distribution was issued to both Broom and Andrews after all outstanding debt was satisfied and before Broom received all his deferred salary payments.[6] (R. p. 1435-36)

PROCEDURAL HISTORY

During this period of uncertainty after operations had been stopped in late June 2005, Broom filed the underlying lawsuit because Andrews refused to help manage the uncertain future of the company in the Dominican Republic. Andrews answered the lawsuit but refused to seek a solution to the situation in the Dominican Republic. Then in 2006 after Broom paid all the company's known debts and distributed the remaining money as equity, Andrews amended his answer to allege ten causes of action against Broom. (R. pp. 95-108) All of Andrews' claims were based on various allegations of mismanagement on the part of Broom as an officer and director that allegedly resulted in losses to Tri-Star, as a corporate entity, and to Andrews, as a shareholder and creditor of Tri-Star.

In September 2011, Broom moved to dismiss the Andrews' claims because Andrews had not complied with the pleading and demand requirements of Rule 23(b)(1) prior to filing shareholder derivative claims on behalf of Tri-Star. After a hearing, the trial court dismissed with

[6] Tri-Star ceased operations and wound down in December 2005. It was administratively dissolved on August 13, 2009.

prejudice "all claims of Tri-Star and all claims brought by Andrews individually that overlap with any alleged injuries suffered by Tri-Star." (R. pp. 1-9)

The trial court provided a claim-by-claim analysis explaining that Andrews failed to allege facts sufficient to show he had standing because all recoveries were to be paid to Tri-Star. (R. p. 4) Notably, the trial court held "this record does not present a factual scenario sufficient to ignore the corporate nature of [Tri-Star]." (R. p. 8) The trial court specifically rejected Andrews' argument that an exception to the rule for derivative claims should be applied, noting that "our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations." (*Id.*)

Andrews subsequently filed a motion to amend the counterclaims "based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims is May 2006" as well as a motion to reconsider the order granting Broom's motion to dismiss. (R. pp. 2483-2513) Following a hearing, the motion to reconsider was denied, and no ruling was made on the motion to amend. (R. pp. 10-11) An appeal followed.

In the prior appeal, Andrews argued he should be allowed to bring direct claims instead of being encumbered by derivative suit requirements when a corporation only has two shareholders and that he also should have been provided the opportunity to amend the pleadings. (R. pp. 2542-2551) Broom argued the latter was not preserved for review because the trial court did not rule on Andrews' motion to amend and a ruling had not been sought in a motion to reconsider. (R. pp. 2583-84) Following oral argument, the Court of Appeals entered an unpublished opinion that "did not address these issues and, instead remanded the case to the [trial] court so the trial judge could rule on [Andrews'] Rule 15, SCRCP, motion to amend the pleadings." *Broom v. Ten State St., LLP*, 2015 WL 164429, at *1. (R. pp. 12-14)

Broom petitioned the Supreme Court arguing the decision to remand was an error of law because Andrews failed to obtain a ruling on the motion to amend, and it would be improper to provide Andrews a second opportunity to receive a ruling. (R. pp. 2587-2596) In his return, Andrews acknowledged the Court of Appeals' decision was incorrect but urged the Supreme Court to end the appeal and allow him to amend his pleadings. (R. pp. 2600-02) Relying solely on the petition and return, the Supreme Court reversed the Court of Appeals. *Broom v. Ten State St., LLP*, 2015 WL 164429, at *1. (R. pp. 15-17)

The only remaining issue on appeal which had not been addressed by either appellate court, was whether the trial court erred in holding that the ALI exception to the requirement of asserting derivative claims did not apply. (R. pp. 2542-2551) Following the Supreme Court's reversal of the Court of Appeals decision, the matter was remitted, instead of being returned to the Court of Appeals to address Andrews' remaining issue on appeal. (R. pp. 2604) Andrews' counsel wrote a letter to the Supreme Court to note the discrepancy, to which the Supreme Court responded by notifying counsel that the sole basis to maintain appellate jurisdiction was through a motion to reinstate a remittitur that was sent down by mistake, error or inadvertence, citing *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007). (R. pp. 2611-12) No motion to cure the mistake was made, and the matter was sent back to the trial court.[7]

At a hearing in June 2016, Andrews moved to amend the pleadings to allege derivative claims that complied with the requirements of Rule 23. (R. pp. 18-36) Although the trial court

[7] At that time Broom's complaint was still pending, and the Honorable J. Mark Hayes, II again presided.

reaffirmed its prior decision that direct recovery was not permitted,[8] it granted the motion permitting Andrews to cure the Rule 23 deficiencies for asserting derivative claims. (*Id.*)

After the amended pleading was filed, Broom moved to dismiss the amended pleading pursuant to the law of the case doctrine based on the trial court's prior ruling and Andrews' failure to obtain a ruling from his appeal of that order. (R. pp. 2613-2622) The trial court ruled that the prior appellate proceedings did not establish any law of the case that would prevent Andrews from reasserting his derivative claims. (R. pp. 38-40)

Shortly before trial, Broom dismissed all his affirmative claims against Andrews, leaving only Andrews' derivative claims. The matter was then recaptioned and tried with Andrews as the plaintiff. (R. pp. 44-46)

In late June 2017, a three-day bench trial was held.[9] Both Andrews and Broom testified, along with a former employee for Drews Distributing as an expert witness on the value of the gaming machines sold in the Dominican Republic in 2005. Additionally, one page of Tri-Star's CPA Tim Russell's deposition testimony was submitted by the consent of both parties. (R. p. 2471) There was lengthy questioning about Broom's deferred salary payments and the May 2004 meeting among Tri-Star's attorneys, CPA, Broom, and Andrews. Significantly, Andrews and Broom each testified that Broom was entitled to a salary for the entirety of his employment, which was further supported by the admission of the meeting's agenda and notes, in which the proposed salaries were listed. (R. p. 2462-63) Russell confirmed the amounts of Broom's deferred salary payments were reasonable. (R. p. 2471) Andrews acknowledged that his agents had full access

[8] No appeal of the trial court's reaffirmed ruling dismissing Andrews' direct claims has been made.

[9] Because Andrews succeeded on only one of his ten causes of action (statutory breach of fiduciary duty for the payment of deferred salary) and no cross appeal was filed, Broom has truncated the factual discussion of trial testimony to reflect only relevant testimony for that issue.

to the ledger showing all transactions and that he relied on them for taking care of his business with Tri-Star. (R. p. 466, line 11-p. 467, line 1) Moreover, Andrews confirmed Broom's testimony that no transactions or other information was kept from Andrews and that Andrews generally ignored the financial information he received. (R. p. 466, lines 11-20, p. 502, line 18-p. 503, line 18)

In November 2017, the Court entered an Order and Judgment (the "Final Order"). The trial court rejected Broom's contention that the law of the case doctrine barred Andrews' claims. The court held that the law of the case doctrine did not apply because the 2011 dismissal with prejudice was merely an interlocutory order, and "there [wa]s no mandate or decision from an appellate court establishing any law for this case." (R. p. 54)

Turning to the claims themselves, the court agreed with Broom that Andrews' ten causes of action constituted a single cause of action for breach of the standard of care for an officer and director. (R. p. 54)[10] The court described Andrews' claim breach of fiduciary duty as alleging three breaches: (1) unauthorized payments by Broom to himself; (2) unauthorized sale of video gaming machines; and (3) income Broom made in the Dominican Republic from activities after Tri-Star stopped operating. As to the second and third allegations, the court determined Andrews had failed to meet his burden.

As to the allegation about unauthorized deferred salary payments, the court held Andrews had shown by clear and convincing evidence that Broom's payments of deferred salary to himself from Tri-Star's account beginning December 31, 2004 was done in bad faith and with fraudulent

[10] The court further concluded that the applicable standard of care was the standards of conduct for officers and directors in the South Carolina Business Corporation Act, not the standard for a partnership, as Andrews had urged. (R. p. 55)

intent. Finding Broom breached his duty, the court then turned to the derivative nature of the claims and adopted the ALI exception for statutory close corporation, which would allow Andrews to collect damages directly, despite it being a derivate suit. In so doing, the court determined Andrews was entitled to damages in an amount of $510,000—half of Broom's Tri-Star salary. In addition, the court awarded punitive damages in the amount of $510, 000, finding there was clear and convincing evidence that Broom acted fraudulently and in bad faith. Specifically, the court held Broom paid himself exorbitant amounts of deferred salary as part of a plan or scheme to shut down and cut Andrews out of the business operations in the Dominican Republic and concealed his actions from Andrews. Additionally, the court awarded attorney's fees pursuant to section 33-18-410(b) of the South Carolina Code.

Broom subsequently filed a motion pursuant to Rules 50(b), 52(b), 59(a), and 59(e) of the South Carolina Rules of Civil Procedure to alter or amend the findings of facts and conclusions of law in the Final Order; for reconsideration of the decisions and judgment; and for judgment notwithstanding the verdict or, in the alternative, for a new trial. (R. pp. 2663-2694) Andrews filed a petition for attorney's fees in the amount of $194,306.53. (R. p. 2695-2699) The trial court denied Broom's motion and granted Andrews' motion for attorney's fees in full. (R. pp. 68-75) In total, the Court ordered a judgment to be entered in the amount of $1,214,406.53. This appeal followed.[11]

[11] This Court stayed the appeal while Broom's motion for stay of execution of judgment pending appeal was pending before the trial court. This Court then lifted the stay following the trial court's denial of the motion to stay execution of the judgment pending appeal.

STANDARD OF REVIEW

In an appeal based on an error of law, the Court reviews *de novo*, owing no deference to the lower court's decision. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 78 S.E.2d 106, 108 (2015). Statutory interpretation is a question of law subject to de novo review. *Hueble v. S.C. Dept. of Natural Resources*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016). Moreover, "because of changes in federal case law, the South Carolina Supreme Court has recently adopted a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards." *Hale v. Finn*, 388 S.C. 79, 92, 694 S.E.2d 51, 58 (Ct. App. 2010).

"In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support." *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 629, 767 S.E.2d 157, 162 (2014), *amended,* 414 S.C. 166, 777 S.E.2d 547 (2015). However, "[w]here mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Chambers v. Pingree*, 351 S.C. 442, 449, 570 S.E.2d 528, 532 (Ct. App. 2002).

ARGUMENT

This appeal has a long procedural history that should not have been allowed. Finite procedural rules and precedent exist to ensure consistency and finality. Yet when rules and precedent are ignored, errors can grow like weeds, eventually choking justice and taking over if left unchecked—like in this case. This Court is now being asked to cut through an unwieldy and nuanced factual and procedural history to remedy the error. However, the error itself is quite simple: Andrews should have been barred from amending his pleadings in 2016 to add derivative claims that were eventually tried for two independent reasons: (1) his derivative claims had

previously been dismissed with prejudice in 2011, and that ruling was unsuccessfully appealed and became the law of the case; and (2) the time had expired to assert claims based on allegations that were then ten years old. Each of these reasons separately warrant reversal.

If this Court finds it necessary to inquire further, then the trial court's award to Andrews that Broom's deferred salary payments violated his duty owed to Tri-Star is unsupported by any evidence in the record. In the absence of evidence of a violation, the award of damages, including also awards of punitive damages and attorneys' fees should be reversed. Additionally, the trial court should not have adopted the use of an ALI exception, which is inapplicable and unsupported by law, to overcome the same deficiencies in Andrews pleading derivative claims the second time. Even revisiting the ALI exception's applicability in this case, which had been rejected and appealed by Andrews in his earlier appeal, further demonstrates the error arising from Andrews' failure to obtain a ruling in that appeal. The trial court's inconsistent rulings after the prior appeal cause the fundamental error raised by this appeal—that is, the dismissal with prejudice of Andrews' derivative claims became the law of the case and thus barred their re-litigation. For these reasons, Broom requests this Court reverse the trial court by recognizing the finality of this matter before the trial even occurred or at least that Andrews failed to prove any violation under the circumstances at the time the deferred salary payments were made.

I. Andrews' Claims are Barred by the Law of the Case Doctrine.

The trial court erroneously allowed Andrews to amend his pleading following a mistaken remittitur in the first appeal. By failing to have his first appeal reinstated to obtain an appellate ruling, the 2011 order dismissing Andrews' claims with prejudice became law of the case. Accordingly, Andrews was barred from pursuing any derivative claims, and thus the trial was allowed only in error.

As this Court is aware, the doctrine of the law of the case prohibits issues that have been decided in a prior appeal from being re-litigated. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see also Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015). It also forbids a party from "re-litigating issues decided in a lower court, when the party voluntarily abandons its appeal of that order." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014); *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The law of the case doctrine equally applies to a remittitur. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right."). Additionally, if a remittitur is issued by mistake or error, a party is required to file a motion for reinstatement, which is the procedural mechanism for a court to recall the remittitur. *Wise*, 372 S.C. at 174, 642 S.E.2d at 551 (citing *State v. Keels,* 39 S.C. 553, 17 S.E. 802 (1893)); *see also* Rule 221, SCACR.

Andrews' failure to obtain relief on appeal from the 2011 order dismissing his claims with prejudice is the law of the case. In the prior appeal, Andrews argued his claims should not be dismissed because the ALI exception should apply to save his claims and, alternatively, that he was entitled to amend his pleadings. In reversing this Court's ruling that the issue be remanded for the trial court to rule on motion to amend, the Supreme Court expressly found Andrews' issue of amending his pleading was unpreserved for appellate review. (R. pp. 15-17) Thus, the issue to be addressed in the prior appeal was whether the dismissal with prejudice of Andrews' claims should be reversed and in particular whether the ALI exception should have been applied. (R. pp. 2542-2551) When the matter was remitted, instead of being remanded to the Court of Appeals,

Andrews received no ruling on that issue. Thus, the 2011 order dismissing his derivative claims was effectively affirmed.

Andrews could have received a ruling on that issue by requesting the Supreme Court to reinstate the appeal. *See Wise*, 372 S.C. at 174, 642 S.E.2d at 551. By failing to assert a motion for reinstatement the final decision on Andrews' derivative claims, pursuant to the law of the case, can be only one: they were dismissed with prejudice. Practically, one cannot amend claims that have been dismissed with prejudice.[12]

Furthermore, the trial court's explanation for not applying the law of the case doctrine is unavailing. The trial court held that Andrews' claims are not precluded because the earlier order granting Broom's motion to dismiss was merely an order and not a final judgment. (R. pp. 52-53) This is a distinction without a difference because the law of the case doctrine can apply to interlocutory orders, not merely to final judgments. *See Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 539, 201 S.E.2d 245, 246 (1973) (holding that "where ruling on demurrer to complaint was not appealed from, it became the law of the case" on a subsequent demurrer to an amended complaint in the same action).

For these reasons alone, this Court should reverse.

II. Andrews' Claims Are Also Barred by the Statute of Limitations.

Andrews' claims were also barred by the state of limitations. Andrews did not file his second amended counterclaims until 2016, which is long past the two-year statute of limitations for the actions that occurred in 2004-2005. S.C. Code Ann. §§ 33-8-300(e); 33-8-420(e).

[12] This outcome is consistent with the concerns raised by Broom to the Supreme Court in his petition for certiorari in the prior appeal. (R. pp. 2592-95) Broom argued that Andrews should not be allowed to amend his pleading after the final and appealed ruling that Andrews' claims were dismissed with prejudice. (*Id.*) To allow the amendment ignored preservation rules and the finality of appealed judgments that are not properly exhausted.

Moreover, the second amended complaint does not relate back to the earlier complaint since the earlier complaint was dismissed with prejudice. *See Grover v. Eli Lilly & Co.*, 896 F. Supp. 725, 728 (N.D. Ohio 1995) ("Because the dismissal of *Grover I* with prejudice wiped the slate clean of remaining claims, plaintiffs' current claims cannot relate back to the filing of plaintiffs' second amended complaint."); *see also Harmon v. Patrolman's Benev. Ass'n of City of New York (PBA)*, 199 F. App'x 46, 48 (2d Cir. 2006) ("The dismissal with prejudice of a lawsuit does not toll the statute of limitations."); *cf. Braudie v. Richland Cty.*, 217 S.C. 57, 61, 59 S.E.2d 548, 550 (1950) ("It clearly appears that the statute of limitations had not run so as to bar the plaintiff's cause of action at the time the amendment was allowed.").[13]

For these reasons, Andrews was barred from asserting these claims in 2016, and this Court should reverse.

III. The Trial Court's Material Findings of Fact and Application of Facts to the Law are Unsupported by the Evidence.

The trial court's ruling that Broom breached his fiduciary duty is riddled with factual error and unsupported by evidence in the record, which in turn amounts to legal error. In making the overall determination on breach, the trial court made four unsupported factual findings: (1) substantial debt for the machines was still owed at the time deferred salary payments were made, (2) Broom "secretly" borrowed money to make the salary payments in December 2004, (3) Tri-Star was not profitable in 2004 and 2005, and (4) Broom designed and executed a plan beginning

[13] Furthermore, the statute of limitations is not tolled based on Andrews having moved for leave to amend prior to the 2011 appeal. First, Andrews' claims had already been dismissed with prejudice before that motion for leave to amend was filed in November 2011. Second, the 2011 motion for leave to amend was not the motion that the trial court ultimately granted in 2016. Andrews moved for leave to amend in 2011 simply to add some supplemental facts to his pleading. (R. pp. 2514-2531) It was not until 2016 that Andrews moved for leave to amend to cure the Rule 23 pleading deficiencies that had caused the trial court to dismiss his claims in 2011. (R. pp. 18-21, pp. 130-145)

in 2004 to take all the money out of Tri-Star and shut it down. These factual assertions and findings of bad faith are not true and unsupported by the evidence in the record, which includes the Bankruptcy Order and undisputed findings concerning the Dominican Republic's unexpected complete ban on all video gaming at the end of June 2005.

The South Carolina Corporate Code requires a corporate officer or director to discharge his duties "(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." S.C. Code Ann § 33-8-420. Andrews offered only his own and Broom's testimony as fact witnesses and failed to present any evidence to support any reasonable inference that Broom violated the Corporate Code standards of conduct in making payments in late 2004 and early 2005 for a reasonable deferred salary for his full-time work for Tri-Star from 1997-2005.

All evidence in the record demonstrates that Broom was entitled to a salary. Both Andrews and Tri-Star's CPA Russell testified that Broom was entitled to a reasonable salary for his efforts. (R. p. 462, line 5-p. 463, line 12; R. p. 2471) Moreover, evidence demonstrates that the salary amounts were discussed and reported as reasonable and fair by Tri-Star's CPA and attorneys in the May 18, 2004 meeting with both parties and the professionals. (R. p. 337, line 12-p. 343, line 24; R. pp. 2462-2471) While Andrews stated he did not remember the May 18, 2004 meeting—the only alleged evidence of an improper salary submitted by Andrews—he did not deny the documented meeting and also admitted he relied on his agents to conduct all of his businesses, including Tri-Star. (R. p. 479, lines 8-18; p. 503, lines 5-18; p. 506, line 12-p. 507, line 21) Significantly, the record reflects that deferred salary payments were discussed in advance; made after Tri-Star was making $180,000 per month; disclosed to and known by Andrews, at least

through his agents; and were properly recorded in ledgers and other financial documents—all of which was available to Andrews and his agents. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622)

Significantly, Andrews acknowledged he usually ignored the financial information and relied on his agents and the Tri-Star CPA, who unquestionably received the Tri-Star financial information and created the ledgers that were admitted by both sides without dispute. (R. p. 517, line 18-p. 518, line 18) Yet at trial, Andrews did not present the testimony of any of his agents on whom he relied to handle his business with Tri-Star. Andrews cannot try to contradict the documentary evidence of disclosure of the salary with self-serving testimony without offering any of his agents as witnesses. Andrews is charged with both knowledge of his agents and the inference that he would have called his agents if their testimony could have helped him. *See Crystal Ice Co of Columbia v. First Colonial Corp.,* 273 S.C. 306, 309, 257 S.E.2d 496, 497-98 (1979); *Wisconsin Motor Corp. v. Green,* 224 S.C. 460, 79 S.E.2d 718 (1954). In the absence of this evidence, Andrews failed to meet his burden. Moreover, the Corporate Code specifically shields Broom from liability when he relied on Tri-Star's attorneys and CPA, including Russell's trial testimony through deposition that the deferred salary payment amounts were reasonable. *See* S.C. Code Ann. §§ 33-8-300(b) & -420(b) (stating officers are "entitled to rely on information, opinions, reports, or statements . . . by . . . legal counsel [and] public accountants.") (R. p. 337, line 12-p. 344, line 24; pp. 2462-63, 2471) This alone warrants reversal.

Because the trial court's ruling ignored the statutory shield for reliance on the company's professionals and in turn made unsupported evidentiary findings on bad faith and fraudulent intent, a limited discussion of each is required. In so doing, Broom recognizes he is asking this Court to broadly revisit underlying themes of Andrews' arguments at trial that are not on direct appeal nor

raised in a cross-appeal. However, the trial court improperly latched on to those unsupported themes—like the suggestion that Broom effectively controlling the ban in the Dominican Republic—that effectively shaped the trial court's review of the evidence. As discussed herein, each of the four findings are unsupported by any evidence and demonstrate the error of the trial court's evaluation of the evidence and the overall ruling in this matter.

First, the trial court's finding that salary payments were made "at a time when Tri-Star owed Andrews significant sums for the video games" is contrary to all evidence in this case. In November 2002, Andrews cancelled the significant promissory note from his company Drews Distributing's initial contribution of gaming machines to Tri-Star and after he had assigned that note to himself. (R. pp. 956-59) With the cancellation of Tri-Star's debt to Andrews then, it could not be owed in 2004 and 2005 when the alleged violations occurred. Andrews acknowledged this by not including the debt in his involuntary bankruptcy petition he filed against Tri-Star in 2005. (R. pp. 1418-1437)[14] Moreover, at the start of trial Andrews withdrew any claim against Broom for any loan or debt payments. (R. p. 160, lines 16-25) Without any evidence of this critical underlying fact, there should be no finding that Andrews was owed any debt for the machines or that Broom acted improperly based on Andrews still being owed significant debt for the machines.

[14] On December 7, 2005, Andrews filed an involuntary petition in the U.S. Bankruptcy Court for relief against Tri-Star under Chapter 11 of the Bankruptcy Code. (R. pp. 1418-19) In his bankruptcy filings, Andrews made only one claim for a $130,000 business loan he made to Tri-Star. (R. p. 1424) Broom had checks issued to Andrews before the bankruptcy petition was filed, which were refused, and then again post-petition to satisfy his petition debt claim along with two checks in the amounts of $25,000 and $60,000, "representing Andrews' equity in Tri-Star after liquidation of assets." (R. pp. 1424-25) The Bankruptcy Court found no evidence that Tri-Star owed any debt to Andrews, other than the amounts that had already been paid before wind down. (R. pp. 1435-36)

Without this erroneous finding, Andrews failed to present evidence to support any conclusion of Broom having violated the Corporate Code standard of conduct.

Second, there is no evidence that Broom kept any loans or other transactions secret, nor did the loans themselves suggest financial distress. As recognized by the Bankruptcy Order, all shareholder loans in 2004 and 2005 were being paid and were paid in full. (R. pp. 1435-36) There is no evidence that Andrews was owed any money in 2004 or 2005 that he did not receive, *and he received an equity distribution*. (*Id.*) Moreover, the trial court's finding that getting loans to repatriate revenues was deceitful is not supported by any evidence that there was an intent to conceal the truth. Both parties testified about the difficulty of repatriating Tri-Star revenues from the Dominican Republic to pay bills in the United States and the need for short term loans to do so under the circumstances at the time in the Dominican Republic. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23)

The trial court acknowledged that the full value of the machine sale was deposited in Tri-Star accounts and used to benefit all shareholders, as previously determined in the final, unappealed order from the Bankruptcy Court. However, the trial court took issue with the deposit being the same amount from different sources. This is not legally relevant. *See City of Myrtle Beach v. Tourism Expenditure Review Comte.*, 407 S.C. 298, 308, 755 S.E.2d 425, 430 (2014) (Hearn, J., dissenting) ("Quite simply, a dollar is a dollar; money is fungible. [I]t makes no difference whether a dollar with a particular serial number was expended for one purpose as opposed to another."). More importantly, it was consistent with Tri-Star's past practices for repatriating revenues earned from operations in the Dominican Republic and necessary for business purposes in protecting Tri-Star from risks and challenges with the Dominican Republic banking system and currency exchange, as admitted by Andrews. (R. p. 385, line 5-p. 386, line

19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23) In sum, the trial court failed to appreciate the parties' accepted course of business caused by the banking crises in the Dominican Republic and the many complexities of cross-border financial transactions – cash flow, fax, and currency exchange issues – and instead erroneously seemed to infer fraud at every turn. Such an inference would be inappropriate in any event without evidentiary support but is particularly inappropriate here given the evidence that demonstrates the legitimacy and full disclosure of the transactions.

Third, Broom did not have plans in 2004 to wind down or cut Andrews out of the business they had pursued for more than seven years at that point. Most importantly, there is no evidence Broom knew or could have known in advance of the Dominican Republic's complete ban of video gaming in late June 2005. Inexplicably, the trial court concluded that Broom engaged "in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally" paying himself a salary beginning in 2004. (R. p. 65) All testimony and evidence demonstrates that Tri-Star was profitable through the first half of 2005 until the unexpected ban. Neither Broom nor anyone else associated with Tri-Star knew of the ban in advance, as demonstrated by the Bankruptcy Court's order noting that the government ban was unexpected. (R. p. 1425) Even the trial court acknowledged that the bankruptcy court proceedings required the Court to "infer that the immediate motivation in selling the machines was the Attorney General's action of prohibiting the machines ***and not the Defendant's desire to open another gaming operation***." (R. p. 59) The sale of the machines came in October 2005, months after the ban and efforts to salvage the business. (R. pp. 1440-41)

Thus when Andrews and Broom and Tri-Star's attorney and CPA met in May 2004 to discuss Broom's deferred salary payments and then Broom began taking deferred salary payments in late 2004, he had no way of knowing the machines would be banned more than six months later.

Revenues to Tri-Star during this period were $180,000 per month. (R. p. 345, lines 1-22; p. 480, line 4-p. 482, line 3; pp. 1606-1622) In direct contradiction to the trial court conclusion about a scheme, the undisputed evidence demonstrates that Broom worked without pay until revenues reached $180,000 per month in late 2004 and the first half of 2005. The ban caused all Tri-Star's operations and revenues to stop, and there was no future opportunity there or with the machines stuck in the Dominican Republic under the ban and subsequent confiscation order. (R. p. 345, line 17-p. 349, line 24) Even after the ban, Broom continued to work to preserve the Tri-Star's assets in the Dominican Republic, return the value of those machines to Tri-Star in the United States, pay off all remaining debts, and distribute the remaining equity to both shareholders. (R. p. 345, line 17-p. 349, line 24; p. 396, line 22-p. 397, line 8; pp. 1435-36, 1440) In sum, there is no evidence that there was a scheme to close the business or to cut Andrews out of the business.

Any alleged scheme depended on that unpredictable and unrelated superseding cause of the end of Tri-Star's operations. Otherwise, Tri Star would have continued making $180,000 per month. Then, Broom could have been paid for his work on behalf of Tri Star for late 2005, which he has never received. (R. p. 348, lines 15-20; R. p. 2462-63)

Finally, the trial court's reliance on Broom's February 2005 purchase of a home in Miami as part of a scheme to shut down Tri-Star was convoluted and mystifying. At one point the trial court concluded the deferred salary payments were needed to fund the home purchase but at another point that the purchase was designed to shield the payments from recovery under the Florida homestead exemption from judgments. (R. p. 57, 61) Neither of these inferences have any support in the record. In fact, the uncontroverted evidence from Broom's testimony was that he had to put that home back on the market in August 2005, right after the ban, and that ultimately the property was foreclosed on and sold at a loss. (R. p. 353, line 23-p. 354, line 9) This evidence

does not support any inference of a plan that depended for its success on an unannounced and unknowable ban on all gaming in the entire country of the Dominican Republic for a year. No reasonable inference can be drawn from or supported by the failed purchase of a home in Miami at the wrong time – months before the ban – and which caused a loss to Broom. Rather, it undercuts Andrews' theory along with the superseding cause of the end of operations for Tri-Star as found by the Bankruptcy Court – which was not contradicted by any evidence in this case.

For these reasons, the trial court's findings of violation of the Corporate Code in bad faith are completely unsupported by the evidence presented at trial, and the trial court's order should be reversed for this reason alone.

IV. The Trial Court Erred in Applying an ALI Exception to Established Precedent.

Despite correctly finding that Andrews' claims were derivative, the trial court incorrectly permitted Andrews to obtain an individual recovery for the derivative claims. The ALI exception ignores precedent and is contrary to this State's public policy. Moreover, the necessity to have this question addressed in this appeal further highlights that Andrews previously appealed it but failed to obtain a ruling on this issue.

"It is firmly established by [the South Carolina Supreme Court] that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation." *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991); *Todd v. Zaldo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991) ("[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders.").

In rejecting this unambiguous precedent, the trial court relied on an ALI exception, which provides courts with the discretion to treat an action raising derivative claims as a direct action in

certain circumstances involving closely held corporations.[15] The trial court's adoption of a new rule ignored well settled law and policy of this State. South Carolina courts have explicitly rejected creating special exceptions and continued to uphold the requirements of corporate form. In *Todd v. Zaldo*, the plaintiff argued that he could raise derivative claims as direct claims against a director because the company "was a close corporation with only three stockholders." *Todd*, 304 S.C. at 279, 403 S.E.2d at 668. In declining to do so, this Court stated:

> [Plaintiff] seeks to have Georganne Apparel viewed more as a partnership than a corporation. [] This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Id. (internal citations omitted); *see also Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001).

In *Babb v. Rothrock*, the plaintiff "contend[ed] that an exception to the general rule should be recognized . . . where the underlying reasons for requiring a derivative action were absent." *Babb*, 303 S.C. at 464, 401 S.E.2d at 419. In rejecting this argument, the Supreme Court noted that "[t]he claims of corporate creditors may be jeopardized if individual shareholders are permitted to satisfy their personal debts by raising a claim which can only be asserted by the

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[15] The exception provides:

> "In the case of a closely held corporation [], the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Principles of Corp. Governance § 7.01 (1994).

corporation." *Id.* "As between the creditors and shareholders, the interest of the creditors must prevail." *Id.*

Allowing an exception to the derivative claim requirements would challenge the fundamental operation of the corporate form in South Carolina. While the exception is based on legitimate policy concerns, there are serious consequences for allowing such a relaxed standard for pleadings, as suggested by the ALI exception, when bringing derivative actions. The current rule exists for the purpose of protecting the rights of all entities that place a trust in a business, including customers, shareholders, creditors, et cetera. While the exception purports to apply only if the interests of those other entities does not exist, it can be difficult in practice to know when such a situation exists, and errors can occur. For example, it is not easily apparent whether a corporation has creditors whose rights require protection. For these reasons, a number of other states have also rejected the exception. *See* Allan B. Cooper, *et al.*, *Too Close for Comfort: Application of Shareholder's Derivative Actions to Disputes Involving Closely Held Corporations*, 9 U.C. Davis Bus. L.J. 171, 182 (2009) ("Of the thirty-seven states that have considered the issue, sixteen have adopted the ALI approach by permitting direct suits. Twenty states have held that the traditional shareholder's derivative requirement applies. In one jurisdiction the decisions appear inconsistent."). Here, the record does not clearly establish that no other interests would be affected at the time of filing, when pleading requirements are tested.

Moreover, the exception should also not be adopted because South Carolina law has sufficient safeguards to remedy many of the most important policy considerations that gave rise to the ALI exception. The exception is based in part on the view that the typical requirement in a derivative claim of a pre-suit demand on a corporation will create needless delay for little result in the case of a close corporation. But South Carolina law, like many states, permits a plaintiff

bringing a derivative claim to alternatively plead facts that show why a pre-suit demand was not made. Rule 23, SCRCP. Similarly, South Carolina has created an individual cause of action for a shareholder in a statutory close corporation to individually petition a court for damages or other forms of relief. S.C. Code Ann. § 33-18-400, *et seq.*

Finally, Andrews failed to meet his burden to show that the ALI exception should be applied in this case, regardless of whether it could ever be applied in South Carolina in theory. Specifically, Andrews failed to present any evidence that applying the exception would not prejudice corporate creditors of Tri-Star. The trial court ironically attempted to address this issue by pointing to evidence that Broom introduced at trial – Tri-Star's involuntary bankruptcy in 2006 in which "the bankruptcy court determined there were no claims against Tri-Star other than the claims of equity holders (Andrews)." (R. p. 62)

The problem with this analysis is that the data point that the trial court relied on to establish that there were no creditors was over a decade old at the time of trial. Tri-Star could have incurred other debts after the bankruptcy court's determination. Andrews could have shown that no other creditors existed by showing that the claim resolution procedures of S.C. Code Ann. §§ 33-14-106; -107 were followed after Tri-Star's administrative dissolution in 2009. Yet, Andrews did not do so. Thus, Andrews, having the burden of proof, should not be given the benefit of a presumption that would result in such a serious step as an exception to the rules of derivative claims.

V. The Trial Court Erred in Awarding Punitive Damages to Andrews.

The trial court's conclusion that Andrews had met the high burden necessary for the imposition of punitive damages was also in error. "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15–33–135. This is "the highest burden of proof known to the civil law." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Thus,

"[p]unitive damages can only be awarded where the plaintiff proves 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). Andrews failed to meet his burden of proof in this case, and the trial court's decision to award $510,000 in punitive damages was in error.

The South Carolina Supreme Court has identified three factors that should be considered in conducting a post-judgment review of punitive damages awards: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587-88, 686 S.E.2d 176, 185 (2009).

Regarding the first factor, reprehensibility – the Supreme Court has explained that

> [r]eprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565, 116 S.Ct. 1589. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. Application of these five considerations demonstrates that Broom's action at issue in this case – taking deferred salary payments from Tri-Star after the May 2004 meeting and only after Tri-Star was making $180,000 per month – does not reflect conduct that could be considered reprehensible.

First, it is undisputed that the harm caused was economic, not physical. Finding only economic harm "typically weigh[s] against [] reprehensibility." *Hollis v. Stonington Dev., LLC*,

394 S.C. 383, 397, 714 S.E.2d 904, 912 (Ct. App. 2011) (internal quotation omitted); *see also Duncan v. Ford Motor Co.,* 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (finding the existence of only economic harm weighs in favor of the defendant).

Second, it is similarly undisputed that the conduct did not evince an indifference for the health or safety or others. Third, it is also undisputed that neither party had financial vulnerability. Both Broom and Andrews had full access to the ledgers, and both were advised by professionals about Broom taking deferred salary and the amounts. As to the fourth factor, no evidence was presented that there was prior conduct, nor could the action recur since Tri-Star no longer exists.

As to the fifth consideration, there is no evidence that Broom's actions were based on intentional malice or deceit. In reaching its decision to award punitive damages as to the reprehensibility prong, the trial court found that Broom engaged "in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally" paying himself a salary. This finding is unsupported by the facts of this case for the reasons stated in part III, *supra*. Furthermore, the finding is even further off the mark in the context of punitive damages, given the requirement of clear and convincing evidence. In sum, there is not clear and convincing evidence that Broom's actions were reprehensible. Thus, punitive damages are improper.

As to the ratio, the award is excessive given the fact that Broom reasonably believed he was entitled to the salary. In evaluating this prong, a court is charged with considering the likelihood that the award will deter Broom from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. *Mitchell,* 385 S.C. at 588, 686 S.E.2d at 185. It is erroneous to punish an individual for receiving payment for services rendered, which was known and found to be fair by the company's CPA and the attorney, and was sent to Andrews' agents for monthly review.

Finally, as to the comparative penalty awards, there is no basis for the trial court's finding that its award is comparable. For all these reasons, the award of punitive damages is unsupported by the evidence and by the law.

VI. The Trial Court erred in Awarding Attorneys' Fees to Andrews.

The trial court erred in awarding $194,306.53 in attorneys' fees pursuant to section 33-18-410(b) of the South Carolina Code for three reasons. First, Andrews waived his right to request fees by failing to plead or request fees until the end of trial. Second, Andrews failed to meet his burden to show that Tri-Star was a statutory close corporation subject to section 33-18-410(b). Third, Andrews did not meet his burden to provide facts and evidence to support the award that was issued.

Andrews waived any award of attorneys' fees because he did not plead them. The only mention of attorneys' fees in Andrews' pleading is in the ad damnum clause in part A, which only answered Broom's complaint, which was dismissed prior to trial. (R. p. 144) Andrews did not mention attorneys' fees in any of his claims against Broom nor in his prayer for relief regarding those claims.

The first mention of fees was by Andrews' counsel at the close of his case in chief as a "housekeeping" matter, to which Broom's counsel objected. (R. p. 524, line 9-p. 525, line 24) Even then, Andrews provided no statutory or contractual basis for an award. Significantly, Andrews did not cite the Statutory Close Corporation Supplement,[16] or any other statute, as the basis for requesting an award of attorney's fees and costs until the filing of his proposed order on

[16] Andrews did not allege any relief or petition the Court for relief under the Statutory Close Corporation Supplement, as required by section 33-18-410(b) for attorneys' fees and costs. *See* S.C. Code Ann. § 33-18-400(a) ("Subject to satisfying the conditions of subsections (c) and (d), a shareholder of a statutory close corporation may petition the circuit court for any of the relief described in Section 33-18-410 . . . .").

findings of fact and conclusions of law – more than twelve years into this litigation and 170 days after the trial was completed.

Andrews waived any claim for fees. *See generally Westbrook v. Hutchison*, 195 S.C. 101, 10 S.E.2d 145, 150 (1940) (holding that specific relief and damages are required to be pleaded so that a party may have notice of such requested relief and defend accordingly).[17] This Court should reverse because the award ignores pleading requirements, including that parties seeking special damages should plead specific as compared to general damages and that it effectively usurps the notice requirements.

Andrews also failed to offer any evidence that Tri-Star was a statutory close corporation, i.e., "a corporation whose articles of incorporation contain a statement that the corporation is a statutory close corporation." S.C. Code Ann. § 33-18-103(a). At the attorneys' fee hearing, the trial court Andrews' counsel "produced a Tri-Star share certificate with the language required by 33-18-109(a), indicating the company was in fact a statutory close corporation." (R. p. 71) The document was not authenticated and, in any event, does not state whether Tri-Star was a statutory close corporation. Andrews had 12 years of litigation and a full trial to provide admissible testimony on this issue or to provide an authenticated copy of the articles of incorporation to meet his burden to show that Tri-Star was a statutory close corporation. Without such evidence, the

[17] *See also Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007); *Gaskins v. State Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), *aff'd as modified on other grounds*, 354 S.C. 416, 581 S.E.2d 169 (2003); *see also* Rule 8(f), SCRCP (providing that all pleadings must be construed to do substantial justice to all parties); Rule 12(b), SCRCP ("Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . . .").

attorneys' fees remedy of S.C. Code § 33-18-410(b) does not apply. S.C. Code Ann. § 33-18-102(a).[18]

Finally, the award of fees was unsupported by evidence. The party seeking the fee award has the burden of coming forward with sufficient evidence to support the request. *Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (1983). Andrews failed to meet his burden. Andrews did not submit a copy of his fee agreement and did not provide any detailed billing statements of his counsel. This deficiency alone warranted a denial of the request for the award of attorney's fees and costs. *See 4 Amigos, LLC v. Carolina Bueno, LLC*, 2011 WL 1979720 * 5 (D.S.C. May 20, 2011); *Laser Supply & Servs v. Orchard Park Assocs.*, 382 S.C. 326, 341-42, 676 S.E.2d 139, 148 (Ct. App. 2009) (reversing award of attorney's fees as unsupported by the evidence where the affidavit submitted by counsel failed to properly address the work done on a particular claim in the case).

Andrews' attorneys' fees petition also failed to provide information that would allow the trial court to evaluate the fees requested or to award fees for the limited success. Andrews pursued a total of ten causes of action and five factual claims for damages, only one of which was he ultimately successful. Specifically, there is no detailed accounting of any of the time nor does the petition distinguish between Andrews' partial success of Andrews on one of ten causes of action that until the morning of trial made five damages claims, only one of which (the deferred salary payments) was successful at trial, and his lack of success on the other claims. It also fails to

[18] Moreover, the attorney fee petition cannot serve as a petition under S.C. Code Ann. § 33-18-400(a) because Tri-Star was dissolved long before the attorneys' fee petition was filed. *See Davis v. Hamm*, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989) (noting that application of the statutory close corporation act "is futile since [plaintiff] was not a stockholder when he instituted this action").

distinguish or detail the time spent on the defense of claims asserted against him that were dismissed prior to trial.

Notably, the Petition even requests an award for his unsuccessful appeal, and those amounts should clearly be denied. The South Carolina Supreme Court has recognized that a party seeking a fee award may only recover on fees on claims in which the party is successful. *See, e.g., Haley Nursery Co, Inc. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989); *Laser Supply & Services*, 382 S.C. at 341-42, 676 S.E.2d at 148. It is well established under South Carolina law that a fee award cannot include fees relating only to claims which the requesting party did not prevail. *See, e.g., Rice v. Multimedia Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (affirming the reduction of a fee request by half where plaintiff prevailed on only four of the seven claims); *Spriggs Group P.C. v. Slivka*, 402 S.C. 42, 55, 738 S.E.2d 495, 503 (Ct. App. 2013) ("The trial court surely did not award fees for the two causes of action it dismissed."). For these reasons, the award of fees should be reversed.

CONCLUSION

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

Respectfully submitted,

July 31, 2020
Columbia, SC

/s/ Matthew T. Richardson

Matthew T. Richardson
James E. Cox, Jr.
Wyche, P.A.
807 Gervais Street, Suite 301
Columbia, SC 29201
(803) 254-6542
jcox@wyche.com
michardson@wyche.com

Whitney B. Harrison
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201

(803) 779-0100
(803) 7878-0750 (fax)
wharrison@mcgowanhood.com

ATTORNEYS FOR APPELLANT

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

Appellate Case No. 2018-002223

H. Hughes Andrews. ..... Respondent,

v.

Quentin Broom, Jr.….....Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

July 31, 2020
Columbia, SC

/s/James E. Cox, Jr.

James E. Cox, Jr.
Wyche, P.A.
P.O. Box 728
Greenville, SC, 29602-0728
(864) 242-8212
jcox@wyche.com