THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Circuit Court
Marvin Dukes, Jr.
Master-in-Equity

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Case No. 2011-CP-07-2216

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Helena P. Tirone and Truman's Eclectic Irish Pub, Inc. .....Respondents,

v.

Thomas W. Dailey ..... Appellant.

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err when it failed to void or amend its summary judgment order dismissing Respondent Tirone when Appellant Dailey promptly provided the trial court a scintilla of evidence supporting Respondent Tirone's individual liability?
2. Did the trial court err when it issued a summary judgment order dismissing Respondent Tirone in spite of the scintilla of evidence of her individual liability present in the record?
3. Did the trial court err when it failed to continue the July 30, 2012 motion for summary judgment hearing in order to allow Appellant Dailey to introduce Respondent Tirone's deposition transcript into the record?
4. Did the trial court err when it failed to grant leave for Appellant Dailey to amend his pleadings to conform with the substantial evidence in the record?

## STATEMENT OF THE CASE

This is a business dispute between ex-lovers. Respondents Helena Tirone and Truman's Electic Irish Pub, Inc. filed suit against Appellant Thomas Dailey on May 20, 2011. (07/30/12 Memo p. 5). Dailey answered the Complaint and asserted Counterclaims on June 3, 2011; this pleading was amended twice. (07/30/12 Memo p. 5; 2nd Amd. Ans. & CC). On June 25, 2012, Respondent Tirone filed a Motion for Summary Judgment. (Mtn. Sum. J.). Appellant Dailey was deposed on May 9, 2012 (8 hours) and again on May 16, 2012 (1.5 hours); Respondent Tirone / Respondent Truman's was deposed on

July 27, 2012. (Tirone depo).

Tirone's Motion for Summary Judgment was heard on July 30, 2012. (Mtn. Sum. J. Tr. p. 1). The deposition transcript for Tirone was unavailable at that time, and Dailey's attorney moved that the hearing be continued to introduce her deposition. (Mtn. Sum. J. Tr. p. 9; 7/30/12 Memo in support of MSJ Hearing). The trial court denied Dailey's Motion to Continue the hearing without addressing it directly by virtue of granting Tirone's Motion for Summary Judgment by order dated August 10, 2012 (Sum. J. Order p 3). Tirone's transcript became available on August 21, 2012, and on September 13, 2012, Dailey made a Motion to Reconsider the order granting summary judgment.. The trial court denied this motion by order dated December 7, 2012. (Mtn. Recon. Order). Dailey filed his Notice of Appeal on December 7, 2012.

## STATEMENT OF THE FACTS

Respondent Helena Tirone and Appellant Thomas Dailey met in late 2009 while working for the Fluor Daniel Corporation in support of the Logistics Civil Acquisition Program ("LOGCAP") in Afghanistan, a program that ran the bases for the military in the north the country. (07/30/12 Memo; p 3). Tirone continues to work for Fluor at the Savannah River Site. (07/30/12 Memo p. 4). Tirone and Dailey became romantically involved, and as a result Dailey shared with Tirone his dream and desire of opening an Irish-themed pub. (07/30/12 Memo p. 4; 2nd Amended Answer and Counterclaim. CC. ¶ 3). On or about December of 2010, Tirone and Dailey decided to become partners in a joint venture to open an Irish-themed pub known as "Truman's Eclectic Irish Pub"

(named after Dailey's pet English Mastiff, Truman) in Beaufort, South Carolina. (07/30/12 Memo p. 4; 2nd And. CC. ¶ 3). In furtherance of this venture, Tirone and Dailey created a corporation, Truman's Eclectic Irish Pub, Inc. on December 29, 2010. (07/30/12 Memo p. 4).

Tirone and Dailey's business relationship was in the nature of equal partners. (07/30/12 Memo p. 3; 2nd And. CC. ¶ 3; Exhibit C). Due to Dailey's relatively modest financial situation, Tirone agreed to supply most of the financial backing and Dailey would supply most of the ideas, energy, contacts, knowledge, and labor (*i.e.* "sweat equity"). (07/30/12 Memo p. 3; 2nd And. CC. ¶ 3).

As the pub neared completion in April of 2011, Tirone and Dailey's romantic relationship ended. (07/30/12 Memo p. 3; 2nd And. CC. ¶ 3). Likely as a result of this change in relationship status, Tirone no longer desired to continue the venture as described above and sought to alter the venture to one in which she was the sole owner of the business, and Dailey ran the business as an employee. (07/30/12 Memo p. 3; 2nd And. CC. ¶ 3). In order to effectuate this change in the venture, Tirone and Dailey entered into a "Key Employee Employee Agreement" (the "Agreement") on May 4, 2011. (07/30/12 Memo p. 3; 2nd And. CC. ¶ 3; 2nd Amended Complaint ¶ 40. Ex. C).

Dailey performed his duties under the Agreement after execution, but the professional relationship began to deteriorate (07/30/12 Memo p. 4). During a preliminary safety inspection on or about May 16, 2011, the police arrived and stated a burglary was reported (07/30/12 Memo p. 4). Dailey showed them a copy of his

employment agreement and a copy of the lease, on which he was the guarantor, and they left (07/30/12 Memo p. 4). Shortly thereafter, the police returned with Tirone's counsel and he was removed from the premises (07/30/12 Memo p. 4). Tirone's complaint was filed on May 20, 2011, and that was the first time Dailey was informed he was terminated (07/30/12 Memo p. 4).

On or about June 19, 2011, Tirone dismantled the business, removing furniture and rendering the location an empty shell (07/30/12 Memo p. 4; 2nd And. CC ¶ 35,36).

## STANDARD OF REVIEW

Rule 60, SCRCP

Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the Circuit Court, and the Circuit Court's findings will not be disturbed on appeal absent an abuse of discretion. Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989). "An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support." Browder v. Browder, 382 S.C. 512, 519, 675 S.E.2d 820, 823 (Ct. App. 2009). A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987).

Rule 56, SCRCP

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Schmidt v. Courtney, 357 S.C. 310, 316-17, 592 S.E.2d 326, 330 (Ct. App. 2003); see also Laurens Emergency Med. Specialists, 355 S.C. 104, 108, 584 S.E.2d 375, 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Id.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law. Id.; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Id. see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Rule 15, SCRCP

A motion to amend is addressed to the sound discretion of the trial judge. Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004).

## ARGUMENT

*Three days* after taking the deposition of Helena Tirone (the Plaintiff and principal of the other corporate Plaintiff), Defendant/Appellant Thomas Dailey was forced to defend her Motion for Summary Judgment without the benefit of her transcript. Tirone prevailed at this hearing. Had Tirone's transcript been available, or had the Circuit Court considered it after it had become available, it would have been abundantly clear that Tirone was not entitled to summary judgment, as she was a proper individual defendant. The Circuit Court's failure to consider this evidence constitutes reversible error and mandates reversal by this Court.

### I. The record contains substantial evidence that Helena Tirone is a proper defendant, both individually and after piercing the corporate veil.

The issue underlying both the Motion to Reconsider and the Motion for Summary Judgment are the acts of Helena Tirone that subject her to personal liability. South Carolina courts have outlined a two-prong test to determine whether a corporate veil should be pierced. The first part of the test requires an eight-factor analysis and looks to observance of the corporate formalities by the dominant shareholders. Sturkie v. Sifly, 280 S.C. 453, 457-58, 313 S.E.2d 316, 318 (Ct.App.1984). "The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Id. In determining whether the corporate formalities were observed under the first prong of the Sturkie test, the courts consider eight factors:

(1) whether the corporation was grossly undercapitalized;

(2) failure to observe corporate formalities;

(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;

(5) siphoning of funds of the corporation by the dominant stockholder;

(6) non-functioning of other officers or directors;

(7) absence of corporate records; and

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 644 (Ct.App.1995). "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Id.

Under the second prong of the Sturkie test, the party seeking to pierce the corporate veil must prove injustice or fundamental unfairness if the corporate veil is not pierced. Multimedia Publ'g of S.C., Inc. v. Mullins, 314 S.C. 551, 553, 431 S.E.2d 569, 571 (1993). "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Id. at 556, 431 S.E.2d at 573.

During the deposition of the Plaintiff, again, three days prior to the motion hearing, she was asked various questions regarding Sturkie 8-prong test requirements (the court in Sturkie forgot one of the prongs but it was later endorsed by the SC Supreme Court in Multimedia Publishing of S.C., Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993)). Her answers and documents turned over in discovery show the following:

(1) whether the corporation was grossly undercapitalized:

The Plaintiff acknowledged that outside of her signed loan agreement to the corporation, she did not disburse the amount of the agreement on the date signed but instead:

> Q: Did you put in $125,000 at the start or incrementally?
> A: Incrementally.
> Q: How did that work? He would just call you and say that he needed more money in the account?
> A: No, I put the first $50,000 in. I guess he would tell me things are running low or something like that, I guess.

(Tirone Depo. 53: 4-11). The original loan disbursement was not made in full, neither by her testimony nor in documentation provided during discovery.

(2) failure to observe corporate formalities:

a. No financial statement was prepared:

> Q: Has an annual financial statement ever been executed for Truman's?
> A: Martin did do some balance sheet, something else. I don't recall exactly what it is. It was never signed by a CPA or anything. I don't know if it is valid or not."

(Tirone Depo. 116: 25, 117: 1-5)

b. No officers were elected.

Q: Were board members ever elected or assigned positions?
A: No, there's only one board member, and that would be me.

(Tirone Depo. 100: 6-9)

c. No records were kept, other than some receipts that she or an accountant friend of hers or her attorney may have in their possession:

Q: What records did you keep of Truman's other than bank records? Were there any?
A: There were receipts.
Q: What kind of receipts?
A: From things Mr. Dailey bought.
Q: So he would buy things, and then where did the receipts go to? Did he give them to you? Did he mail them?
A: He sent some to Martin, and he gave some to me.
Q: These are debit card receipts and ATM receipts and the like?
A: I don't recall what all they are. All I know is I have receipts.
Q: And you have them?
A: Mr. Twombley has them.

(Tirone Depo. 115: 2-18)

d. No bylaws were ever executed:

Q: There were never any by-laws or any paperwork having to do with the running of the company that were ever written?"
A: No.

(Tirone Depo 115: 19-22)

(4) insolvency of the debtor corporation at the time:

No cash flow model had been prepared:

Q: What was the expected cash flow of the bar?
A: There was never a cash model made.

(Tirone Depo. 114:11-13) and she disbursed money solely upon request by the Defendant, whom she claims was not even an employee.

(5) siphoning of funds of the corporation by the dominant stockholder:

The Plaintiff admittedly closed the corporate account and returned the funds to herself outside of the arrangements of the loan agreement she had signed.

Q: How much is currently in the BB&T business account for Truman's?
A: There is no current BB&T business account.
Q: When did you close the account?
A: I don't remember exactly.
Q: What did you do with the funds when you removed them from the account?
A: There weren't any funds in the account. There might've been-- I take that back. There might have been, like, 200 bucks."

(Tirone Depo. 117:6-15)

(6) non-functioning of other officers or other directors:

The Plaintiff stated repeatedly that she was the sole owner and specifically the sole officer.

Q: No officers were ever selected? You're the sole officer of the corporation?
A: Yes.

(Tirone Depo. 116:18-21)

(7) absence of corporate records:

No records were kept.

Q: What records did you keep of Truman's other than bank records? Were there any?"
A: There were receipts.
Q: What kind of receipts?
A: From things Mr. Dailey bought.
Q: So he would buy things, and then where did the receipts go to? Did he give them to you? Did he mail them?
A: He sent some to Martin, and he gave some to me.
Q: These are debit card receipts and ATM receipts and the like?
A: I don't recall what all they are. All I know is I have receipts.
Q: And you have them?
A: Mr. Twombley has them.
Q: There were never any by-laws or any paperwork having to do with the running of the company that were ever written?
A: No.

(Tirone Depo. 115: 2-22)

(8) the fact the corporation was merely a facade for the operations of the dominant stockholder:

The Plaintiff repeatedly made clear that the corporation had no employees and that she was the sole owner, and, ipso facto, the corporate entity herself in all but name.

Q: Did you ever ask Mr. Dailey to be a part of the corporation?
A: No, it was capitalized with my money. I was the sole owner of the bar."

(Tirone Depo 43:3-6)

A: I capitalized the pub. I owned 100 percent.

(Tirone Depo. 51: 15)

A: I was 100 percent ownership of the project. It was all my money. I capitalized everything.

(Tirone Depo. 71:16-18)

Additionally, in regards to where the Plaintiff was a co-director of another corporation, she initiated action to repossess a van leased to the Plaintiff, without regard to the co-director because in her words:

A: It was my van. I paid for it."

(Tirone Depo. 97:19-20)

As she has spoken that way about Truman's repeatedly throughout her deposition, that sheds light on her absolute refusal to participate in the corporate form in anything but name and has repeatedly acted at her personal discretion at all times, (Tirone Depo. 96:22-25, 97:1-25, 98:1-15)

The second prong of Sturkie test simply states that after a sufficient number of the first prong have been shown that "The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Sturkie, 313 S.E.2d at 318. Sturkie also states that "The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." Id. at 319.

Plaintiff Tirone, in July 2011, well after the original answer and counterclaim of

the Defendant, did knowingly and admittedly dismantle the business, hiring movers to empty the bar, thereby effectively destroying it:

> Q: Did you, in fact empty the bar?
> A: A U-Haul company emptied the bar.
> Q: After the U-Haul company emptied the bar, what was left inside?
> A: Miscellaneous items. I can't really recall what.
> Q: Was it mostly an empty shell? You took most of the property out?
> A: The things that I recovered under my security agreement were taken out.
> Q: You signed a multi-year lease on the property. What was your plan?"
> A: To open up a pub.
> Q: After you emptied the pub, what was your plan moving forward?
> A: I had no plan.

(Tirone Depo.104:9-24) She also closed out the corporate accounts, in full knowledge of the claims against herself and the corporation, by the Defendant.

> Q: You would say that you definitely shut down the Truman's business account after the initiation of this lawsuit?"
> A: Yes.

(Tirone Depo.118:4-7)

## II. The Circuit Court committed a reversible error of law by not vacating or amending its earlier ruling based on newly-discovered evidence of Tirone's individual liability.

The evidence set forth above from Tirone's deposition was not before the Circuit Court at the July 30, 2012, Motion for Summary Judgment hearing. At that hearing, the Master-in-Equity orally ruled for Tirone and requested a proposed order, which resulted in the Aug 10, 2012 order. When Dailey filed his Motion to Reconsider, he promptly

presented the trial court with the evidence set forth above. This evidence creates the necessary scintilla of evidence that would have defeated Tirone's Motion for Summary Judgment. See Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("mere scintilla" needed to withstand summary judgment). As its prior order granting summary judgment was now invalid, it was incumbent on the trial court to vacate or amend its order. Its failure to do so was reversible error.

The case of Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) is instructive here. In Baughman, the trial court granted the defendant partial summary judgment on several personal injury claims, finding there was no genuine issue of material fact as to causation. After the grant of summary judgment, the Plaintiffs procured an expert that provided testimony that was relevant to the issue of causation and moved to have the summary judgment orders vacated. The trial court denied these motions, but the Supreme Court ultimately reversed, holding that the plaintiffs had "demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation..." Id.

In this action, Dailey promptly provided the trial court with the necessary evidence relevant to piercing the corporate veil (See Section I). Considering that South Carolina only requires a showing of a scintilla of evidence on the part of a non-moving party to avoid summary judgment (see Section III), Dailey presented sufficient evidence to warrant reversal.

The trial court committed another error of law in possibly ruling that Dailey was not entitled to pursue supplemental proceedings post judgment. In an off-the-record discussion during the hearing concerning Summary Judgment, the court stated that supplemental proceedings to pierce the corporate veil were appropriate against the individual plaintiff to bring her back in, as it were, should the defendant's counterclaims against the corporate plaintiff be successful. The court based much of its decision to grant summary judgment to the individual plaintiff at that time because she could be brought back in in supplemental proceedings and so the issue of piercing the corporate veil was not yet ripe. The court had the plaintiffs' attorney draft the order. The order, as written, seems to preclude the possibility of supplemental proceedings against the plaintiff individually by virtue of ruling relatively demonstratively that facts to support veil piercing must be pled initially:

> While there is authority to support the idea that a party is not required to affirmatively plead veil piercing as a separate cause of action (and can in some instances attempt to pierce post-judgment), a party seeking to pierce the corporate veil is still required to set forth basic facts (as well as a request for relief) to put an individual on notice that it seeks to hold the individual liable for the debts of the corporation under a veil piercing theory. Rule 8(a), SCRCP; see also Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 104, 668 S.E.2d 798, 802 (2008) (finding that only when a party has "pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, [should] the trial court move forward to determination of both matters.")
>
> Here, Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012. Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs' Motion for Summary Judgment as to the individual liability of Tirone is

hereby granted.

Aug 10, 2012 order p. 2,3

As the court never ruled on the Defendant's motion to amend the answer and counterclaim to include those facts which would warrant piercing the corporate veil which was included in the defendants supporting memorandum and also requested orally at the hearing, it is arguable that supplemental proceedings against the individual plaintiff are not possible since the order states that the facts to support them were not included in the pleadings on record.

Additionally, the judge's off-the-record assessment that supplemental proceedings could be brought against the individual plaintiff were never clarified in the subsequent written order, and was also not ruled upon when addressed in Dailey's Motion to Reconsider, which respectfully pointed out the possible error in law made in regard to waiting to pierce the corporate veil post-judgment. As the Drury court found:

> While it is undoubtedly true that the corporate veil is often pierced post-judgment, it is also true that South Carolina courts frequently consider these issues in one bifurcated action.... We therefore decline to adopt a rule which would require South Carolina's trial courts to resolve in two separate actions what they now ably determine in one. Id. at 801

While the subject of whether supplemental proceedings could be taken against the plaintiff was discussed again orally during the hearing for the motion to reconsider, and the judge stated it could, it was simply dismissed via form 4, so there was no distinct ruling on the record.

On the one hand, Dailey respectfully submits that the Master made an error in law in basing his decision to grant summary judgment on the opinion that the time was not ripe for piercing the corporate veil which the Drury court has stated is not required, while, on the other, even if Dailey were to win against the corporation and attempt to pierce the corporate veil as the master suggested, the master's order, as written, would seem to preclude the possibility of doing so. This places Dailey in a difficult situation, as it is ambiguous as to whether he could pursue Tirone in supplemental proceedings when he obtains a judgment against Truman's. Either the trial court has ruled pre-judgment that supplemental proceedings are not proper since facts were not pled, or the trial court has failed to rule on allowing the pleadings to be amended. Either scenario is an abuse of discretion and warrants reversal.

## III. The Circuit Court committed a reversible error of law by granting summary judgment for Tirone, when the record clearly contains a scintilla of evidence of Tirone's individual liability.

Even without the transcript of Helena Tirone, there was a scintilla of evidence in the record by the July 30, 2012, Motion for Summary Judgment hearing, and the trial court's grant of that motion was reversible error.

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). While Tirone's transcript clearly provides this necessary scintilla, there was ample evidence in the record on the day of Tirone's Motion

for Summary Judgment hearing (Memorandum of Law of Defendant for July 30, 2012 Motions Hearing; p. 11-16), and so the request for summary judgment should have been denied.

Even without the availability of the deposition, there was more than enough evidence on the record in regards to Tirone's actions individually through piercing the corporate veil that clearly provided the necessary scintilla of evidence required to defeat the motion for summary judgment. Following the Sturkie test, the record showed prior to the availability of the transcript:

(1) whether the corporation was grossly undercapitalized & (4) insolvency of the debtor corporation at the time. At the time of the suit, the business bank account had a balance of roughly $3,091.18 (Ex. B of Amended Complaint). As of July 27th, at the plaintiff's deposition, all funds had been removed and the account closed by the plaintiff at an undetermined time prior. Additionally, Truman's Eclectic Irish Pub, Inc. "does not own any assets" (7/30/12 Memo, Exhibit H: Plaintiff's Responses to Defendant's Second Request for Production)

(2) failure to observe corporate formalities. Tirone signed the Agreement with Dailey as "Helena P. Tirone", not as "Helena P. Tirone, as president of Truman's Eclectic Irish Pub, Inc." (Amended Complaint Exhibit C), whereas she had documented other signatures when signing for Truman's with "director" (7/30/12 Memo, Exhibit J: Security Agreement and Promissory Note).

(5) siphoning of funds of the corporation by the dominant stockholder. Rather than investing equity in the business, Plaintiff Tirone executed a loan for $125,000 to the Corporation on or about January 21, 2011 (7/30/12 Memo, Exhibit J: Security Agreement and Promissory Note). However, Plaintiff Tirone did not transfer the money to the Corporation's business account, instead dispensing funds on an as-needed basis, thus keeping the interest that would or could have accrued for the Corporation in her own personal accounts. Plaintiffs answer to Defendant's First Set of Interrogatories #11 ("Set forth a complete accounting of all capital contributions to Truman's Eclectic Irish Pub, Inc., and all expenditures made by Truman's Eclectic Irish Pub, Inc.") shows that Plaintiff Tirone only contributed $50,000 the day of the execution of the loan and $95,780 in total (7/30/12 Memo, Exhibit K: Plaintiffs Answer to Defendant's First Set of Interrogatories).

(6) non-functioning of other officers or directors & (7) absence of corporate records. There are no corporate minutes, resolutions, bylaws, or even stock certificates from Truman's (7/30/12 Memo, Exhibit I: Plaintiffs Responses to Defendant's First Request for Production; Exhibit H: Plaintiffs Responses to Defendant's Second Request for Production). There is no record that Plaintiff Tirone has performed any of her duties as Owner, President, and CEO.

(8) the fact that the corporation was merely a facade for the operation fo the dominant stockholder. The Plaintiff has acted alone and solely with th eintention of acting as the embodiment of Truman's.

Injustice and Fundamental Unfairness. The second part of the Sturkie test is easily achieved when the facts of the case is considered. Plaintiff Tirone, the only acting member of Truman's, has broken a written contract with an employee, signed May 4, 2011, and provided no proof to substantiate her claims of threat or duress. She has cleared out the bar (on or about June 19, 2011) and, apparently, sublet the location to another entrepreneur (date unknown). She has emptied and closed the Truman's business account (since the initiation of this suit). As the court in Sturkie stated, "The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against he corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." Sturkie, 313 S.E.2d 316 at 320.

Accordingly, as at the very least, a scintilla of evidence was met even without the deposition transcript being available, the circuit court erred in granting summary judgment to Helena Tirone and such error warrants reversal.

## IV. The Circuit Court committed a reversible error in refusing to grant Dailey's motion to postpone the summary judgment hearing in order to present further evidence.

At the July 30, 2012, hearing for his Motion for Summary Judgment, Dailey's attorney requested that the Circuit Court postpone the hearing in order for him to obtain a transcript of his client's deposition testimony, both in his memorandum of law in support of the motions hearing (Mem Law mot hearing, page 16) and during the hearing itself:

> The Defendant asks for a continuation on the motion of summary judgment until the transcript of the deposition of Plaintiff can be

> submitted. The deposition was heard three days prior to this hearing and the transcript is not yet available. There were numerous statements made by the Plaintiff that will support...the Defendant's contention that Plaintiff Tirone is inseparable from Plaintiff Truman's Eclectic Irish Pub, Incorporated.

(Mtn. Hrg. Tr. p 9,10).

This request was made pursuant to Rule 56(f), SCRCP, which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although an affidavit is normally required to invoke the provisions of this rule, strict compliance with the technical requirements of Rule 56(f) is not required where the need for further discovery is otherwise made known to the trial court. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (citing First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988) and Snook v. Trust Co. of Ga. Bank of Savannah, 859 F.2d 865 (11th Cir.1988)). Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Id. (quoting Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975)). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman at 543.

In this action, discovery was clearly incomplete, as the trial court judge did not even have the transcript of Helena Tirone, Plaintiff and principal of the corporate plaintiff, available for review. To not continue the hearing to, at the minimum, allow

Dailey to present Tirone's deposition transcript to the trial court, is reversible error mandating reversal.

## V. The Circuit Court abused its discretion by refusing to allow Dailey to amend his pleadings, especially in light of the substantial evidence he presented to the court.

While Dailey believes that his pleadings fairly apprise the opponent of a desire to pierce the corporate veil, as his answer and counterclaim reference Helena Tirone in her personal capacity nearly exclusively, and also because by the questioning presented to her at her deposition laid out the elements of piercing the corporate veil, as did the memorandum filed for the Summary Judgment hearing and for the Motion to Reconsider, in an abundance of caution, he requested that the lower court allow him to amend his answer and counterclaims to conform to the evidence before the court (*i.e.* to more clearly allege that he seeks to pierce the corporate veil). (Mtn. Recon. n. 1). This motion was not ruled upon, and was apparently denied.

Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Id. The party opposing the amendment has the burden of establishing prejudice. Id. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. Id.

By failing to rule on the Defendant's request to amend, the circuit court failed to exercise its proper discretion. A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987).

## CONCLUSION

Dailey asks this Court to reverse the orders of the Circuit Court and allow him to pursue and resolve his action in the most efficient and logical way possible, *i.e.* against all potential tortfeasors. Judge Dukes' December 7, 2012 order denying reconsideration and his August 10, order granting summary judgment should be reversed for any and all of the arguments set forth above, and Dailey should be allowed to amend his pleadings to conform with the evidence.

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Attorney for Appellant

Charleston, South Carolina
5 March 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
CIRCUIT COURT
Marvin Dukes
Master-in-Equity

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Case No.: 2011-CP-07-02216

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Helena P. Tirone and Truman's
Eclectic Irish Pub, Inc,.....Respondent,

v.

Thomas W. Dailey .....Appellant.

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**APPELLANT'S DESIGNATION OF MATTER FOR THE RECORD ON APPEAL**

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Pursuant to Rule 209, SCACR, Appellant Thomas W. Dailey ("Appellant") designates the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal:

**ORDERS**

1. Motions Order Granting Summary Judgment filed August 10, 2012

2. Form 4 Denying Motion to Reconsider filed December 7, 2012

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**PLEADINGS**

3. 2nd Amended Complaint (excluding exhibits irrelevant to the matter on appeal)

4. 2nd Amended Answer and Counterclaim

5. Notice of Motion and Motion for Summary Judgment

6. Memo in support of Motion of Summary Judgment hearing

7. Notice of Motion and Motion to Reconsider

**TRANSCRIPTS**

8. Tirone Deposition Transcript Pages: 43, 51, 53, 71, 96-98, 100, 104, 114-118

9. Motion for Summary Judgment Hearing Transcript Pages 1-11

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**Attorneys for Appellant**

**Dated:** 6MARCH **2013**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
CIRCUIT COURT
Marvin Dukes
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Case No.: 2011-CP-07-02216

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Eclectic Irish Pub, Inc,..... Respondent,

v.

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PROOF OF SERVICE

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I, André Rembert, attorney for the Appellant, certify that I have served opposing counsel in this action by serving a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by U.S. Mail to the following on the date listed below:

Pleadings: DESIGNATION OF MATTER OF RECORD ON APPEAL

Party Served: J. Ashley Twombley
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TWENGE + TWOMBLEY LAW FIRM
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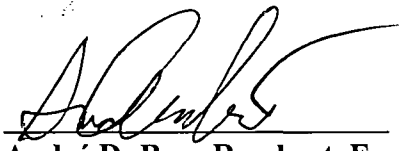

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**Dated:** 6 MARCH **2013**