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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-23-00998
Appellate Case No. 2021-000365

McMillan Pazdan Smith, LLC, ... Plaintiff-Respondent,

v.

Donza H. Mattison, ... Defendant-Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant, Donza H. Mattison (hereinafter "Ms. Mattison"), by and through her undersigned counsel, hereby submits this Initial Reply Brief to respond to the arguments made in the Initial Brief of Respondent, McMillan Pazdan Smith, LLC (hereinafter "MPS").

As an initial matter, Respondent's assertion in its Introduction (repeated from the first appeal) that Ms. Mattison "had for many years opposed nearly every business decision made by the otherwise unanimous vote of MPS's members," (Br. of Resp., at 1), is not only an unfair characterization, but is also not supported by any competent evidence in the record, especially on a motion for summary judgment. To be sure, Ms. Mattison was not a wall-flower who could easily be pushed around by the managing partners of the firm without question; however, Respondent's portrayal of her as an obstructionist is not accurate or appropriate. Ms. Mattison was a loyal and dedicated member of the firm for over twenty years. (Verified, Amended Answer, Counterclaims, and Third-Party Complaint, at 9, ¶¶ 44, 47).

In addition, as also noted in Appellant's previous appeal, the phrase "otherwise unanimous"[1] is not a recognized concept in either the MPS governing documents or the South Carolina Uniform Limited Liability Company Act of 1996, as amended (hereinafter "LLC Act"), S.C. Code Ann. § 33-44-101 et seq. Pursuant to the MPS's Operating Agreement,[2] certain business decision of the LLC, such as proposed amendments to the Operating Agreement that affect the voting rights or financial interests of a member or that ratify acts taken in contravention of the Operating Agreement,

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[1]See Br. of Resp., at 1, 3.

[2]The original Operating Agreement of MPS dated September 25, 2009 is the only viable operating agreement, at least with respect to any provisions affecting the voting rights or financial interests of the members, because no proposed amendment has ever received unanimous approval of the members. (Verified, Amended Answer, Counterclaims, and Third-Party Complaint, at 9, ¶ 48).

can only be effective if they garner unanimous approval of the members. (MPS Operating Agreement, at 8, Sec. 4.2(d)). Similarly, the LLC Act also requires unanimous consent of all members to perform certain acts, including amending an LLC's operating agreement. S.C. Code Ann. § 33-44-404(c)(1). These important protections exist for the very purpose of preventing minority owners from being taken advantage of by the majority, as Ms. Mattison has alleged occurred in this case. Because it is undisputed that Ms. Mattison never consented to any amendments to the original MPS Operating Agreement, no subsequent attempts to amend the Operating Agreement were effective to change or affect her financial interests or voting rights as a member of the LLC.

Contrary to Respondent's oft-repeated assertions, the Severance Agreement and General Release that Ms. Mattison signed on December 2, 2017 (hereinafter "Severance Agreement") did not set the purchase price of Ms. Mattison's membership units in MPS. Respondent's contention that "MPS offered to purchase her shares for that amount," (Br. of Resp. at 1) (emphasis added), is plainly misleading. The Severance Agreement does not incorporate the valuation provisions of the proposed 2015 Amended and Restated Operating Agreement of MPS, no matter how many times Respondent's counsel repeats that false assertion. What the Severance Agreement actually provides with respect to the valuation of Ms. Mattison's membership interests is the following: "The parties agree that the value of Employee's membership units shall be **mutually** determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by [Mattison's] counsel." (Severance Agreement at 2, ¶ 2(j)) (emphasis added).

Appellant does believe that this language is clear and unambiguous; however, Appellant's

clear reading of this language is markedly different than that proposed by Respondent.

REPLY TO RESPONDENTS' COUNTER-STATEMENT OF THE CASE AND THE FACTS

Appellant takes issue with a number of representations made by Respondent in its Counter-Statement of the Case and the Facts, particularly when the Court must take the facts of record and all inferences from those fact in the light most favorable to Ms. Mattison on an appeal from a summary judgment ruling against her.

First of all, there is no competent evidence in the record to support Respondent's assertion that Ms. Mattison ever sought to use the threat of a derivative action to extort an above-market valuation of her membership interest. It was, and still is, improper for Respondent's counsel to attempt to use the initial demand that Appellant's counsel conveyed on January 14, 2019, in advance of the mediation in this case, as evidence of some improper motivation, because that communication was a confidential settlement discussion under Rule 408, SCRE, and was part of the confidential mediation process, specifically requested by Respondent's counsel prior to mediation. (Second Rule 56(f) Aff., at 8, ¶¶ 28-29). The following testimony from Ms. Mattison's first Affidavit explains the nature of her pre-mediation demand:

> The monetary demand that my attorney made in his letter of January 14, 2019, was based on my expert's evaluation of the latest HDH Advisors' summary report, with adjustments made based on the limited information that we had at that time. I was not seeking any additional value or "premium" on the value of my shares to "purchase my silence" with respect to the possible derivative shareholder claim.

(Mattison Aff. I, at 5, ¶ 15). Similarly, the Second Rule 56(f) Affidavit of [Appellant's] Counsel states, "We based the purchase price in our offer on January 14 to sell Ms. Mattison's shares on the corrected value of HDH's report from the deficiencies noted by our expert witness. Ms. Mattison

has never demanded more than what our expert determined to be the fair market value of MPS based on the defects he noted in the HDH report for YE2017." (Second Rule 56(f) Affidavit, at 8-9, ¶ 29). These two statement are the only evidence in the summary judgment record about the circumstances of the pre-mediation offer. Respondent did not place anything in the record on summary judgment to refute this testimony by Ms. Mattison and her counsel.

Second, Respondent mischaracterizes the substance of the Severance Agreement and General Release, which plainly intended to address only Appellant's potential employment-related claims against MPS and its officers and managing members. Several provisions of the Severance Agreement expressly recognize that Ms. Mattison and MPS were only addressing any possible legal claims relating to her employment with (or separation from) MPS, not those relating to her financial interests as a member/owner of the LLC. The preamble to the Severance Agreement provides, in part, that "the Company and Employee do not anticipate that there will be any disputes between them or legal claims arising out of Employee's separation from employment, but nevertheless, desire to ensure a completely amicable parting and to settle fully and finally any and all differences or claims that might arise **out of Employee's employment**." (Severance Agreement, at 1) (emphasis added). The Severance Agreement expressly carves out the claims Appellant raised in her counterclaims in this case: "***provided, however, that nothing in this Agreement shall have any effect on [Mattison's] rights and remedies relating to her dissociation from the Company.***" (Id. at 5, ¶ 4) (emphasis in original). The Covenant Not to Sue in Section 5 of the Severance Agreement applies only to "the claims released and forever discharged pursuant to this Agreement." (Id. at 5, ¶ 5). The Severance Agreement also expressly provides, "Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interests upon dissociation." (Id. at 8, ¶ 13) (emphasis added). The

actual reason the Severance Agreement "left open the amount that Mattison would be paid for her membership units," was because the 2017 year had not been completed at the time the Severance Agreement was signed in early December 2017, not because "the annual valuation of MPS had not yet been completed for 2017," as asserted by Respondent. (Br. of Resp., at 4). In fact, Ms. Mattison expressly testified in her Affidavit that "I never agreed to submit the question of the valuation of my shares to HDH Advisors or any other appraiser that was paid for solely by MPS." (Mattison Aff. I, at 3-4, ¶ 10). Ms. Mattison had expressly rejected MPS's initial offer to purchase her membership units in November 2017, which offer was based on the HDH Advisors valuation report as of December 31, 2016.

Third, Respondents wrongly assert that "[t]he Severance Agreement . . . provided the method by which Ms. Mattison's ownership share of MPS would be valued and paid in accordance with MPS's 2015 Operating Agreement." (Br. of Resp., at 4). In actuality, the only provision in the Severance Agreement regarding the valuation of Ms. Mattison's membership units is found in the first two sentences of Paragraph 2(j): "The parties agree that Employee's dissociation from Company shall be treated as a Proper Dissociation with no penalty or reduction on the value of her financial rights. The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's counsel." (Id. at 2, ¶ 2(j)) (emphasis added). Importantly, the provision in the Severance Agreement about "mutually" determining value after disclosure of all relevant financial information is not found anywhere in the proposed 2015 Amended and Restated Operating Agreement of MPS, which Ms. Mattison never signed or approved. In other words, the valuation

methodology expressly spelled out in the Severance Agreement is materially different from that provided for in the 2015 Amended and Restated Operating Agreement of MPS.

ARGUMENTS IN REPLY

1. THE CLEAR LANGUAGE OF THE SEVERANCE AGREEMENT SPECIFIED THE VALUATION METHODOLOGY FOR APPELLANT'S OWNERSHIP INTERESTS, WHICH IS VERY DIFFERENT FROM THAT FOUND IN THE 2015 AMENDED AND RESTATED OPERATING AGREEMENT OF MPS.

From the very outset of this case, Respondents misled the circuit judge into believing that the Severance Agreement simply incorporated by reference the provisions in the 2015 Amended and Restated Operating Agreement for valuing a departing member's ownership interests in the firm. A careful reading of the entirety of Paragraph 2(j) of the Severance Agreement reveals that the September 30, 2015 Operating Agreement governs only the procedural aspects of "Proper Dissociation," not the actual valuation of Ms. Mattison's ownership interests upon her dissociation. Respondent repeats the same flawed argument here on appeal.

Ms. Mattison's acknowledgment in her Answer and Counterclaims that the Severance Agreement is a "valid and enforceable contract" does not mean that she agrees with MPS's suggested interpretation of it. Ms. Mattison has consistently rejected the interpretation of the Severance Agreement advanced by MPS, that the valuation of her shares was to be governed by the 2015 Amended and Restated Operating Agreement. The Severance Agreement provides for its own, very specific procedure for valuation of her shares, and such procedure is clearly different than the one spelled out in the proposed 2015 Amended and Restated Operating Agreement. Appellant does believe that the language in the Severance Agreement is "clear and unambiguous" and that its plain meaning, when the contract properly is considered as a whole, favors Appellant, not Respondent.

As noted above, the Severance Agreement contains an express provision about how Ms. Mattison's ownership units were to be valued upon her departure from the firm: "The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's counsel." (Severance Agreement, at 2, ¶ 2(j)) (emphasis added). The Severance Agreement thus mandated a two-step process for the valuation of Ms. Mattison's member units: (1) disclosure of relevant financial records to enable Ms. Mattison and her attorney and financial advisor to make the necessary calculations, followed by (2) good-faith negotiations in an attempt to "mutually determine[]" the value of her membership units.

Unfortunately, Respondent did not comply with this two-step process: it never provided all of the financial information requested by Appellant's counsel, nor did Respondent ever make a good-faith effort with Ms. Mattison to engage in negotiations to "mutually determine" the value of her membership units as required by Section 2(j) of the Severance Agreement. Instead, in early January 2018, approximately five or six weeks before the effective date of Appellant's actual resignation from the firm, which would have been the triggering event of her dissociation, Respondent's then-COO, Chad Cousins, wrote an email to HDH Advisors stating that they were going to need a rush valuation because of the anticipated departure of a member of the firm in early 2018 (i.e., Ms. Mattison). (Cousins Email of Jan. 4, 2018 to T. Hillegass). The unit price from the HDH Advisors valuation report for YE2017 is the amount Respondent ultimately insisted that Ms. Mattison accept for the redemption of her units.

The trial court erred by disregarding the language from Paragraph 2(j) of the Severance

Agreement emphasized above entirely, but instead focused only on the last sentence of that paragraph: "The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement." (Id.). The trial court's ruling was erroneous because it relied exclusively on that last sentence of Paragraph 2(j) to the exclusion of the remainder of the Severance Agreement, taking the last sentence completely out of context. Under well-established law in South Carolina, a contract must be "read as a whole document," rather than "reviewing isolated portions" of it. Williams v. Government Employees Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (internal quotations omitted).

Respondent also attempts to invoke a provision of the proposed 2015 Amended and Restated Operating Agreement that has no possible application to Ms. Mattison's situation. Respondent's brief quotes from a portion of the definition of "Fair Market Value" in the proposed 2015 Amended and Restated Operating Agreement, which Respondent argues gives the Management Committee the unilateral right to select an outside appraiser to determine the value when the selling member and the LLC are unable to reach agreement about the value of the shares within 30 days of the event triggering the sale. (Br. of Resp., at 4-5, 13-14). What Respondent conveniently omits from its quotation of the definition of "Fair Market Value" Agreement is the provision that such procedure only applies "in the event that the Management Committee does not make such a determination of the value of the Units for two (2) consecutive years." (2015 Amended and Restated Operating Agreement of MPS, at 5).

Here, as Respondent admits in other parts of its Brief, the Management Committee used HDH Advisors every year from 2013 to 2016 to create annual valuation reports, which all contain a cover letter from HDH Advisors stating that they are not full business appraisals, but are based

only on unverified information provided by the Management Committee of MPS. (HDH Advisors Reports). At the time of Ms. Mattison's voluntary resignation as an employee of the firm, there had not been a two-year, consecutive period without an annual valuation report; thus, the 30-day provision simply does not apply in this situation.

In addition, in situations where the 30-day provision does apply, the fees of the Qualified Appraiser are supposed to be split evenly between the seller and MPS. (2015 Amended and Restated Operating Agreement, at 5). The obvious intent of this provision is to ensure the independence of the appraiser as a matter of fundamental fairness. The Qualified Appraiser is not supposed be the Company's regular appraisal firm that would be naturally biased in favor of the party that regularly pays its salary.

Here, Respondent did not retain HDH Advisors "[w]hen Mattison and MPS were unable to agree on a price for Mattison's membership shares within 30 days after the execution of her Severance Agreement" as Respondent contends. (Br. of Resp., at 5). Rather, MPS's CFO Cousins emailed HDH Advisors on January 4, 2018, requesting a rush appraisal for 2017 because of Ms. Mattison's anticipated departure from the firm. (Cousins Email to Hillegass, Jan. 4, 2018). HDH Advisors was not hired so serve as an independent Qualified Appraiser, whose fees would have been split evenly between the seller and the Company, pursuant to the 30-day provision in the 2015 Amended and Restated Operating Agreement.

Ms. Mattison testified in her Affidavit that she was keenly aware of Respondent's history of using HDH Advisors to manipulate the stated share price of MPS to further the financial interests of the members of the firm's Executive Committee. (Mattison Aff. I., at 6, ¶¶ 19-21). The Management Committee of MPS did not merely "elect[] to use HDH's 2017 valuation as provided

in the [Severance] agreement to determine a per unit prices for Mattison's 2,035 membership units," as stated in Respondent's Brief. (Br. of Resp., at 5). Instead, MPS pushed HDH Advisors to produce its report some 6-7 months earlier than it ever had done before, in an effort to force Ms. Mattison to accept that contrived price.

2. RESPONDENT PLAINLY VIOLATED THE TERMS OF THE SEVERANCE AGREEMENT BY NOT PROVIDING THE FINANCIAL INFORMATION REQUESTED BY APPELLANT'S COUNSEL AS PART OF THE AGREED-UPON, "MUTUAL" EFFORT TO DETERMINE THE VALUE OF APPELLANT'S OWNERSHIP INTERESTS.

Respondent did not comply with the plain language of the Severance Agreement, which required the company to disclose all relevant financial information as requested by Ms. Mattison's counsel. The Confidentiality and Non-Disclosure Agreement, which is dated October 17-18, 2018,[3] and which MPS insisted on receiving before it provided any additional financial information to Ms. Mattison under the terms of the Severance Agreement, expressly acknowledged that the information had not yet been provided: "A. The parties wish to value Mattison's Units in accordance with the Operating Agreement[4] between the Parties, the [Severance] Agreement and Release dated December 5, 2017, and the South Carolina Uniform Limited Liability Company Act, S.C. Code Ann. § 33-44-101 et seq. B. As part of this valuation ("Valuation") MPS will provide confidential and

[3]The Confidentiality and Non-Disclosure Agreement was first signed over six months after the HDH Advisors report for YE2017 was created.

[4]This reference to "Operating Agreement" is ambiguous, because it does not specify whether it refers to the original Operating Agreement of MPS from September 2009, upon the creation of the LLC, or the proposed 2015 Amended and Restated Operating Agreement, which Ms. Mattison never signed. Appellant contends that, because the 2015 Amendment was never unanimously approved by all members of MPS, the only viable Operating Agreement that existed at that time was the original version from 2009, as a matter of law.

proprietary information to Mattison." (Confidentiality and Non-Disclosure Agreement, at 1) (emphasis added). The phrases "wish to value" and "will provide" are expressed in the future tense. In other words, the parties acknowledged in mid-October 2018 that no valuation of Ms. Mattison's shares had occurred at that time.

In addition, the Confidentiality and Non-Disclosure Agreement specifically defines "Confidential Information" to include "the information requested in Mattison's attorney request correspondence dated November 19, 2017, August 16, 201, and August 28, 2018, attached hereto." (Id. at 1, sec. 1.1(a.)). The undersigned's Rule 56(f) Affidavit recounts in great detail the deficiencies in the financial disclosures by MPS and its repeated failure or refusal to provide relevant information necessary for a full and accurate valuation of the firm. (Second Rule 56(f) Affidavit). At the time of the pre-suit mediation in this case on February 20, 2019, Respondent still had not provided all of the relevant financial information requested by Appellant's counsel.

Respondent now tries to argue that the language of the Severance Agreement limited the scope of the financial records to only two years, 2016 and 2017. This is a deliberate distortion of the language of the Severance Agreement, which actually uses the following language: "with the Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel" (Severance Agreement, at 2, ¶ 2(j)). The phrase "all . . . prior year" is an adjective referring financial documents for all prior years (i.e., 2010-2016), not just for one prior year (2016). On December 20, 2017, approximately two weeks after the Severance Agreement was signed, the undersigned counsel sent an email to Respondent's counsel, Tom Keim, confirming this understanding: "With respect to the financial information, I am sure that the company is working on its year-end reports and records; however, Ms. Mattison should

be given access to the prior years' information that we have asked for, as well as whatever YTD information is already available." (Email from Rothstein to Keim, Dec. 20, 2017, Ex. 2 to Second Rule 56(f) Affidavit). The use of the plural possessive s' at the end of the word "years" demonstrates that the parties knew the information requested was not limited to only one prior year. Appellant's counsel never sent a request for financial information that was only limited to the years 2016 and 2017. Likewise, Respondent's counsel never tried to limit the information only to those two years.

Because MPS had a formal appraisal of the company done in 2010, immediately after the merger, and because the HDH Advisors reports starting in 2013 were cumulative, year-over-year, based on the previous year's valuation, all of the financial information going back to the beginning of the firm in late 2009 is relevant to the valuation of Ms. Mattison's shares.

Furthermore, the Tolling Agreement in this case, which was entered on December 3, 2018,[5] also acknowledged that the parties were still engaged in the valuation procedure set forth in the Severance Agreement of disclosure and "mutual" determination of the value of Ms. Mattison's ownership interests in MPS at that time. If the HDH Advisors valuation report were conclusive, as Respondent argues and as the trial court found, there would have been no need for the parties to have been continuing their discussions for over 10 months after the HDH Advisors report for YE2017 was complete.

The Confidentiality and Non-Disclosure Agreement and the Tolling Agreement both confirm the parties' original intent and understanding in drafting the Severance Agreement. These documents are not extrinsic evidence submitted by Appellant in an effort to contradict any language

[5]The Tolling Agreement was extended on January 22, 2019, to run through March 4, 2019, at 5:00 p.m., which is the day Appellant first filed her Counterclaims against Respondent.

within the four corners of the Severance Agreement; rather, those documents are contemporaneous evidence that confirms the parties' intended meaning of the language of the Severance Agreement. See Farr v. Duke Power Co., 265 S.C. 356, 363, 218 S.E.2d 431, 434 (1975) ("The practical interpretation of the contract by the parties to it for any considerable period of time before it becomes the subject of controversy is entitled to great, if not controlling, influence."). The verbiage of these two documents is particularly revealing, which explains why Respondent have tried to down-play their significance or to argue that such documents should be excluded by the Court altogether.

3. RESPONDENT'S NEW ASSERTION THAT THE HDH ADVISORS'S REPORT WAS MERELY INTENDED AS THE "STARTING POINT" FOR THE MUTUAL DETERMINATION OF VALUE IS INCONSISTENT WITH ITS ARGUMENT THAT THE SEVERANCE AGREEMENT ALLOWED THE COMPANY TO HIRE AN OUTSIDE FIRM TO DETERMINE THE PRICE OF THE SHARES.

Respondent now argues that "nothing in Section 2(j) [of the Severance Agreement] or the 2015 Operating Agreement prohibits MPS or its Management Committee from retaining an outside appraiser whenever they wish or from using an outside appraisal as a starting point for the parties' mutual attempt to determine the value of a member's share." (Br. of Resp., at 18) (emphasis added). This is a curious argument because it directly contradicts Respondent's previous arguments that the Severance Agreement incorporated by reference the valuation procedures of the 2015 Amended and Restated Operating Agreement, which would have allowed the Management Committee to make an annual determination of the value of the company however it chose to do so.

Ms. Mattison specifically rejected MPS's first attempt in November 2017 to use the HDH Advisors valuation from YE2016 for the re-purchase of her shares, and the Severance Agreement absolutely does not allow Respondent unilaterally to set the value, with or without the help of its

regular outside appraisal firm.

Respondent cannot have it both ways: it cannot argue out of one side of its mouth that the 2015 Amended and Restated Operating Agreement allows it complete discretion to set the value of the shares, while arguing out of the other side of its mouth that it offered the HDH Advisors report to Ms. Mattison merely as "starting point for the parties' mutual attempt to determine the value of a member's share."

Although Ms. Mattison's personal health crisis unfortunately delayed her ability to participate in the valuation process of her shares until August 2018, the bulk of the delay in the negotiations over the re-purchase of her shares was primarily caused by MPS's failure, refusal, and delay in disclosing its financial information to Ms. Mattison's counsel as required by the Severance Agreement. Appellant's counsel was ready, willing, and able to receive the financial information he had been requesting since late November and early December 2017, and the HDH Advisors' report was completed in early April 2018; yet, none of the underlying information from the HDH Advisors' report or the financial information MPS provided to HDH Advisors as part of their valuation for 2017 was provided to Appellant until well after the Confidentiality and Non-Disclosure Agreement was signed in late October 2018.

4. APPELLANT'S ARGUMENTS REGARDING PRE-JUDGMENT INTEREST AND DISCOUNTS IN VALUATION WERE TIMELY RAISED TO THE TRIAL COURT AND ARE PROPERLY BEFORE THIS COURT ON APPEAL.

Appellant has raised an argument in the alternative in this appeal, that the Circuit Court erred in refusing to award pre-judgment interest in the re-purchase of her membership units from MPS and that the valuation of her shares improperly includes discounts for lack of marketability and lack of

control. These issues were not addressed in the Circuit Court's original summary judgment order because Respondent's motion for summary judgment was completely silent on those two issues. In fact, Respondent's motion only sought summary judgment on its cause of action for Declaratory Judgment, not on Appellant's various Counterclaims against MPS. Only when the Circuit Judge requested that Respondent's counsel prepare a formal, written order did Respondent's counsel include a sua sponte ruling extending Plaintiff's Motion for Summary Judgment to include Appellant's Counterclaims.

For Respondent now to argue that these issues were not preserved for appeal by Ms. Mattison because she "never raised either of these arguments to the trial court prior to its ruling" (Br. of Resp., at 23), is somewhat disingenuous. Ms. Mattison's Verified Counterclaims include an express request for pre-judgment interest from the date of her proper dissociation in February 2018 until the date of final payment for her membership units. (Verified Amended Answer, Counterclaim, and Third-Party Complaint, at 12-13, 14, ¶¶ 66, 80). Furthermore, Ms. Mattison's first Affidavit, which was already in the record on this case before the circuit judge,[6] discusses the course of dealing at MPS and its predecessor entity of not discounting share value for lack of control or lack of marketability. (Mattison Aff., at 2, ¶¶ 5-6). Additionally, the original valuation of the MPS shares in on March 5, 2010, was unanimously set at $108.00 per share, without any discounting for lack of control or lack of marketability. (Memo. of Mar. 5, 2010 from B. Smith to MPS Members).

The only opportunity Appellant had to raise the issues of pre-judgment interest and improper discounting of the value of the shares was on the Motion for Reconsideration filed on February 22,

[6]Under the Business Court Program, this case has been assigned to the same Circuit Court Judge throughout the entire proceedings below.

2021. (Motion for Reconsideration, at 3).

The cases cited in Respondent's brief are inapposite on the issue preservation question. The first case, Johnson v. Sonoco Prods. Co., 381 S.C. 172, 672 S.E.2d 567 (2009), involved a workers' comp case where the circuit court assessed interest and a 10% penalty under S.C. Code Ann. § 42-9-90. On appeal, the employer argued that the circuit court did not have authority to make such an award because the Workers' Compensation Commission had exclusive authority to do so. The Supreme Court ruled that the employer had not preserved an issue for appeal because it did not raise that issue with the circuit court initially, but waited until a motion for reconsideration to raise that argument for the first time. The Johnson court noted, "The matters of interest and the ten percent penalty were squarely before the circuit court, and Sonoco's pre-hearing written responses to Johnson's motions did not raise the section 42-9-90 challenge." Id. at 177, 672 S.E.2d at 570.

Here, by contrast, Respondent's summary judgment motion did not raise the propriety of an award of pre-judgment interest or the valuation discounts, which had been raised in Appellant's Counterclaims. Only after the Court requested Respondent's counsel to prepare a proposed written order did Respondent expand its summary judgment motion to Appellant's Counterclaims. Unlike the situation in Johnson, Respondents her did not put the issues in question directly before the circuit court in the initial motion.

The other case cited by Respondent on this point is Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005), which involved a dispute between a mother and her son over some property that she had deeded to him in consideration of a lifetime agreement by him to care for the mother and maintain her residence. In Dixon, after the master in equity found at trial that there were no grounds to set aside the deed, the mother attempted to raise two alternative theories by a post-trail, Rule

59(e), SCRCP, motion: that she should be deemed to be the beneficiary of a constructive trust or the holder of a life estate in the property in question. The Supreme Court held that both issues were not preserved for appeal because they were not raised to the trial judge until after the trial, by way of a post-trial motion. Id. at 399, 608 S.E.2d at 854.

The appeal in the instant case is from a grant of summary judgment, not from a completed trial. Unfortunately, Respondent's original motion for summary judgment did not purport to extend to the claims raised in Appellant's Counterclaims. Unlike the situation in Dixon, Ms. Mattison's original, verified pleading seeking pre-judgment interest and her affidavit testimony regarding MPS's course of dealing in not applying the challenged discounts were already in the record that was presented to the circuit judge on summary judgment here. Accordingly, these issues were properly preserved for appeal.

Finally, Appellant is not seeking pre-judgment interest to "reward[] her for her own recalcitrance," as unfairly argued by Respondent. There is no evidence in the record on summary judgment that Ms. Mattison has been recalcitrant in any way since her resignation of employment from MPS or during this litigation. The delay in finalizing the redemption of her shares was caused initially by her cancer treatments (at least through August 2018), followed by Respondent's repeated refusal to provide the requested financial information as part of the agreed-upon process of mutually determining the value of her shares per the terms of the Severance Agreement. Respondent commenced this lawsuit and has benefitted from having the use of Ms. Mattison's capital investment in MPS for three-and-a-half years longer than it should have. The Severance Agreement stated that Ms. Mattison's shares were supposed to have been purchased in "early 2018," upon her departure as an employee of the firm. While Ms. Mattison was still a member of the firm, she was absolutely

entitled to receive distributions made to members in consideration of their ownership percentages, pursuant to the terms of both the Severance Agreement and the Operating Agreement. Pre-judgment interest is designed to compensate Ms. Mattison for the fact that she did not have the use of her money, which was tied up in MPS until August 19, 2021, when she negotiated the check from MPS following this Court's denial of her petition for supersedeas. Pre-judgment interest would likewise prevent MPS from receiving an unfair wind-fall in its continuing to have unfettered use of those funds during the same period. Ms. Mattison had virtually no say in how MPS's business was run after her resignation in February 2018, because she was not allowed to participate in regular member meetings.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court's order granting summary judgment in favor of Respondent on its own declaratory judgment action and against Appellant on her counterclaims. In the alternative, Appellant requests that the Court eliminate any discounting for lack of control and marketability in the determination of the fair value of Appellant's membership interests and award pre-judgment interest to her from February 12, 2018, through August 19, 2021, when the purchase of her units was fully completed.

Respectfully submitted,

December 1, 2021

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

Case No. 2019-CP-23-00998
Appellate Case No. 2021-000365

McMillan Pazdan Smith, LLC, ... Plaintiff-Respondent,

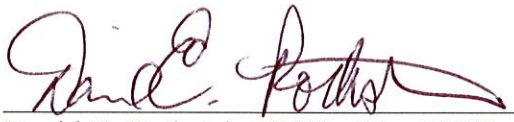
v.

Donza H. Mattison, ... Defendant-Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on Respondent, McMillan Pazdan Smith, LLC, by depositing these documents in the United States Mail, postage prepaid, on July 21, 2021, addressed to their following attorneys of record: Samuel W. Outten and Miles Coleman, Nelson Mullins Riley & Scarborough LLP, 2 W. Washington St., Suite 400, Greenville, SC 29601; Thomas H. Keim, Jr., Ford Harrison, 100 Dunbar St., Suite 300, Spartanburg, SC 29306; and A. Mattison Bogan, Nelson Mullins Riley & Scarborough, LLP, , 1320 Main St., 17th Floor, Columbia, SC 29201.

December 1, 2021



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December 1, 2021

VIA EMAIL (ctappfilings@sccourt.org)
Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: McMillan Pazden Smith, LLC v. Donza H. Mattison etc.,
Appellate Case No. 2021-000365

Dear Ms. Kitchings:

Enclosed please find the Initial Rely Brief of Appellant in the above-referenced case, along with the Proof of Service. Please file the originals of these documents and email a stamped copy to me for my records.

As noted in the Proof of Service, I am hereby serving these document by email and by regular mail on Respondent's counsel.

Thank you in advance for your attention to this matter. If you have any questions or need anything else, please do not hesitate to call me or email me.

Sincerely yours,

David E. Rothstein

Enclosures

cc: Samuel W. Outten, Esq. (all via email and U.S. mail w/ encl.)
Miles Coleman, Esq.
Thomas H. Keim, Jr., Esq.
H. Mattison Bogan, Esq.