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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman,
Circuit Court Judge

Case No. 2015-CP-10-05463

The Boathouse at Breach Inlet, LLC, by and through
its member, Laurence O. Stoney, Jr.Appellant,

vs.

Richard S. W. Stoney, individually and as Member-Manager
of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants
and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr.
and Gregory G. Holmes, Third-Party Intervenors,
of whom

Richard S. W. Stoney, individually and as Member-Manager of The
Boathouse at Breach Inlet, LLC is.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in its finding that Appellant Laurence Stoney lacked the requisite standing under Rule 23(b)(1), SCRCF, to maintain a shareholder derivative lawsuit?
2. Did the Trial Court err in ordering the dissociation of Laurence Stoney as a member of The Boathouse at Breach Inlet, LLC?

STATEMENT OF THE CASE

1. Appellant filed his Summons and Complaint with the Charleston County Circuit Court on October 9, 2015 against the Respondents Richard Stoney and Crew Carolina, LLC, as a shareholder derivative lawsuit on behalf of the Boathouse at Breach Inlet, LLC; alleging, *inter alia*, that he “will fairly and adequately represent the interests of Boathouse and its members in enforcing and prosecuting the rights of The Boathouse.”
2. Respondents Richard Stoney and Crew Carolina filed their Answer November 12, 2015.
3. On October 18, 2016, Ted Stoney and Gregory Holmes, also members of the LLC, filed their Motion to Intervene, alleging, *inter alia*, that they are members of the LLC, that the Appellant had not consulted with them about his filing of the action; that they oppose the action; and that Appellant could not adequately represent the interests of the members.
4. On November 23, 2016, Appellant filed his Motion to Amend Complaint to allege, *inter alia*, that he would represent “similarly situated” members of the company; and further alleging that Ted Stoney and Greg Holmes were not “similarly situated”.

5. On November 28, 2016, the parties filed their Consent Motion to assign the case to the Business Court.

6. On December 9, 2016, the Chief Business Court Judge assigned the case to the Honorable Clifton Newman as Business Court Judge.

7. On March 21, 2017, Judge Newman filed his Order granting Appellant leave to amend his Complaint.

8. Appellant's Amended Complaint was filed March 29, 2017.

9. Respondent and Defendant Crew Carolina filed their Answer April 13, 2017.

10. On January 22, 2017, Judge Newman filed his Order granting the Motion of Ted Stoney and Gregory Holmes to intervene as Third-Parties in the case.

11. On July 24, 2017, Third-Party Intervenors filed their answer alleging, *inter alia*, that despite purporting to represent their interests, Appellant had not consulted with them before filing the action; that they oppose the action; and further alleging that Appellant had filed the action only to benefit himself.

12. On March 29, 2018, Respondent and Third-Party Intervenors jointly filed their Motion to Bifurcate the proceedings, to conduct a trial or hearing to decide whether Appellant Laurence Stoney had standing to prosecute the action in the name of corporation.

13. By Stipulation filed December 7, 2018, the parties stipulated that Laurence Stoney was a "class of one" in the membership of the LLC; that is to say that there were no other members similarly situated.

14. A Preliminary Hearing on Appellant's standing to maintain the action was heard before Judge Newman on December 13th and 14th, 2018, at which the Court heard from witnesses and received exhibits.

15. On May 20, 2019, Judge Newman filed his Order from the Preliminary Hearing, concluding, without prejudice, that Respondent had standing to maintain the action.

16. Respondents appealed Judge Newman's May 20, 2019 Order to the Court of Appeals. The Appeal was dismissed by Order filed October 24, 2019.

17. On January 7, 2020, Respondent and Third-Party Intervenors jointly filed their Motion to Dissociate Laurence Stoney from The Boathouse at Breach Inlet, LLC.

18. Following Hearing January 16, 2020, Judge Newman filed his Order February 24, 2020, preliminarily denying, without prejudice, the Motion to Dissociate Laurence Stoney from the LLC.

19. A full trial on the merits of the case was heard by Judge Newman on March 9, 10, and 11, 2020.

20. On July 7, 2020, Judge Newman filed his Order denying the relief sought by Appellant in his Complaint and ordering that he be dissociated from the LLC.

21. On July 16, 2020, Appellant filed his Motion to Alter or Amend the July 7, 2020 Order of Judge Newman.

22. By Order filed August 10, 2020 Judge Newman denied Appellant's Motion to Alter or Amend.

23. On August 25, 2020, Respondent filed his Return to Judge Newman's Order of Dissociation, which had required delivery of a purchase offer to Plaintiff.

24. On August 28, 2020, Appellant filed his Notice of Appeal to the Court of Appeals.

STANDARD OF REVIEW

In the case of *Wilson v. Gandis*, 430 S.C. 282, 844 S.E.2d 631 (S.Ct.2020), the South Carolina Supreme Court most recently articulated the standard of review applicable to an action in equity: “This Court reviews factual findings and legal conclusions in an equitable action *de novo*. See *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241-248, 715 S.E.2d 348,352 (Ct.App.2011). Therefore, we may find facts according to our own view of the preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). However, this broad scope of review does not require this Court to disregard the findings below or to ignore the fact that the trial judge was in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). In addition, a petitioner is not relieved of its burden of convincing this court that the trial court committed error in its findings. *Id.* at 387-388, 544 S.E.2d at 623.”

STATEMENT OF FACTS

Respondent Richard Stoney is an attorney on active status with the South Carolina Bar, although his principal occupation since 1997 has been that of restaurateur. (R.p. 942 Lines 3-19; R.p. 953 Lines 8-22.) The Third-Party Intervener Theodore Stoney, Jr. (“Ted”) is Richard’s brother, and is a retired realtor. Appellant Laurence O. Stoney, Jr. (“Laurence”) is a first cousin of Richard and Ted. (R.p. 940 Lines 14-21). Laurence owns and operates a ship chandler business, Coleman Supply Company, that supplies ships serving the Port of Charleston with a broad range of provisions, from food-stuffs to tools, maritime and other

equipment, and navigational materials.¹ (R.p. 707 Line 10 to R.p. 708 Line 15).

In 1996-1997, after practicing law for eighteen years, Richard set out into the restaurant business on a site at Breach Inlet, which separates Isle of Palms from Sullivan's Island. That restaurant became The Boathouse at Breach Inlet. To start up the Boathouse restaurant, Richard negotiated a lease agreement with option to purchase, and he borrowed approximately \$500,000 secured by a second mortgage on his Sullivan's Island home to fund construction. (R.p. 952 Line 20 to R.p.953 Line 7). Richard testified that he had long been intrigued by the hospitality industry, and that he had been inspired to begin the Boathouse restaurant after a visit to the California coast. (R.p. 943 Line 20 to R.p. 944 Line 13). He performed due diligence by consulting texts, attending seminars, and consulting with restaurant professionals before commencing the Breach Inlet venture. (R.p.944 Line 14 to R.p. 946 Line 17; R.p. 949 Line 2 to R.p. 951 Line 17).

There was conflicting testimony at trial whether Richard and Laurence, who are two years apart in age, had been close in their younger years. Whereas Richard and Ted Stoney described Laurence's arrogant manner during their younger years, all were in agreement that by the time of the formation of the Boathouse restaurants in 1997 and 1999, Laurence had encountered business and other setbacks while employed as a broker in New York, following which he had returned to Charleston as a "more humble and gentle" person, by Richard and Ted's description. (R.p. 958 Line 13 to R.p. 960 Line 1).

When time came to open the doors of the restaurant in the Fall of 1997, Richard needed additional capital to fund start-up costs. He borrowed additional funds from US Foods, a food purveyor for the restaurant. And it was then that he formed the LLC party to

¹ Because three parties, and other witnesses, bear the surname "Stoney", they will be referred to by their first names in most instances, for clarity.

this case, The Boathouse at Breach Inlet, LLC, and offered membership interests to his brother Ted, and to his cousin Laurence, with whom he was by then on better terms. (The Boathouse at Breach Inlet will sometimes be referred to in this Brief as “Boathouse” or “Breach Inlet”.) Ted contributed \$50,000.00, in addition to providing his personal services to the business during the period of construction. Laurence contributed \$28,750.00. (R.p. 962 Line 16 to R.p. 963 Line 6). The initial membership interests in the LLC were: Richard Stoney, 80%; Laurence Stoney, 5%; Ted Stoney, 10%; and a 5% interest was created for Richard’s son, Richard Stoney, Jr., which is held in trust by Ted. (R.p. 955 Lines 11-25).

In subsequent years, Richard transferred portions of his interest to others, so that at the time of trial the membership interests in the Boathouse at Breach Inlet, LLC were held: Richard Stoney, 60%; Laurence Stoney, 5%; Ted Stoney, 10%; Ted Stoney as trustee for Richard Stoney, Jr., 5%; Lori Stoney (Richard Stoney’s former wife), 5%; Lori Stoney as trustee for Croft Stoney (daughter of Richard and Lori), 5%; and Greg Holmes, 10%. (R.p. 603 Line 16 to R.p. 604 Line 3).

Upon its opening, the Boathouse restaurant was an immediate success, owing in large part to two things: its location at Breach Inlet, and the creative talents of Richard Stoney. (R.p. 963 Line 7 to R.p. 965 Line 5). Building upon that success, in the following year Richard formed a second Boathouse restaurant in the City of Charleston which he named Boathouse on East Bay. (R.p. 965 Line 6 to R.p. 966 Line 1). At the same time, and based upon research and the advice of persons experienced in the restaurant industry and in general business administration, he formed a management company that he named Crew Carolina, LLC, a single member LLC of which Richard is the sole member. (R.p. 967 Lines 7-25).

The Crew Carolina management concept was this: the business costs associated with

accounting and personnel management, the common costs of health, worker's compensation and liability insurance, and the costs of food and restaurant material acquisition are radically reduced when multiple restaurant operations are consolidated under an umbrella of common management. At the same time management tasks, as well as operational tasks (including servers), associated with each restaurant can be shared among fewer management and operational personnel than would be required with multiple restaurants operating separately. Richard testified that he envisioned four or five restaurants operating under central management would provide the most viable return on the investments of the principals. (R.p. 950 Line 8 to R.p. 951 Line 9; R.p. 411 Line 12 to R.p. 415 Line 5).

As recounted by Chip Robinson, today a Baptist minister who had been the Boathouse's controller from 2002 to 2010, the economies of scale offered by the consolidated management provided by Crew Carolina afforded cost savings to every entity, including the Boathouse at Breach Inlet. (R.p. 870 Line 24 to R.p. 873 Line 14). At its peak, the Boathouse "Brand" included fourteen to fifteen entities, all managed by Crew Carolina. (R.p. 885 Line 23 to R.p. 886 Line 2). It included multiple restaurants; a catering company, "Carolina Catering"; and "Bluewater Management" which published a cookbook and prepared and sold specialty foods to grocery stores such as Whole Foods. (R.p. 886 Line 3 to R.p. 887 Line 11).

Early on, multiple bank accounts were created for each entity within the Boathouse family, all with the same bank, which imposed a cumbersome management and accounting task. After consulting with bankers at Wachovia Bank, banking arrangements were streamlined to create a "sweep" account, whereby funds, usually by credit card payments, were nightly deposited to an entity's account, and then overnight all funds were "swept" into

a central account in the name of Crew Carolina. The funds were tracked, nevertheless, in the name of the depositor entity. Crew Carolina then paid expenses from the central account, allocating each expense payment to the appropriate entity. In the instance where an entity account did not contain sufficient funds to pay an expense, the payment was made from the central sweep account and noted as an amount “due from” the liable entity, and “due to” the central Crew Carolina account. (R.p. 874 Line 17 to R.p. 876 Line 24).

The individual expenses of each restaurant, in the circumstances where that restaurant’s revenues were not sufficient to cover expenses, were therefore “borrowed” from the revenues in Crew Carolina’s central account. These “loans” were regularly accounted for and were regularly reported on the books of Crew Carolina and on the books of the related entities as the “due to/due from” entries. (R.p. 876 Line 25 to R.p. 880 Line 22). This operating framework was openly accounted for on the books, and was known to all members, including to the plaintiff Laurence Stoney. (R.p. 411 Line 22 to R.p. 414 Line 4).

Even before its opening, The Boathouse at Breach Inlet received local, state and national media attention. (R.p. 963 Line 7 to R.p. 964 Line 12). The potential for a successful organization was significant. If the business plan had been successful, every entity that was managed by Crew Carolina, including Boathouse at Breach Inlet, would have benefitted and prospered. Crew Carolina’s then-controller Chip Robinson wrote a memo in 2007 that stated, in part: (with reference to the centralized accounting and banking) “This banking convention has significantly decreased the money we are spending on bank fees (specifically NSF fees) to the tune of approximately \$500 - \$1,500 per major account per month, or roughly \$50,000 - \$100,000 annually. In addition, it has reduced the amount of time needed to reconcile the bank accounts from roughly 3-5 days monthly to 1-

1.5 days.”

Beginning in 2003, however, the organization of restaurants encountered a series of business catastrophes that ultimately caused most of them to fail. In 2003, the manager of Boathouse at East Bay, Patrick Ringwald, was savagely murdered in an armed robbery attempt at the restaurant, that chilled consumer interest and effectively destroyed the business. (R.p. 980 Line 16 to R.p. 984 Line 5). In 2005, the North Carolina Department of Transportation began road construction that blocked access to the then-operating Boathouse on Lake Julian in Asheville; and access was blocked for twenty-four months. (R.p. 985 Line 21 to R.p. 988 Line 12). The national business recession of 2008 negatively affected all business operations. Finally, in March 2009, only thirty days after it had opened, the Boathouse on Ellis Creek burned to the ground. (R.p. 977 Line 23 to R.p. 978 Line 23).

Accordingly, over a span of about six years, all of the related business entities failed except for Boathouse at Breach Inlet. The other entities had been formed after Breach Inlet’s immediate success, and they never had the opportunity to realize the degree of success that Breach Inlet had achieved. Because of the central banking and accounting methodology created with the formation of Crew Carolina, utilizing the sweep of bank accounts and the central accounting for debits and credits with the “due to/due from” entries, the net result after the other entities had failed was that Breach Inlet, the only surviving restaurant, carried substantial accounts receivable from Crew Carolina. Although booked as owed by Crew Carolina to Breach Inlet, the expenditures had been used in the final analysis to pay expenses of the other entities that had ultimately failed. (R.p. 876 Line 25 to R.p. 880 Line 1; R.p. 879 Line 11-20).

Richard described himself as the “eternal optimist”, believing that the business plan

would succeed and everything would work out in the end. Crew Carolina's former controller, Chip Robinson, echoed the sentiment: "Richard is one of the most optimistic people I've ever worked with. And consistently when I would raise concerns about sustainability, his opinion was that things would turn around very, very soon." (R.p. 885 Lines 4-18).

Through it all, nevertheless, the accounting records of Boathouse at Breach Inlet and Crew Carolina openly reported the liabilities. They regularly reported, and reported in currently dated exhibits admitted at trial, an account entry on the balance sheet entitled "due from Crew Carolina" that states the cumulative total of funds that were administered by Crew Carolina for the expenses of the related restaurant entities, and that are owed to Breach Inlet. The most current balance sheet of Boathouse at Breach Inlet reported the amount due from Crew Carolina to Boathouse at Breach Inlet on December 31, 2019 to be \$4,194,264.66. (R.p. 878, Line 19 to R.p. 880 Line 8). In turn, each of the related entities, although now defunct, owe liabilities to Crew Carolina that equal the same \$4,194,264.66 due from Crew Carolina to Boathouse at Breach Inlet. (R.p. 877 Line 14 to R.p. 878 Line 12).

There is a lesser sum showing on the balance sheet of Boathouse at Breach Inlet as "due from" Richard Stoney individually. That sum according to the balance sheet as of December 31, 2019 was \$42,835.19. (R.p. 880 Line 23 to R.p. 881 Line 15).

Respondent Laurence Stoney's Personal and Vindictive Agenda.

In early 1999, after Breach Inlet had been in business a little more than a year, and after the opening of Boathouse on East Bay and Crew Carolina, a meeting was held at Richard Stoney's law office on Broad Street in Charleston. Present were Richard, Laurence, Ted, tax attorney Bobby Pearlman, CPA Harold Pratt-Thomas, and Jane Baker, an administrative assistant. (R.p. 724 Line 7 to R.p. 725 Line 7; R.p. 968 Line 1 to R.p. 970

Line 5). In that meeting, Richard described the concept of central management provided by Crew Carolina. (R.p. 970 Lines 1-5). The members of the two restaurant LLCs that had been formed as of that date were essentially the same: Richard, Laurence, Ted, and Ted as Trustee for Richard, Jr. were members of both LLC's. Additionally, in the East Bay restaurant Richard and Ted's sister Beverly was a member, as was Charleston attorney Michael Molony.

The 1999 meeting exposed a measure of the contentious relationship between Laurence and the other members, that was to grow over time until festering into the present case. In the meeting Laurence disputed the payment to Richard of a car allowance, and he also objected to Richard's position that artwork placed in the Boathouse at East Bay restaurant was to be considered Richard's asset. "Laurence absolutely came unglued, used profanity, was extremely rude to Bobby Pearlman, who he had never met...Harold (Pratt-Thomas) was offended. Jane, everybody was offended. Everybody was offended. Everyone was shocked. I think everyone walked out. But he was completely out of control. And the demeanor that His Honor observed in this Courtroom, it is – it would be a starter kit to what happened in that room that night." (R.p. 411 Lines 2-21).

The East Bay restaurant was located on leased property owned by the Drew family. Almost from the outset of the lease term, disagreements between landlord and tenant were encountered, principally related to the physical condition of the property, which was subject to tidal flooding that created mold, mildew and odor issues. The relationship became so contentious that, in the words of Richard, Ted and Laurence, Boathouse at East Bay was in jeopardy of losing its lease. (R.p. 999 Line 22 to R.p. 1004 Line 10).

To protect the interests of the East Bay restaurant, Richard and Ted began

negotiations with the Drew family to purchase the property from them. (R.p. 1002 Line 20 to R.p. 1003 Line 5). However, while those negotiations were on-going, and unknown to anyone else, Laurence approached the Drew family and made offers to buy the property for himself. Although Laurence knew that Richard and Ted were attempting to buy the land to protect the interests of the restaurant, Laurence did not disclose to Richard or Ted or to any other member that he was also seeking to purchase the property. In the final analysis, and even though Laurence had offered a higher purchase price for the land, the Drew family sold the land to Richard and Ted, although for a higher price than had been previously offered. (R.p. 1003 Line 6 to R.p. 1004 Line 10).

Laurence would not admit in his testimony at trial that his attempted purchase of the East Bay property was disloyal to the LLC, stating instead that it was “a good business deal”. When asked why he did not inform Richard and Ted of his overtures to purchase the land, his response was, “why would you tell your competitors?”. (R.p. 720 Lines 18-25).

Because of the personality and business friction existing between Richard and Ted on the one hand, and Laurence on the other, Laurence was not thereafter invited to participate in any of the additional restaurants formed after Boathouse at East Bay. (R.p. 1007 Lines 4-25).

In 2009, Richard Stoney and his then wife, Lori Stoney, were separated and a divorce action had been filed by Lori. The Stoney divorce trial was removed from Charleston to Orangeburg for trial before a Family Court judge there. One of the issues in the Stoney divorce trial was the equitable division of property, a principal asset of which was the Boathouse at Breach Inlet restaurant. Lori Stoney was seeking an order of the Family Court awarding the Breach Inlet restaurant to her as a part of the Court’s equitable division of the

marital assets.

In support of Lori's case, she called upon Laurence to testify. Although Laurence testified that he had been subpoenaed to appear, he nevertheless admitted that he had voluntarily appeared with Lori at her lawyer's office to prepare for his testimony. (R.p. 299 Line 21 to R.p. 301 Line 5). At trial, Laurence testified that he would not object to the award of Breach Inlet to Lori as a marital asset, or to the hiring of Charleston restaurateur Bill Hall to manage the restaurant. (R.p. 728 Line 13 to R.p. 729 Line 24). In that trial, Laurence also testified that the "crux of the matter" with Richard was "where is my money?" (R.p. 729 Line 25 to R.p. 730 Line 22). This was referring to his constant refrains, complaining to his lack of distributions as a member of the Boathouse at Breach Inlet, LLC.

In similar context, when asked at trial before the Trial Court when his relationship with Richard began to deteriorate, Laurence testified that it was when the distributions stopped coming. (R.p. 726 Lines 6-15). Although he did not file this action until 2015, Laurence testified that he had suspected Richard of "robbing Peter to pay Paul" as long ago as 1999. (R.p. 323 Line 16 to R.p. 324 Line 8; R.p. 361 Line 20 to R.p. 363, Line 1).

Laurence Stoney's ship chandler company also does business with some of the same purveyors who supply food to the Boathouse at Breach Inlet restaurant. (R.p. 707 Line 10 to R.p. 708 Line 16). Laurence was examined at trial about his communications with the food purveyors in common, which included Limehouse Produce and US Foods, about the credit worthiness of Beach Inlet. He conceded in his testimony that he had corroborated with the purveyors the credit problems that he believed Breach Inlet was encountering. When challenged about those communications and their effect on Breach Inlet, Laurence's response was "it was the truth." He also conceded that such a conversation "maybe it would be

disloyal” to Breach Inlet. (R.p. 366 Line 4 to R.p. 367 Line 18; R.p. 714 Line 4 to R.p. 716 Line 14).

Ted Stoney testified about numerous complaints and threats that Laurence had made. He recalled a specific conversation in June of 2010 in which Laurence complained that he was not getting his fair share of distributions from the restaurant, and that “Boathouse at Breach Inlet was subsidizing some of the other entities.” In that same conversation Laurence had repeated his allegation that Breach Inlet was “slow in paying its bills”. (R.p. 835 Line 16 to R.p. 836 Line 12).

Ted described a conversation with Laurence in the back bar of the Carolina Yacht Club shortly before this case was filed in 2015. After complaining to Ted about a dispute relating to the adjoining properties each of them own in rural Berkeley County, Laurence told Ted that Richard “had been stealing from him...he had been taking money from the Boathouse at Breach Inlet to support the other restaurants.” Ted further testified: “And I will never forget his last few words to me.” “I’m going to get Richard. I’m going to turn his world upside down.” Ted described the conversation as “very intimidating”. “I remember that quite vividly because I was personally shaking after the confrontation.” (R.p. 1023 Line 10 to R.p. 1024 Line 15; R.p. 1028 Line 5 to R.p. 1029 Line 5).

Ted Stoney’s testimony is notably credible, particularly because of his other testimony at trial, expressing candid criticism of his brother’s personal spending habits.

Plaintiff’s accounting expert concluded that the Boathouse at Breach Inlet had sustained a loss of \$4,194,264.66 representing liabilities owned by Crew Carolina in the “due to/due from” category previously described. Another liability of \$42,835.19 is owed by Richard Stoney individually in the same “due to/due from” category. (R.p. 627 Lines 1-14;

R.p. 628 Lines 3-9; R.p. 879 Line 17 to R.p. 881 Line 3). Significantly, and although Plaintiff's expert was paid \$80,000.00 (R.p. 628 Line 17 to R.p. 629 Line 12) and studied three million bits of data for the case. (R.p. 548 Line 14 to R.p. 549 Line 16). In the final analysis he utilized the identical sums openly reported by Boathouse at Breach Inlet on its balance sheet as owed by Crew Carolina and Richard Stoney, respectively. (R.p. 627 Line 5 to R.p. 628 Line 12).

Laurence Stoney purports to bring this action as a "class of one". The parties have stipulated that no other member of the LLC is similarly situated. Although there are three other 5% members, the distinctive difference between Laurence Stoney and every other member, including the other 5% members, as he testified at the preliminary hearing on standing, is that all other members had received disproportionately greater distributions than he. The single distinguishing fact that makes Laurence Stoney a "class of one" is disproportionate distributions. In the preliminary hearing on standing, he testified that the factual distinction between him and every other member is they got distributions when he did not, "that is my stance". (R.p. 333 Line 11 to R.p. 334 Line 18; R.p. 364 Lines 1-9). This case has always been about Laurence Stoney's distributions, and nothing else.

As previously observed, Laurence Stoney has paid his forensic accountant \$80,000 for his work in this case. Although no testimony was offered at the February, 2020 trial relating to attorney fees paid by Laurence, he testified in the Preliminary Hearing in December of 2018 that he had then paid about \$200,000.00 in fees and expenses as of that date. In that hearing, Laurence testified that he "didn't care if it costs more than that. I'm going to keep paying until we get this thing straightened out". (R.p. 296 Lines 8-25).

Notwithstanding the undisputed evidence of the loss to the Boathouse at Breach Inlet,

LLC, not a single member other than Richard Stoney's former wife Lori supports Laurence's lawsuit. (R.p. 699 Line 12 to R.p. 700 Line 14). Laurence holds a 5% interest and Lori holds a 5% interest. Therefore, 90% of the membership of the Boathouse at Breach Inlet, LLC oppose this lawsuit. It should be noted that, although Lori also holds a 5% interest in trust for Croft Stoney, the daughter of Richard and Lori, Croft, who is now emancipated and in college, testified at trial that she does not support this lawsuit brought by Laurence. (R.p. 893 Line 2 to R.p. 894 Line 17).

Laurence Stoney was not invited to participate in future restaurant LLC's after 1999 because it was not reasonably practicable for him to do so in light of the contentious relationship between Richard and Laurence, as manifested by Laurence's attempts to buy the East Bay property, his testimony against Richard in the divorce trial, his criticisms of Breach Inlet to food purveyors, and the obvious distrust between them. (R.p. 1029 Line 24 to R.p. 1030 Line 18). In his testimony at trial, Laurence candidly testified, "I don't want to be in the restaurant business with Richard"; (R.p. 702 Lines 17-25) and although it would be difficult but not impossible for them to continue as members together, he agreed it would not be practicable: "that's a good term". (R.p. 703 Lines 10-16).

Likewise, both Richard and Ted testified that it would not be reasonably practicable to carry on the business of the Boathouse at Breach Inlet with Laurence as a member. (R.p. 745 Line 1 to R.p. 746 Line 6) (R.p. 1029 Line 24 to R.p. 1030 Line 18).

In the Preliminary Hearing on standing, heard December 13-14-2018, Lori Stoney, Richard's ex-wife and 5% member of The Boathouse, testified that after she had been served with a subpoena in this case by Respondent's counsel to produce documents, she consulted with attorney McQuillan, who is presently Respondent's attorney in this case, because she

had also previously consulted with Mr. McQuillan about issues relating to The Boathouse at Breach Inlet. Although Ms. Stoney denied colluding with Appellant to file this lawsuit, she did admit to consulting with attorneys McQuillan and his partner Scott Barnes about the “disparate treatment of the members” of The Boathouse at Breach Inlet.

In that same preliminary hearing, Laurence Stoney admitted to communications with Lori Stoney before he filed this lawsuit. Lori emailed Laurence on March 9, 2016, asking who his accountant would be for this case, and then asked “What’s the latest? Still no word on the appeal, unfortunately.” (Referring to the pending appeal of her divorce case.) Laurence’s reply was: “The usual foot dragging crap. Last I heard, the accountants were going through the books. Comment from all – this is after they looked at the books, Dick is toast.” (emphasis added). (R.p. 321 Line 8 to R.p. 322 Line 15; Ex. 10, R.pp. 1120, 1121). “Dick”, in Laurence’s email, is Respondent Richard Stoney; and “Dick is toast” is a reference that Laurence casually dismissed in his testimony as “(no) acrimony...just a phrase”. (R.p. 322 Lines 14-23).

ARGUMENTS

I. INTRODUCTION.

The opening paragraphs of Appellant’s arguments propose that the Trial Court’s Order be reversed because of “the undisputed harm (suffered by) the company”, and suggesting that the Trial Court “excused” breaches of fiduciary duty by Richard Stoney.

Appellant’s opening argument improperly places the cart before the horse. Rule 23(b)(1) of the SCRCP expressly provides: “the derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or

association.” Notwithstanding evidence of harm or loss to the corporation, therefore, the derivative lawsuit may not proceed -- it “may not be maintained”-- if it is determined that the putative plaintiff cannot fairly and adequately prosecute the interests of the corporation. In the case law, the competence of a putative plaintiff to bring the action under 23(b)(1) is recognized as a form of “standing”, as discussed below.

Appellant’s arguments about the harm suffered by the corporation therefore seek to obfuscate Laurence Stoney’s personal agenda in filing this case. The heart of the case presently centers upon the question of Laurence’s standing. The Trial Court properly held that he lacks standing, for the reasons discussed below. Accordingly, the case need go no further.

II. THE TRIAL COURT PROPERLY HELD THAT LAURENCE STONEY LACKED STANDING TO PROSECUTE A SHAREHOLDER DERIVATIVE SUIT PURSUANT TO RULE 23(b)(1) SCRCP.

It is a prerequisite of a stockholder derivative lawsuit brought under Rule 23 of the SCRCP that the putative plaintiff must “fairly and adequately represent the interests of the stockholders or members similarly situated in enforcing the right of the corporation or association”. Rule 23(b)(1), SCRCP. Although no South Carolina cases have discussed to any extent the factors weighing on the “fair and adequate representation” requirement, treatises and the case law elsewhere are universal in setting down the relevant considerations.

Perhaps the most substantial and frequently cited source of authority in the area of shareholder derivative litigation is contained in the federal cases and treatises. In 5 Moore’s Federal Practice-Civil, Section 23.1.09 [1] it is stated: “Rule 23.1(a) (the federal

rule equivalent of SCRCP 23(b)(1)) *provides that a representative plaintiff may only maintain a derivative action if the plaintiff fairly and adequately represents the interests of similarly situated shareholders in enforcing a right of the corporation. Constitutional requirements of due process mandate that absent shareholders are not bound by a judgment in a derivative action unless the named plaintiff is a fair and adequate representative. Because the representative shareholder seeks to protect interests that are broader than his or her own stake in the corporation, the representative stands in a fiduciary relationship with the corporation and the other shareholders.*"

Moore's Federal Practice further describes in Section 23.1.09(3) the standard for evaluating the adequacy of a putative plaintiff's representation. *"For a plaintiff to be a fair and adequate representative, the plaintiff must have the capacity to vigorously and conscientiously prosecute a derivative suit and must not have interests that are antagonistic to those of the other shareholders."*

"In addition, the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation."

"The application of these general principles is highly dependent on the facts of a particular case. The following factors bear on the adequacy of the representative plaintiff:

- 1. Economic antagonism between the representative and the class;*
- 2. The remedy sought by the plaintiff in the derivative action;*
- 3. Indications that the named plaintiff was not the driving force behind the litigation;*
- 4. Plaintiff's unfamiliarity with the litigation;*
- 5. Other litigation pending between the plaintiff and the defendant;*

6. *The relative magnitude of the plaintiff's personal interests in matters beyond the scope of the derivative action, as compared to his or her interests in the derivative action;*

7. *The plaintiff's vindictiveness toward the defendants; and*

8. *The degree of support the Plaintiff received from the other shareholders that he or she purports to represent.”*

“A plaintiff will not be disqualified as a representative merely because of conflicting interests that go beyond the subject matter of the derivative action.”

In support of the factors cited above, *Moore's* cites *Davis v. Comed, Inc.*, 619 F.2d 588, 593-594 (6th Cir.1980). Also cited in support of *Moore's* § 23.1.09 [3]: *GA Enterprises, Inc. v. Leisure Living Communities, Inc.*, 517 F.2d. 24, 26 (1st Cir.1975); *Vanderbilt v. Geo Energy Limited*, 725 F.2d. 204, 207 (3rd Cir.1983); *Larson v. Dumke*, 900 F.2d 1363, 1368 (9th Cir.1990).

In the case of *Smith v. Ayres*, 977 F2d 946 (C.A. 5), the Fifth Circuit Court of Appeals decision cited by the trial court in its order, and argued to the trial court by all parties, and also cited in *Moore's Federal Practice* discussed above, the Court of Appeals affirmed a District Court ruling that the putative plaintiff lacked the requisite standing to maintain a shareholder derivative lawsuit. The Court's reasoning was almost exclusively based upon the evidence of plaintiff's personal vindictiveness toward the defendant.

In that case, Smith was a “class of one” plaintiff in a closely held corporation, who sought to sue Ayres, the corporation's attorney, in the name of the corporation. Observing that Smith, unlike the plaintiff in the cited case of *Larson v. Dumke*, 900 F.2d 1363 (9th Cir.1990), was not the individual who created, nurtured and operated the corporation from

inception; and Smith retained only a negligible interest in the corporation, the court observed that “a Plaintiff in a derivative action owes the corporation his undivided loyalty. The Plaintiff must not have ulterior motives and must not be pursuing an external, personal agenda.” 977 F.2d. 949. The court further observed that Smith had “an unmistakable personal and professional dispute with Ayres. His brief is peppered with vituperative epithets, pugilistic metaphors, and descriptions of Ayres as ‘satanic’ and ‘evil’”. Smith was quoted as saying he is committed to “ruin ten years of (Ayres’ life) because I’m going to make sure that Pat Holloway prevails...and he – if he things this is even the end of the tenth round, I mean we’re – we’re not even in the first round.”. 977 F.2d at 949.

Smith’s words in *Smith v. Ayres* are eerily reminiscent of Laurence Stoney’s words in this case as recounted by Ted Stoney, describing the conversation he had with Laurence in the back bar of the Carolina Yacht Club in 2015, shortly before this case was filed:

“Then he launched into a tirade about Richard and the same thing, the money being used for Breach Inlet for other entities and he wasn’t getting his fair share and he needed his money and Richard was skimming, you know, money from one to pay for the other. And then he said, I’m going to get Richard. I’m going to turn his whole world upside down.” (R.p. 379 Line 6 to R.p. 380 Line 9; R.p. 1028 Line 5 to R.p. 1029 Line 5). This was “several months prior to” the filing of this case. (R.p. 380 Lines 16-19).

The case of *Davis v. Comed, Inc.*, supra, cited above in *Moore’s Federal Practice*, which was also cited by the trial court in its order, and argued to the trial court by both parties, is particularly instructive as the source case for the eight factors in evaluating the quality of standing, quoted above in *Moore’s*. See 619 F.2d at 593, 594. *Davis* is extensively cited in derivative cases from multiple jurisdictions.

The *Davis v. Comed* court expressly rejected earlier decisions which held that a shareholder's motive in bringing the derivative action was immaterial to his right to sue in Federal Court if the corporation had been injured by the wrongful act of an officer or director, because "in prosecuting a derivative claim, a shareholder acts in the stead of the corporation, as a corporate surrogate seeking vindication of a corporate right." 619 F.2d at 593. Thus, "should any 'ulterior' motives of plaintiffs which are inimical to their ability to adequately represent the other shareholders become manifest, the court is free to make appropriate adjustments." *Id.*

"The proceeds of the action belong to the corporation and it is bound by the result of the suit. The heart of the action is the corporate claim." *Davis v. Comed, Inc.*, *supra*, 619 F.2d at 593 citing *Ross v. Bernhard*, 396 U.S. 531, 538-39, 90 S. Ct. 733, 738, 24 L.Ed.2d 729 (1970). The assurance demanded by due process and Rule 23 is that the representative party in a class action be free of any interests which holds the potential of influencing his conduct of the litigation in a manner inconsistent with the interests of the class." *Id.* citing *Seiden v. Nicholson*, 69 F.R.D. 681, 687 (N.D.Ill. 1976); *Schulman v. Ritzenberg*, 47 F.R.D. 202, 207 (D.D.C.1969).

As recounted in the Statement of Facts of this Brief, evidence of Laurence's vindictive animus consists of far more than his overt threat made to Ted before filing this lawsuit which is recounted above. There was the meeting in Richard's law office as early as 1999, in which Laurence threw a fit over the prospect that Richard would be paid a car allowance, and that the paintings hanging at Boathouse on East Bay would belong to Richard.

There was Laurence's backstabbing attempt to surreptitiously buy the property on which Boathouse on East Bay was located, knowing that Richard and Ted were negotiating to buy the property in order to protect the interests of the company. Laurence's intervention caused Richard and Ted to pay a higher price for the land. When asked why he did not tell them he was also trying to buy the land, Laurence responded, "why would you tell your competitors?" (Emphasis added.)

Further, there was the evidence that Laurence denigrated the credit standing of The Boathouse at Breach Inlet to its food vendor creditors.

In Richard's divorce trial with his wife Lori, Laurence voluntarily met with Lori and her lawyers, and testified at trial that he would support the removal of Richard and the substitution of Charleston restaurateur Bill Hall as Manager of The Boathouse at Breach Inlet.

Laurence's interests in filing this case have always been to seek payment for the distributions he believes were not fairly paid to him. In the Family Court Hearing in Orangeburg, as well as in the trial of this case before Judge Newman, Laurence agreed that the crux of this case is "where is my money?" (R.p. 303 Line 13 to R.p. 304, Line 11; R.p. 364 Lines 1-4).

This evidence conclusively supports the Trial Court's findings that Laurence's filing and prosecution of this case was for the purpose of recovering his distributions, notwithstanding Laurence professing that it was brought to restore funds to the company, and that the suit's purpose was further to vindicate Laurence's personal animus for his cousin Richard.

Perhaps the strongest evidence to support the conclusion that this case is about Laurence's distributions is his rationale for the proposition that he is a "class of one"; that no other member is "similarly situated".

Laurence holds a 5% interest in The Boathouse at Breach Inlet, LLC. But there are three other 5% members, as well: Lori Stoney, Croft Stoney (whose 5% interest is legally held by Lori as Trustee), and Richard Stoney, III (whose 5% interest is held in trust by his Uncle Ted). Why and how is Laurence's 5% interest different from the other three?

The difference between them is that the others received distributions when Laurence did not. He testified:

Q. Okay. So you are a class of one?

A. Correct.

Q. Right? Now, is it correct that what makes you a class of one is that everybody's got distributions when you did not?

A. They enjoyed distributions in one form or another and I did not.

Q. And you did not. So the distinction in the classes has to do with the distributions; isn't that correct?

...

Q. So the factual distinction between you and the rest of them is, they got distributions and you didn't, isn't that right?

A. That is my stance, yes.

(R.p. 333 Line 11 to R.p. 334 Line 4)

Thus, the very essence of Laurence's status as a plaintiff in this case centers on his distributions; the fact that he received less in distributions than did others, including the

other 5% members. Laurence's distributions comprise his central purpose in filing this case.

In his Brief, Appellant pays only lip service to the essence of Trial Judge Newman's ruling that Laurence cannot fairly and adequately represent the interests of the company because of his personal vindictiveness toward Richard, and because of his underlying motivation to recover his distributions. Appellant in his Brief (pages 19-23) relies upon and cites the case of *Walbeck v. The I'on Company, LLC*, Op.No.5588 (Ct.App. filed August 8, 2018; Shearouse Advance Sheet No. 32 at 125) ("*Walbeck I*"), for the proposition that the test for standing required to prosecute a shareholder's derivative lawsuit is only "that the representative will vigorously protect the interests of the company through qualified counsel".

Appellant, in his Brief, then dismisses the trial court's reliance upon *Davis v. Comed*, supra and *Smith v. Ayres*, supra, as "out of circuit Federal cases", apparently to suggest that those cases carry no weight in South Carolina courts on the standing issue now before this Court.

In the first place, as Appellant acknowledges in his Brief, the opinion in *Walbeck I* was withdrawn by the Court of Appeals, and its replacement decision, *Walbeck v. I'on Company, LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct.App. 2018) ("*Walbeck II*"), as Appellant also concedes, does not address at all the standing issue discussed in *Walbeck I*.

Additionally, and more significantly, the standing criteria from *Walbeck I*, argued by Appellant to be that "the representative will vigorously prosecute the interests of the company through qualified counsel", cites for the proposition the case of *Runion v. U.S. Shelter*, 98 FRD 313, 317, a 1983 South Carolina District Court decision. However,

Runion was a Rule 23 class action lawsuit and was not a shareholder derivative lawsuit. For a multitude of reasons, therefore, the *Walbeck I/Runion* criteria argued by Appellant simply do not apply to this case, nor to any shareholder derivative lawsuit, for that matter. Appellant's reliance on *Walbeck I* is misplaced.

Appellant's casual dismissal of *Davis v. Comed*, supra, as an "out of circuit Federal case" disrespects the stature of the case. *Davis* has been cited in no fewer than 68 Federal Court opinions and 42 State Court opinions, as well as in law review articles and, as before discussed, in legal treatises including *Moore's Federal Practice*. It is fair to say that the *Davis v. Comed* standing criteria are universally accepted and applied in American jurisprudence.

At the same time, *Davis v. Comed*, as well as its progeny, recognizes that no single factor is determinative of the standing issue, and that each case must be assessed on its own facts. As articulated in *Davis*, although it is frequently a combination of factors which leads a court to conclude that a Plaintiff does not fulfill the requirements for standing, "often a strong showing of one way in which the Plaintiff's interests are actually inimical to those he is supposed to represent fairly and adequately, will suffice in reaching such a conclusion". *Davis v. Comed*, supra, 619 F.2d.593. (Emphasis added.)

Without regard, however, to any rigid checklist of criteria, the essence of standing requires that the representative plaintiff be free to act in vindicating the corporate interests without extraneous entanglements; that is to say, "unfettered" by them. As demonstrated by the evidence in this case, Laurence Stoney is fettered by his thirst to recover distributions that he believes were wrongfully withheld from him. More significantly,

Laurence seeks vengeance against his cousin Richard, as expressed by his own words: “I’m going to get Richard. I’m going to turn his world upside down”.

The Trial Court’s ruling, that Laurence is not a fair and adequate representative because he is acting out of vindictiveness, spite, and for personal gain, must be affirmed.

Appellant’s arguments about the harm suffered by the corporation therefore seek only to obfuscate Laurence Stoney’s personal agenda in filing this case.

Credibility of the Witnesses; Appellant’s Personal Agenda.

Trial Judge Newman heard the evidence in this case in two lengthy and contested hearings, spanning a total of five days. (R.pp. 273-451; R.pp. 502-1108). Most significantly, the Trial Judge had the full opportunity to assess the evidence and the credibility of the witnesses. Judge Newman heard testimony from the three Stoney cousins, Laurence, Richard, and Ted, in both of the hearing sessions.

No appellate record can begin to replicate the credibility of a witness, his demeanor on the witness stand, the manner in which he speaks the words later appearing in a printed transcript.

At times, however, the printed words suggest the demeanor of the witness as he expresses them. For example, in the first Hearing in this case held December 13-14, 2018, Laurence testified that he had paid “around \$200,000” in fees and costs as of that date to prosecute this case; and he agreed that in his deposition he had testified “I don’t care if it costs more than that, I’m going to keep paying until we get this thing straightened out.” (R.p. 296 Lines 8 to R.p. 297 Line 2). Although Laurence did not testify about his fee payments in the 2020 Hearing, his expert accountant, Mr. Hollerbach, testified that as of that date he alone had been paid \$80,000.

Laurence admitted that he had accused Richard of “skimming” funds and that he had asserted that to a multitude of people: “I have no problem with telling the truth.” (R.p. 292 Line 19 to R.p. 293 Line 15). He admitted that he had concealed from Richard and Ted his efforts to buy the East Bay property, while Richard and Ted were also attempting to buy it to protect the interests of the company, and stated: “Why would you tell your competitor?” (R.p. 720 Lines 18-23). (Emphasis added.)

Although professing to be “close” with Richard, Laurence testified that their relationship changed “when the checks from Boathouse at Breach Inlet stopped coming in”. (R.p. 285 Lines 9-20; R.p. 726 Lines 6-15).

Laurence also testified, “Listen, Capers, I had suspicions and told you I’ve had suspicions. But I never had any proof. And it took lawyers in courtrooms in order to get the proof. Now can we dispense with a lot of this repetition?” (R.p. 733 Lines 3-13). And, “Come on, man. Bring that letter out and I will read that sentence to you again so maybe you will understand why I didn’t do anything. I trusted my first cousin.” (R.p. 734 Lines 4-10). And, “What difference does it make if it’s (Richard’s office) physically near me? What difference does that make, Capers? Tell me about it. Q: How long would it take you to walk from your office to Richard’s office? A: It’s very close, Capers. We’ve already established that. I want you to tell me what the difference is between me and Los Angeles, California.” (R.p. 742 Lines 1-9) (This exchange was in reference to questions why Laurence did not accept Richard’s offer to examine the business records in Richard’s office.).

Laurence was questioned about an email he wrote to Richard on December 17, 2014 (Exh.6; R.p. 1114, 1115) in which he told Richard, “make your best offer” to buy him

out. (R.p.315 Line 16 to R.p. 316 Line 4). In part his answer was, “Good God, how many times are you going to ask the same question?” (R.p. 341 Line 25 to R.P. 342 Line 1).

The testimony of Laurence Stoney recited above suggests the arrogance and the hostility he openly expressed in his demeanor on the witness stand. While openly professing love for his first cousin Richard, Laurence was at the same time backstabbing him by slandering his name to their social friends, by denigrating the credit standing of the Boathouse Restaurant, and by surreptitiously bidding against Richard and Ted for the East Bay property.

Appellant attempts to discredit the evidence of his malevolence toward Richard by deflecting that evidence: it (the evidence) is not, Appellant argues, “possible negative conduct toward the company”. (Brief at pg. 22). In other words, Appellant argues that the magnitude of the evidence of Laurence’s improper motivations, because they are not “directed toward the company”, should be disregarded.

Appellant’s argument overlooks the reality that The Boathouse at Breach Inlet, LLC is predominantly a family, closely held LLC. But for Greg Holmes and the non-voting interest of Michael Cox, the members are all Stoneys. For all intents and purposes, Laurence’s misconduct directed at The Boathouse at East Bay property was Stoney misconduct directed at other Stoneys, who were also members of the Boathouse at Breach Inlet. Laurence’s attempt to buy the East Bay property was more than deceitful. His attempts to remove Richard as Manager of Breach Inlet, in collusion with Lori in the divorce case, was “negative conduct toward the company”. His personal agenda in filing this action because he had not been paid his fair share of the distributions is “negative conduct toward the company.” His vindictive agenda, to retaliate against Richard,

“whatever the cost”, is negative conduct toward the company. And his denigration of the company’s credit standing is certainly, as Appellant seems to concede, “negative conduct toward the company”.

Appellant carries the burden of persuading this Court in its *de novo* review of the Trial Record that Judge Newman’s factual conclusions must be reversed. Appellant has failed to do that.

Perhaps Judge Newman’s factual characterization of Laurence’s misconduct as breaching an implied covenant of good faith and fair dealing should have been more appropriately characterized as evidence of his vindictiveness, his spite, and his personal agenda to recover his distributions; and to have another party pay the fees and costs of that effort. The findings should certainly not be disregarded, as Appellant urges this Court to do.

III. THE TRIAL COURT DID NOT CONCLUDE THAT LAURENCE COULD HAVE BROUGHT THIS ACTION IN AN INDIVIDUAL CAPACITY.

Appellant’s lead argument on the standing issue is that the Trial Court erred by holding Laurence could have brought this derivative action in his individual capacity. The argument is a red herring. The Trial Court did not hold that Laurence could bring a shareholder derivative suit in his individual name. Rather, and because the Trial Court also found that Laurence’s underlying motivation was for personal gain to recover his own distributions, the Court found that Laurence could have filed suit to recover those distributions under Code § 33-44-410. That is the Code section cited by the Court in its Order. The Court’s finding has nothing to do with a derivative suit, but rather provides the

circumstances under which Laurence as an individual may sue for his personal claim of loss. Laurence chose not to pursue that course of action.

IV. THE TRIAL COURT PROPERLY ORDERED THE DISSOCIATION OF LAURENCE STONEY'S INTERESTS IN THE LLC.

A. The evidence at Trial was overwhelming that it is “not reasonably practicable” to carry on the business with Laurence as a member.

“The term ‘dissociation’ refers to the change in the relationships among the dissociated member [of an LLC], the company and the other members caused by a member's ceasing to be associated in the carrying on of the company's business.” *Park Regency, LLC v. R&D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012), citing S.C. Code § 33-44-601. “[A]n action for dissociation is [...] equitable in nature.” *Id.* See also *Ballard v. Robinson*, wherein the South Carolina Supreme Court affirmed the trial court’s decision, ordering a Company to buy the stock of a minority shareholder who had filed a derivative action against the majority. In rendering its decision, the Supreme Court noted that “[a] shareholder’s derivative action, as well as stockholder oppression, is one in equity.” 399 S.C. 588, 733 S.E.2d 107 (2012).

The South Carolina Uniform Limited Liability Company Act of 1996 (the “Act”) sets forth the procedure for dissociation of LLC members and buyout of their membership interests. Specifically, S.C. Code § 33-44-601(6)(iii) states:

Events causing member’s dissociation. A member is dissociated from a limited liability company upon the occurrence of any of the following events: [...] (6) on application by the company or another member, the member’s expulsion by judicial determination because the member: [...] (iii.) engaged in conduct relating to the company’s business which make it not reasonably practicable to carry on the business with the other member. [Emphasis added]

In addition, § 33-44-702 of the Act authorizes the Court to determine the fair value of a party's distributional interest, setting forth the factors that the Court should consider.

The Boathouse at Breach Inlet, LLC Operating Agreement authorizes the Company to buy out a Member's interest upon their dissociation from the Company. Section 3.24 of the Operating Agreement sets forth the agreement of the parties:

§ 3.24 Buyout of disassociating member.

If, following the death, retirement, resignation, **expulsion**, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company, a Majority in Interest of the remaining Members vote to continue the Company, **the disassociating Member shall be entitled to receive any distribution which the disassociating Member was entitled to receive prior to the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company.** Subject to any Agreement of the Members otherwise, **the Member shall additionally receive the fair value of the Member's Membership in the Company as of the date of the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any other event which terminates the continued Membership of a Member in the Company determined as provided in Section 33-44-701 of the Act.** The date of payment shall be made pursuant to the provisions of Section 33-44-701 (b) of the Act. [Emphasis added]

In the case of *I.E. Test, LLC v. Carroll*, 226 NJ 166, 140 A.3rd 1268 (S.Ct. N.J., 2016), cited by all parties to the Trial Judge, the New Jersey Supreme Court reversed an order of dissociation citing, among other decisions the Colorado case of *Gagne v. Gagne*, 2014 COA 127, 338 P3d 1152 (Ct.App, Colo. 2014), and articulating a seven factor test to determine whether the conduct of a member "makes it not reasonably practicable to carry on the business with the member", as follows:

- a. The nature of the LLC member's conduct relating to the LLC's business;
- b. Whether, with the LLC member remaining a member, the entity may be managed so as to the promote the purposes for which it was formed;
- c. Whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals;
- d. Whether there is a deadlock among the members;
- e. Whether, despite that deadlock, members can make decision on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions;
- f. Whether, due to the LLC's financial position, there is still a business to operate; and
- g. Whether continuing the LLC with the LLC member remaining a member is financially feasible.

The New Jersey Court in *I.E. Test* emphasized that every case is fact specific, requiring an analysis of the record using the factors, and other considerations raised by the record, with no requirement that all factors support expulsion and no single facts determining the outcome. 140 A.3rd at 1279.

The phrase "not reasonably practicable to carry on the business" with the member is not defined in the statute. New Jersey's statute and South Carolina's contain almost identical provisions, both derived from uniform acts. It is a prospective, forward-thinking standard, looking to the future of the operations of the business *I.E. Test*, 266 NJ at 181-182.

As for the phrase “not reasonably practicable”, the *I.E. Test* court wrote: “interpreting the statutory text, ‘we ascribe to the statutory words their ordinary meaning and significance.’ (Citations omitted). Black’s Law Dictionary defines ‘reasonable’ to mean ‘fair, proper or moderate under the circumstances; sensible.’ *Black’s Law Dictionary*, 1456 (10th Edition, 2014). It defines ‘practicable’ to denote ‘reasonably capable of being accomplished; feasible in a particular situation.’ Thus, the pivotal language suggests that it must be unfeasible, despite reasonable efforts, to keep the LLC operating while the disputed member remains affiliated with it.” 226 NJ at 182.

Analyzing the Boathouse case in light of the seven factors set forth in *I.E. Test*, where the court need not find that all factors have been established (see *Gagne*), it is apparent that dissociation was properly ordered.

From the testimony of Richard Stoney and Ted Stoney, and Laurence Stoney himself, in the bifurcated hearing on standing, it is apparent that Laurence is an obstructionist and an outlier. He has been critical not only of Richard Stoney, but, more importantly, of the operation of the restaurant, itself, causing economic harm. Whereas Laurence had the constitutional right to file this lawsuit, when he did so he also released that fact to the newspapers, which published derogatory reports, not so much about Richard Stoney, but about the restaurant and its operations. The newspaper article is of record from the bifurcated hearing on December 13-14, 2018.

Dissociation of Laurence Stoney from the Boathouse does not deprive him of a property right or deny any benefits. Rather, he is entitled to fair compensation for his interest, which may be determined at court hearing.

Appellants argued to the Trial Court, and now argue to this Court, the impropriety of ordering dissociation based upon the fact that Laurence filed this derivative lawsuit. They now argue: “it would be nonsensical to require the expulsion of a Member simply for seeking a statutorily guaranteed right to redress the misconduct to the LLC’s Manager.” The argument borders on the disingenuous. It is not the filing of the lawsuit by Laurence that justifies dissociation in this case. Rather, it is the evidence of his underlying bad faith and dishonest misconduct that supports the Trial Court’s order of dissociation.

The statutory standard, enumerated in Code § 33-44-601(6)(iii) is whether the member “engaged in conduct relating to the company’s business which makes it not reasonably practicable to carry on the business with the other members”. The examples of Laurence Stoney’s misconduct in his dealings with the company and its members have been recounted in great detail in the previous sections of this Brief. One of the more telling circumstances, early in the relationship, relates to the reasons why Laurence was not invited to participate in other restaurant ventures after the Boathouse on East Bay experience. As Ted Stoney testified, Laurence was not invited to participate in any of the other restaurant ventures after Boathouse on East Bay because of his disruptive nature: “Due to the ongoing problems that he was causing for the restaurants with personnel, vendors, bankers, you name it, friends, general public, Richard did not want him to be involved in any other restaurants. (R.p. 377 Line 11 to R.p. 378 Line 2; R.p. 1007 Lines 8-25).

But the most conclusive evidence to support the Trial Court’s finding that it is not reasonably practicable for the LLC to continue business with Laurence as a member is the direct testimony presented by Laurence, Ted, and Richard, themselves.

Laurence testified: "...I don't want to be in the restaurant business with Richard. Okay." (R.p. 702 Lines 24 and 25); and: "Q: It's not reasonably practicable for you and Richard to continue together in the restaurant business is it, Laurence? A: It would be difficult. Not impossible, mind you but... Q: But not practicable? A. Not practicable, that would be a good term." (R.p. 703 Lines 10-16). (Note: the printed transcript at the question on R.p. 703 Line 10 correctly uses the term "practicable". The question as reported on Line 15 uses the term "practical", as does the answer on Line 16. The undersigned suggests that this is an error in transcription, and that the word "practicable" was used throughout. Nevertheless, the terms are synonymous in the context of the testimony.)

Ted Stoney testified: "As Richard stated earlier, his intention was to allow the original investigators (*sic*: "investors") to continue participating in the restaurants as he built his plan portfolio. Unfortunately, by the time the next restaurant which was the Lake Julian in Asheville, Laurence was already such an antagonistic and destructive member to the two existing LLC's that he was – he wanted to, but he was not invited to participate in Lake Julian. "Q: Do you believe that it is reasonably practicable to continue the operation of The Boathouse at Breach Inlet with Laurence Stoney as a Member? A: Absolutely not." (R.p. 1030 Lines 5-18).

Richard Stoney testified: "Q: Did you and Ted end up buying the building? A: We did. And as a result of Laurence interfering, Ted reminded me – or some notation, I forgot how much. We spent – we ended up \$100,000 to \$200,000 more for the building. Because the Drews said if you don't do it, they're going to buy it. And I think Bill Craig is the one that brought some sensibility to the two Drew brothers. Q: Richard do you believe that it is

reasonably practicable to continue the operation of the Boathouse at Breach Inlet with Laurence continuing as a Member.” (Objection Colloquy here not repeated.) Q: Do you believe it is reasonably practical (*sic*, practicable.) to continue the operation of The Boathouse at Breach Inlet with Laurence Stoney as a member? A: Forward in time, I absolutely do not. And Laurence obviously agreed yesterday. Q. Is it feasible to keep the LLC operating while he is a member? A: No.” (R.p. 1004 Lines 2-17; and R.p. 1005 Lines 12-19).

This unanimous consensus between the three Stoney cousins is a rarity in this case. There can be no more overwhelming evidence than their unified testimony, particularly from Laurence, that it is not reasonably practicable for the LLC to continue with him as a member.

The Trial Court’s Order of Dissociation must be affirmed.

B. Appellant’s argument that the Trial Court’s Ruling of Dissociation is in error because Laurence was not an individual party in the case, is not preserved for appeal.

At no place in the substantial Trial Record of this case did Appellant assert the issue he now argues, that he was not an individual party to the action, and therefore the Trial Court erred in granting the Motion to Dissociate against his individual interests.

Rather, that position by Appellant appears for the first time in a terse, single paragraph of his Motion to Alter or Amend filed July 16, 2020. A party may not use a post-trial motion to raise an issue that could be been raised at trial. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995); see also, *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 512 S.E.2D 123 (Ct. App.199).

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus (the Appellate Court) with a platform for meaningful appellate review. *S.C. Coastal Conservation League v. S.C. DHEC*, 380 S.C. 349, 669 S.E.2d. 899 (Ct.App.2008) citing *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). An issue cannot be raised for the first time on appeal. *South Carolina Coastal Conservation League v. South Carolina DHEC*, supra, internal citations omitted. The issue must have been raised to and ruled upon by the trial judge to be preserved for review. Id. An appellate court will not consider issues on appeal which have not been preserved for appellate review. To preserve an issue for appeal, it must be (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. Id. citing *Ulmer v. Ulmer*, 369 S.E. 486, 490, 632 S.E.2d.858, 861 (2006). *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2017) (citing Jean Hoefler Toal et al. Appellate Practice in South Carolina 57 (2d ed. 2002)). Without an initial ruling by the trial judge, a reviewing court would have no foundation on which to evaluate whether an error has been committed. Id., internal citations omitted.

A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not raised. *S.C. Coastal Conservation League v. S.C. DHEC*, supra, citing *Fields v. Regional Medical Center of Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

Thus, it is crystal clear that the issue that Appellant now seeks to raise was not preserved in the Court below.

C. The issue of Richard’s “unclean hands” relating to the Motion for Dissociation is not preserved for Appeal.

Just as the Appellant’s argument that the Order of Dissociation was improper because he was not an individual party in the case was not preserved for appeal, neither is Appellant’s argument preserved that Richard’s unclean hands bar the Order of dissociation. Appellant’s first and only assertion to the Trial Judge that Richard’s unclean hands should bar the Order of dissociation appears in his Motion to Alter or Amend the Court’s Final Order.

As discussed above, a party cannot use a Rule 59(e) Motion to present an issue to the Court that could have been raised prior to judgment but was not raised. *S.C. Coastal Conservation League v. SCDHEC*, supra. As previously written, issue preservation rules are designed to give the Trial Court a fair opportunity to rule on the issues, and thus to provide the appellate court with a platform for meaningful appellate review. *S.C. Coastal Conservation League v. SCDHEC*, supra. Here, the Trial Court was not given that fair opportunity.

As was the case with Appellant’s lament that the Order of dissociation was improper because he was not an individual party, it is likewise clear that Appellant raised the issue of Richard’s “unclean hands” with respect to dissociation for the first time only in his Motion to Alter or Amend.

Respondent concedes that Richard’s “unclean hands” was argued at trial, but only with respect to Richard’s defense of *laches*. It is not sufficient that the argument about “unclean hands” was made generally or as to another issue in the case. As set forth above, to preserve an issue for appeal it must be (1) raised to and ruled upon by the Trial Court,

(2) raised by the Appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. *S.C. Coastal Conservation League v. SCDHEC*, supra (emphasis added).

Richard's "unclean hands" as a bar to the motion for dissociation was neither raised to nor ruled upon by the Trial Court, much less raised by the Appellant to the Trial Court in a timely manner, or raised with sufficient specificity.

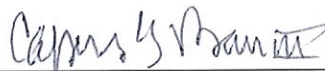
Accordingly, the Trial Judge's Order of Dissociation should be affirmed.

CONCLUSION

After a cumulative five days of trial over a span of two years, the trial judge was eminently qualified to evaluate and to assess the evidence and the credibility of the witnesses. In this Appellate, *de novo* review of the trial court's decision, Appellant has failed to sustain his burden of convincing this Court that the rulings of the Trial Court should be disturbed. The Trial Court's Order should be affirmed in all respects.

Respectfully,

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May 21, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman,
Circuit Court Judge

Case No. 2015-CP-10-05463

The Boathouse at Breach Inlet, LLC, by and through
its member, Laurence O. Stoney, Jr.Appellant,

vs.

Richard S. W. Stoney, individually and as Member-Manager
of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants
and

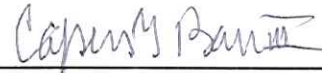
Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr.
and Gregory G. Holmes, Third-Party Intervenors,
of whom

Richard S. W. Stoney, individually and as Member-Manager of The
Boathouse at Breach Inlet, LLC is.....Respondent.

CERTIFICATE OF COUNSEL

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

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May 21, 2021

