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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Tracking No. 2018-002223
(S.C. Ct. App. Filed March 11, 2022)

H. Hugh Andrews, Petitioner,

v.

Quentin S. Broom, Jr. Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner H. Hughes Andrews certifies that Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 9, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the trial court's judgment for Petitioner by misapplying the doctrine of "the law of the case" when it held that Petitioner's claims were effectively dismissed with prejudice as a result of the prior appeal, when neither the Court of Appeals, nor the Supreme Court addressed the substantive dismissal of Petitioner's claims?

2. In view of the facts and evidence presented at trial where Respondent was clearly have proven to have wronged the Petitioner, can the Supreme Court now revisit its 2015 decision ("Andrews I") so that justice is done to the parties?

STATEMENT OF THE CASE

Pursuant to Rule 242 SCACR, Petitioner humbly and respectfully petitions this court to reverse the decision of the Court of Appeals that dissolved the judgment Petitioner was finally able to obtain after twelve years of litigation. Petitioner ["Andrews"] and Respondent ["Broom"] were former business partners, each a 50% owner of their business, Tri-Star Communications, Inc. In late 2005, Respondent wrongfully liquidated the assets of Tri-Star Communications over Petitioner's strenuous objections.

Originally, Respondent Broom was the plaintiff. On September 16, 2005, he filed his original complaint alleging legal malpractice against other parties. [R pp. 76-94] Respondent also alleged claims against Petitioner for fraud, constructive fraud, negligent misrepresentation and civil conspiracy. [*Id.*] Petitioner Andrews filed his answer on November 16, 2005.

On May 30, 2006, Petitioner Andrews filed an Amended Answer and Counterclaims. Andrews asserted claims against Broom for himself individually and on behalf of their closely-held corporation, Tri-Star Communications, Inc. On behalf of himself, Andrews alleged claims against Broom for promissory estoppel, fraud, negligent representation. [R pp. 95-108] On behalf of Tri-Star, Andrews alleged claims against Broom for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of covenant of good faith and fair dealing, conversion, and violation of S.C. Code of Laws §33-8-300. [*Id.*] Collectively, Andrews alleged ten (10) counterclaims: four (4) individually, and six (6) on behalf of Tri-Star. [*Id.*]

On September 25, 2006, Broom filed his reply. [R. pp.109-129] In his reply, Respondent alleged the same defense *verbatim* as to each counterclaim asserted by Andrews:

> [Andrews'] Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and [Respondent] fails to adequately state a claim upon which relief may be given against the [Respondent].
>
> *Id*. at p. 111 ¶20, p. 113 ¶38, p. 115 ¶55, p. 117 ¶72, p. 119 ¶89, p. 120 ¶ 107, p. 122 ¶125, pp. 123-124 ¶144, p. 125 ¶ 166, and p. 127 ¶186.

The defenses were identically worded, regardless of whether the counterclaim was individually asserted by Petitioner, or one brought on behalf of Tri-Star. None referenced Rule 23 SCRCivP. [*Id.*] The parties agreed to dismiss the case from the trial docket on June 11, 2008, pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. The case was reinstated by agreement on June 30, 2008 and issued its new case number of 08-CP-42-3397. [R pp. 2745-2746]

On September 15, 2010, Broom filed a motion for partial summary judgment, and did not raise any Rule 23 issue. [R pp. 2477-2479]

The first time Respondent raised any issue alleging Andrews's pleading had failed to comply with the shareholder derivative notice requirements under Rule 23 SCRCivP[1] was not until five (5) years after his original reply, immediately before the case was scheduled to go to trial. [R pp. 2480–2482] By that time, Tri-Star had ceased doing business in 2006 and had been administratively dissolved by the South Carolina Secretary of State in 2009. [R. p.28, p. 62]

On November 1, 2011, the Court granted Respondent's motion to dismiss based upon non-compliance with the class action rule, Rule 23. [R pp. 1 - 9] Petitioner filed a motion to alter or amend, a motion to reconsider and motion to amend his pleadings. [R,

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[1] Rule 23, **Class Actions**.

(b)(1) Derivative Actions by Shareholders.

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. 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. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

pp. 2483-2513] On February 1, 2013, the trial court entered an order denying Petitioner's motion to alter or amend and motion to reconsider; however, the court did not rule upon Petitioner's motion to amend. [R pp. 10 - 11] Petitioner appealed the trial court's orders of November 1, 2011 and February 1, 2013. [R pp. 1576-1603]

In his appeal ("Andrews I"), Petitioner raised two (2) issues:

Statement of Issues on Appeal 1

I. If a Corporation Only Has Two Shareholders and If One Suspects the Other Has Been Engaged in Self-dealing, Whether the Complaining Shareholder May Sue the Alleged Wrongdoer Directly, as Opposed to Bringing a Derivative Suit on Behalf of the Company.

II. If Hugh Andrews Was Required to Bring His Claims in a Derivative Suit on Behalf of His Company, Whether the Circuit Court Erred in Dismissing Mr. Andrews' Claims Without Allowing Him the Opportunity to Amend Them.

[R. 2534]

The Court of Appeals in Andrews I ruled on the second issue (i.e., allowing Petitioner to amend pleadings) in an unpublished opinion, Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015) [R pp. 12–14]. In Andrews I the Court of Appeals remanded the case back to the trial court with specific directions to rule on Respondent's motion to amend his pleading. *Id*. The Court of Appeals declined to address any other issue. [*Id.*, p.14, n.1]

Later that same year the Supreme Court reversed, holding that the Court of Appeals should not have addressed Respondent's motion to amend — even if only for the purpose of remanding for a ruling —because the trial court had not decided the motion. Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015) [R pp. 15-17]. Likewise, in Andrews I, the Supreme Court did not address Andrews' primary argument that the pleading

requirements of Rule 23 for class actions should not apply to business disputes between two equal partners of a closely-held corporation. [*Id.*]

The case was remitted back to the trial court on December 15, 2015. Andrews began seeking a ruling on his motion to amend after the Supreme Court issued the remittitur. On July 6, 2016, the trial court issued an order allowing Respondent to amend his pleading to state his counterclaims derivatively as well as directly, and to comply with the derivative pleading requirements in Rule 23. [R pp. 18 - 36] Respondent filed his Second Amended Answer and Counterclaims on July 8, 2016. [R pp. 109 - 124]

Immediately before the scheduled trial date of June 26, 2017, Respondent dismissed his legal malpractice claims against other parties and dismissed his claims against Petitioner Andrews. [R pp. 41-42] The only remaining issues to be tried were Petitioner's claims against Respondent, which were tried non-jury before the Honorable Mark Hayes, II the week of June 26, 2017.

After a three (3) day trial, on November 8, 2017, the Court entered a judgment in favor of Respondent for $550,000.00 actual damages, $550,000.00 punitive damages and granted Petitioner's request for attorney's fees. [R pp. 49 - 67] Petitioner filed his motion for attorney's fees on December 15, 2017. [R pp. 2695-2703]

The court granted Petitioner's motion and entered a Form 4 order on September 26, 2018 [R pp. 47-48] The court entered a Final Order and Judgment on November 20, 2018, wherein the Court denied all post-trial motions filed by Respondent and entered a judgment in favor of the Petitioner against the Respondent in the amount of $1,214,406.53. [R pp. 68 - 76]

Respondent filed his notice of appeal on December 18, 2018. [R. p. 2706] On January 12, 2022, the Court of Appeals reversed the trial court's judgment for Andrews ("Andrews II"). The Court of Appeals held that that the Supreme Court's decision in Andrews I was a final determination on the merits of the dismissal of Petitioner's claims. Thus, the court concluded that this ruling was "the law of the case" and prevented the trial judge from moving forward with Petitioner's claims. Petitioner filed a motion for a rehearing on January 27, 2022. The Court of Appeals denied Petitioner's motion, but filed a substituted opinion on February 9, 2022 to remove one of its factual findings about which Petitioner complained. [*See*, Andrews' Motion for Rehearing, filed January 27, 2022, p.4, n.1]

This petition followed.

RELEVANT FACTS

In the 1980s and 1990s, Andrews owned numerous video poker machines. [R. p. 267 l.22 – p.271 l.24] His business model was to go into business with various individuals where provided the video poker machines, and his partner handled the day-to-day operations, as a "sweat equity" partner. [R. pp. 520-521] Under this arrangement, the partners would share profits 50-50; and the sweat equity partner never was paid a salary. [*Id.*]

When Andrews began working with Broom via Tri-Star, the compensation was similar. [*Id.*] The corporate and personal tax returns reflect that Andrews and Broom were the only owners of Tri-Star and each reported owning a 50 percent interest in the business. [R. pp. 277, ll 13-15; p. 520, l. 16 – p. 521, l.13; R pp. 456-476, 539-544] When the business operated in South Carolina, Broom never received a salary, and, in fact, never

requested one. [R. pp. 277, ll 13-15; and R. p. 418, ll. 6-19] All payments were equal distributions as shareholder/owners. [*Id.*]

As the trial court found, after a dispute arose in 2004, Broom began unilaterally paying himself a salary (retroactive to the formation of their business in 1997). [R p. 56; p. 850; p. 277, l.6 – p.278, l.14] Broom controlled the checkbook for Tri-Star. [R p. 56, p. 275, ll. 6-18] He admitted that when he began paying himself a salary, he did not consult Andrews as to the amount (because he believed he was not obligated to); nor did he even notify Andrews he had begun paying himself. [R pp. 283, ll. 1-25] Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. [R. p. 56; p. 280, l. 20 – p. 281, l. 17] From the financial records of Tri-Star, Broom paid himself the following amounts on the following dates:

December 31, 2004	$400,000.00
January 31, 2005	$130,000.00
February 28, 2005	$130,000.00
March 31, 2005	$185,000.00
April 30, 2005	$ 75,000.00
Total	$920,000.00

[R. p. 56; p. 836 and p. 850]

Broom testified he believed these were justified because the company had achieved profitability. [R. p. 345, ll. 1-16] However, the evidence directly refuted this assertion. For example, in order to pay himself $400,000.00 in salary from Tri-Star on December 31, 2004, Broom borrowed $325,000.00 from relatives and his other company, Best Games. [R. p. 56 and pp. 385, ll. 1-8, p. 386, ll. 23-25, p. 890 and 892] In other words, in order to

pay himself $400,000.00 payment from Tri-Star in December 2004, Broom had to borrow 81.25% of that amount to make the payment. [*Id*.]

In February 14, 2005, Broom purchased a $3.5 Million-dollar estate in Miami, Florida. [R. p. 57, pp. 873-888] Within the context of the money transfers and payments Broom made to himself beginning on December 31, 2004, as the trial court found the purchase was made as part of Broom's plan to close down the Dominican operations and re-open them without Andrews. [R. p. 57] The homestead exemption under Florida law would have made Broom *de facto* judgment-proof from any claims asserted by Andrews.

Additionally, whenever Broom wanted to move money from Worldwide to Tri-Star, he would simply have the funds wire transferred to Tri-Star's account. [R p. 383, l. 11 – p. 385, l. 4] However, in order to meet Tri-Star's unilateral salary commitment Broom made for himself, it became incumbent for the Dominican Republic's partner in Worldwide (Edmund Elias Yunes) to wire transfer personal funds to Tri-Star. [R p. 390, l 24 – p. 391, l. 5; p. 911] Mr. Yunes transferred $100,000.00 on April 28, 2005 [R p. 911] and $90,000.00 on June 29, 2005 [R p. 921]. Clearly, neither Tri-Star nor Worldwide were independently profitable as Broom contended.

In September 2005, Broom unilaterally sold all of the video poker machines (1,132) for $400,000.00. [R. p. 1441] The parties stipulated that Andrews did not receive notice of any potential sale until after the sale had already occurred. [R. p. 364, ll. 13-25] Andrews vehemently objected to the sale because he believed the machines were worth considerably more. [R p. 998] Andrews' expert witness, Mr. Mike Fletcher, testified that the CPU boards alone on the machines were worth $1,122,000.00. [R p. 206, ll. 10-21]

Mr. Fletcher opined a value of the machines in September 2005 between $1,767,150.00 and $1,512,000.00. [R p. 202, ll. 7-22]

The sale of the machines themselves was highly suspect. When Broom testified about the great difficulty of operating the machines in the Dominican Republic to justify his salary, he stated that the machines had extensive licensing issues that needed to be overcome to have them domesticated in the Dominican Republic. [R pp. 359, l. 1 – p. 360, l. 8] However, when it came to the sale of the machines, literally Broom only had one (1) piece of paper to document the entire sale of $1,122 machines: a receipt showing someone paid Broom's employee, Frank Dillashaw, $400,000.00 cash in US dollars. [R. p. 1441] There were no title transfers; no bank deposit slips for the sale; no other documents of any kind evidencing the sale of 1,122 video poker machines. [R. p. 397, ll. 9-22; p. 1441]

Following the supposed sale, Broom never deposited the $400,000.00 cash in Tri-Star's account. [R. p. 398, l. 2 – p. 401, l. 2] Broom made a $400,000.00 deposit in Tri-Star's account on November 3, 2005. [*Id.* and R pp. 936 and 937] This was designed to give the appearance of depositing the funds from the alleged sale of the machines, however, the deposit slip reveals the $400,000.00 came from multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [R pp. 936 and 937]

By the December 2005, Tri-Star had no assets, after Broom had paid himself $1,020,000.00 in salary from December 31, 2004 through September 30, 2005. [R pp. 859] Following 2005, Appellate Broom's income taxes reflect that he made several million dollars from gaming operations in the Dominican Republic. [R p. 405, l. 16 - 410, l. 11; p. 750, p. 768, p. 772, p. 776, p. 779, p. 782, p. 788, p. 792, p. 797, p. 802, and p. 949]

ARGUMENTS

1. Did the Court of Appeals err in reversing the trial court's judgment for Petitioner by misapplying the doctrine of "the law of the case" when it held that Petitioner's claims were effectively dismissed with prejudice as a result of the prior appeal, when neither the Court of Appeals, nor the Supreme Court addressed the substantive dismissal of Petitioner's claims?

At the heart of this petition is the scope and application of this Court's decision in Andrews I. In 2011, following five (5) years of litigation, the trial court dismissed the claims brought by Andrews for failing to adhere to the pleading requirements of the civil procedure rule (Rule 23 SCRCivP) applicable to class actions. Andrews has vigorously contended from Day 1 that Rule 23 should have no application to a business dispute between two partners of a closely-held corporation. [*See*, e.g., R. 2491-2500] Indeed, in Andrews I this was Petitioner's primary argument for reversing the trial court's dismissal of his claims. [R. pp.2542-2552] Petitioner also raised the procedural issue about being allowed to amend his pleadings (a motion which was filed, but not ruled upon by the trial court). [R. pp.2552-2554]

In Andrews I, the Court of Appeals focused upon the procedural issue and held that the trial court should have ruled on Andrews' motion to amend, so it remanded the case back to the trial court to obtain that ruling. [R. p.14] Importantly to the consideration of this petition, the Court of Appeals in Andrews I did **not** address or rule upon Petitioner's primary argument about the overall applicability of Rule 23 to a suit where two (2) partners are the only owners of a closely-held corporation (i.e., there are no other shareholders other than these two parties such that any discussion of a direct versus derivative injury is purely academic and truly a legal fiction).

The application of such a Rule 23(b)(1) to this case made zero practical sense. Petitioner's claims were not part of any class action. Also, when Andrews and Broom are the only shareholders, there is no logical reason to require Andrews, the victim of a scheme by his partner to steal all of the company's assets, to specify efforts to get the board of directors (which did not exist in this case) to act upon Broom's theft of all of the corporate assets.

In granting Broom's writ of certiorari, the Supreme Court in Andrews I held that Andrews did not preserve the amendment issue for appellate review and reversed the Court of Appeals. [R. p.17] Like the Court of Appeals, the Supreme Court did not address or rule upon Andrews' primary argument on appeal (applicability of Rule 23 to the facts of this case).

Importantly, the issue of whether Andrews was allowed to amend his pleadings was not determinative of the substantive issue of the applicability of Rule 23. In Andrews I neither the Court of Appeals, nor the Supreme Court, addressed or ruled upon this substantive argument. As such, for purposes of evaluating the application of "the law of the case," there was never a final determination on Andrews' challenge. Because neither appellate court addressed the dismissal issue, the order dismissing Respondent's counterclaims does not qualify as "the law of the case" under South Carolina law. *Cf*, Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, **but expressly rejected by the**

appellate court.") (emphasis added). Indeed, every case relied upon by the Court of Appeals in its opinion can be distinguished on this basis.[2]

The law of the case "prohibits issues which have been *decided* in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Nothing about whether Rule 23 pleading requirements should apply to dispute between two business partners was decided in Andrews I. The Court of Appeals remanded the case for a ruling on the motion to amend, specifically instructing the circuit court that amendments should be freely granted. The Supreme Court reversed the Court of Appeals for addressing a motion that had not been ruled on. The Supreme Court remitted the case back to the trial court.

The law of the case applies to subsequent proceedings in the same litigation following an appellate decision. Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). This part of the doctrine is obviously satisfied: the proceedings following the Supreme Court's remittitur (ruling on motion to amend; trial; and ruling on all post-trial motions) were in the same litigation following an appeal. However, because there was a pending motion to amend, and neither appellate decision addressed the applicability of Rule 23 to closely-held corporations issues (directly or indirectly), the trial court was free to take up the pending motion to amend. *See*, Tillman v. Tillman, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017)

[2] For example, RIM Assocs. v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004) is inapplicable to this issue because there has never been a final ruling on merits of the Rule 23 issue. Mason v. Mason, 412 S.C. 23, 770 S.E.2d 405 (Ct. App. 2015) is inapplicable because Petitioner raised the issue in question on appeal, but no appellate court has addressed it. Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014) is inapplicable because Petitioner never abandoned this issue on appeal.

In *Tillman*, the court explained "the fate of [a party's] counterclaims has not been finally determined as long as his motion to amend hangs in the balance," and it also noted, "the ease with which pleadings may now be amended." *Id*. at p. 759.[3]

As the trial court ultimately found when awarding a judgment to the Petitioner:

> This Court's 2011 order was not a final judgment. The order dismissed Andrews' counterclaims, holding they were improperly pied as individual claims when they were in fact derivative claims that did not comply with Rule 23. That order did not direct the entry of any judgment. It was also not the end of the case. The order was not even the end of Andrews' pleading. Broom was still suing Andrews; Andrews' answer remained pending. Andrews moved to amend his pleading in response to the order dismissing his counterclaims. The counterclaims had not reached the end of the road as long as that motion remained pending.
>
> [R.53]

The trial court recognized the case was not final after Andrews I had been remanded. The Court of Appeals erred in holding otherwise.

2. In view of the facts and evidence presented at trial where Respondent was clearly have proven to have wronged the Petitioner, can the Supreme Court now revisit its 2015 decision ("Andrews I") so that justice is done to the parties?

In Barth v. Barth, 293 S.C. 305, 360 S.E.2d 309 (S.C. 1987), when discussing the "law of the case" doctrine, this Court noted an additional exception which is applicable

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[3]The Court of Appeals decision in Andrews II applied the same rationale to reverse the judgment in Andrew's favor. Specifically, the Court of Appeals found that Petitioner's claims were barred by the statute of limitations; that punitive damages should not have been awarded; and that attorney's fees should not have been awarded – all of these were premised upon the erroneous conclusion that the merits of Petitioner's appeal of his claims had been addressed or adjudicated in Andrews I. Because there was never a ruling on the merits of Andrews' appeal about the applicability of Rule 23, these claims were neither final nor fully adjudicated. As such, they were not barred by the statute of limitations, and the Court's award of punitive damages and attorney's fees were proper.

here:

> The rule of the "law of the case" means that what was decided on former appeal is, if evidence is the same on another trial, controlling on the trial court and an appellate court on another appeal**, unless on re-examination the appellate court is convinced that the first decision was wrong**. *Citing*, Atchison, T. & S.F. Ry. Co. v. Ballard, 108 F.2d 768 (1940).
>
> *Id*., 360 S.E.2d at 310 (emphasis supplied).

To this day, no appellate court has yet to rule on the substantive argument raised by Andrews that he should be permitted to sue his former business partner directly when the entity is a closely-held corporation with only two (2) shareholders. To this extent this was overlooked by this court in Andrews I, Andrews *pleads* with this court to reconsider the impact and effect of its prior ruling, otherwise, Broom will have succeeded in his scheme to steal millions from his former partner.

Rendering a decision on the merits of Petitioner's claim is an important opportunity for this court to clarify a critical aspect of South Carolina law for small businesses. These positions have already been extensively briefed by the parties in the appeal for both Andrews I and Andrews II. To the extent reaching the merits of the appeal requires reassessing the scope of this court's decision in Andrews I, Petitioner implores the court to do so, now that the entire factual record has been fully developed.

Taking a step back, in its simplest form, this case epitomizes why labeling a claim as "direct" or "derivative" is literally a distinction that makes no difference when you only have two (2) shareholders. Here, there were no shareholders who were not a party to the litigation. There were no other creditors. In fact, by the time the case went to trial, the corporation itself had been dissolved. There was no corporate entity for Andrews to stand in the shoes of to reclaim his share of the assets stolen by Broom.

There is no question that Broom engaged in a deliberate scheme to convert all of the assets of the company for his personal benefit. As the trial court found, without permission or knowledge of his partner Andrews, Respondent Broom paid himself $1,020,000 in unauthorized salary in 2005. Petitioner invites this Court to review the factual findings of the trial court which painstakingly chronicles the extent to which Broom went to hide his transactions from his partner and steal the company's assets [R. pp. 55-61]. After three (3) full days of trial, the trial court found Broom had acted fraudulently and in bad faith by clear and convincing evidence: "Broom conceived and executed a scheme to take all the cash out of [the company], liquidate the company and cut Andrews out of the business." [R. p.60]

The trial court's findings and judgment are consistent law protecting victims when circumstances **require** a complainant to proceed in a direct action because **"full relief to the stockholder cannot be had through a recovery by the corporation."** Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001), citing 19 Am.Jur.2d Corporations § 2268, at 167 (1986) (emphasis added).

The American Law Institute[4] ("ALI") adopted the latter exception and since applied by several courts in numerous jurisdictions. Section 7.01(d) states:

[4] As the purveyor of the various Restatements and Principles of the Law, South Carolina courts have relied on the principles and rationales espoused by American Law Institute publications on numerous occasions and on a litany of topics. See e.g., Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010) (adopting the risk-utility test for products liability cases as published by the American Law Institute in the Restatement (Third) of Torts: Products Liability (1998) and emphasizing the Legislature's reliance on the ALI for guidance in this area of the law); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) (adopting the rule formulated by the American Law Institute in its Restatement (Second) of Judgments § 29 (1982) for determining whether a party is precluded from relitigating an issue with a nonparty as the more flexible and modern view);

> In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.
>
> American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008).

Importantly, at least two (2) South Carolina courts have acknowledged this exception, but have been unable to apply due to the facts of those particular cases. See Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991); see also Brown v. Stewart, 348 S.C. at 33, 557 S.E.2d at 685. The focus of our courts' discussions has been on the exception articulated in Thomas v. Dickson, 301 S.E.2d 49 (1983), wherein a stockholder is permitted to file an individual action for losses suffered by the corporation if the underlying reasons for requiring a derivative action are absent. Id. at 774. As the trial court found, those reasons are present in this case and the judgment should be affirmed.

CONCLUSION

Petitioner has spent over 17 years seeking to obtain relief from the fraudulent and bad faith actions of his former partner, Broom. Andrews raised the substantive arguments

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McDaniel v. McDaniel, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963) (holding that the appropriate rule for determining standing in a death case is "succinctly and aptly stated in American Law Institute's Restatement, Conflict of Laws …"); and Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764, 766 (D.S.C. 1956) (citing the "prestige of the American Law Institute" as one of the reasons for adopting its new position on the recovery of damages for emotional distress resulting from abusive language).

at every juncture possible, at trial and on appeal. Ultimately, after hearing all evidence, the trial court concluded that Andrews had proven his losses and Broom's culpability by clear and convincing evidence.

To this day, no appellate court has addressed the merits of Petitioner's appeal about the applicability of a pleading requirement in Rule 23 to closely-held corporations. Because there was no ruling on the merits, the trial court's 2011 order was neither final nor *res judicata* to the proceedings which took place when the case was remitted back to the trial court. Respectfully, the Court of Appeals erred in holding otherwise.

Respectfully submitted,

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March 11, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Tracking No. 2018-002223
(S.C. Ct. App. Filed March 11, 2022)

H. Hugh Andrews, Petitioner,

v.

Quentin S. Broom, Jr. Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent, Quentin S. Broom, Jr. by email on March 11, 2022 addressed to his attorneys of record, Matthew T. Richardson, Esq., mrichardson@wyche.com, Wyche, P.A., P O Box 12247, Columbia, SC 29211; James Edward Cox, Jr., Esq., jcox@wyche.com, Wyche, P.A., P O Box 728, Greenville, SC 29602; and Whitney Boykin Harrison, Esq. wharrison@mcgowanhood.com, McGowan Hood Felder & Phillips, LLC, 1517 Hampton Street, Columbia, SC 29201.

I further certify that I have filed a copy of the Writ of Certiorari with the South Carolina Court of Appeals by emailing the same to ctappfilings@sccourts.org.

Respectfully submitted,

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March 11, 2022

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CERTIFICATION OF COUNSEL

The undersigned counsel for Respondent H. Hughes Andrews certifies that Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 9, 2022.

STATEMEN OF THE CASE

As authorized by the South Carolina Appellate Court Rule 221(a), the Respondent moves for Reconsideration of the court's Opinion No. 2022-UP-022, filed January 12, 2022. The Petitioner respectfully submits that while the Court of Appeals incorrectly applied the relevant law to the facts and circumstances of this case.[1] In the Opinion under review, the Court reversed the Trial Court's decision on four (4) principal grounds:

1. Respondent's claims were barred by the law of the case;
2. Respondent's claims were barred by the statute of limitations;
3. Punitive damages should not have been awarded; and
4. Attorney's fees should not have been awarded.

Items two (2) through four (4) above stem are the resulting derivative application of its finding on the first issue to the remaining issues on appeal.

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[1] In its opinion, the Court of Appeals made a factual finding, "By early 2005, Tri-Star was earning $180,000 per month." Andrews v. Broom, Unpublished Opinion No. 2022-UP-022, at p. 2. Incredibly, this statement was **never** a finding by the trial court and was, in fact, a hotly contested issue at trial. For example, the vast majority of funds the Petitioner used to clandestinely pay himself $920,000 he borrowed funds from personal sources and immediately repaid after showing the salary on the books of Tri-Star. The Court of Appeals cannot make its own findings of fact. In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

1. Because no appellate court has previously ruled on the substantive issue of the dismissal of Respondent's Counterclaims, the trial court was completely within its discretion to reverse its prior ruling and let the case proceed on its merits.

Petitioner and Respondent were former 50-50 business partners, operating through a closely-held corporation of the Petitioner's, Tri-Star Communication. After six (6) years of litigation, on the eve of its scheduled trial, the trial court ruled that Respondent's counterclaims were barred because the Respondent did not comply with Rule 23(b)(1), a procedural rule on its face applicable to class actions and shareholder derivative suits. This ruling contradicted the established law set forth in the American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008):

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

Id.

Two (2) South Carolina courts have acknowledged this exception but could apply it due to the facts of those particular cases. See Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991); see also Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676, 685 (Ct. App. 2001).

Following its ruling, Respondent appealed to the Court of Appeals. The overwhelming focus on Respondent's 2011 appeal was to address this issue. Because when the parties are *de facto* partners and the only two (2) shareholders of a closely-held corporation, the pleading pre-requisites and requirements for derivative shareholder actions

for large corporations make absolutely no sense. The Petitioner did not raise this issue any time prior during six (6) years of litigation, and only after he had dissolved the corporation, thereby making complying with the rule (even if applicable) an impossibility. The application of such a Rule 23(b)(1) to this case made zero practical sense. The counterclaims are not part of any class action. Also, when Respondent and Petitioner are the only shareholders, there is no logical reason to require the Respondent, the victim of a scheme by his partner to steal all of the company's assets, to specify efforts to get the board of directors (which there were none in this case) to act on Petitioner's theft of all of the corporate assets.

On appeal in 2015, there were essentially two (2) issues: (1) the dismissal of claims (i.e., should Rule 23(b)(1) apply to disputes between 50/50 owners of a closely-held corporation); and (2) amending the complaint.[2] The Court of Appeals addressed the latter of these two and remanded the case back to the trial court with a directive to rule on the amended complaint. Broom v. Ten State Street, Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015)]. On appeal to the Supreme Court, the Supreme Court addressed the amendment issue by reversing the Court of Appeals on its order to remand. Broom v. Ten State Street, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015). Importantly, the Supreme Court never addressed the dismissal issue. *Id*.

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[2] The reason why Respondent wanted to amend the complaint to begin with was to update the pleadings to reflect the facts that had been learned from six (6) years of discovery. The original counterclaims were filed in 2005. Respondent learned a great deal about Petitioner's theft of the corporate assets. If the appellate court was to decide a matter based upon the pleadings, Respondent believed the Court would benefit from knowing what had been learned over the prior six (6) years.

Respectfully, the Court of Appeals misinterpreted the impact of the ruling from the Supreme Court's decision in 2015 by conflating the separate issues before the Court. In its opinion, the Court summarized the Supreme Court's decision as follows:

> Our supreme court reversed this, holding that "the issue on appeal—whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings—was not preserved for review." Broom v. Ten State Street, LLP, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).
>
> Andrews v. Broom, Slip. Opin. No. 2022-UP-022 (filed, January 12, 2022)

Importantly, deciding whether the counterclaims were properly dismissed is, and has always been, a separate and independent issue – one which neither appellate court addressed. Because neither appellate court addressed the dismissal issue, the order dismissing Respondent's counterclaims does not qualify as "the law of the case" under South Carolina law. *Cf*, Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, **but expressly rejected by the appellate court**.") (emphasis added). Indeed, every case relied upon by the Court of Appeals in its opinion can be distinguished on this basis.[3]

The law of the case "prohibits issues which have been *decided* in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Nothing was decided in the prior appeal. The Court of Appeals tried to remand the case for a ruling on the motion to amend,

[3] For example, RIM Assocs. v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004) is inapplicable to this issue because there has never been a final ruling on merits of the Rule 23 issue. Mason v. Mason, 412 S.C. 23, 770 S.E.2d 405 (Ct. App. 2015) is inapplicable because Respondent raised the issue in question on appeal, but no appellate court has addressed it. Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014) is inapplicable because Respondent never abandoned this issue on appeal.

specifically instructing the circuit court that amendments should be freely granted. The Supreme Court reversed the Court of Appeals for addressing a motion that had not been ruled on. The Supreme Court remitted the case back to the trial court.

The law of the case applies to subsequent proceedings in the same litigation following an appellate decision. Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). This part of the doctrine is obviously satisfied: the proceedings following the Supreme Court's remittitur (ruling on motion to amend; trial; and ruling on all post-trial motions) were in the same litigation following an appeal.

Here, because there was a pending motion to amend, and neither appellate decision addressed the applicability of Rule 23 to closely-held corporations issues (directly or indirectly), the trial court was free to take up the pending motion to amend. *See*, Tillman v. Tillman, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017) In *Tillman*, the court explained "the fate of [a party's] counterclaims has not been finally determined as long as his motion to amend hangs in the balance," and it also noted, "the ease with which pleadings may now be amended." *Id*. at p. 759.

2. The remaining three (3) holdings of the Court's opinion should be reversed on similar grounds.

The remainder of the Court's opinion finds that Respondent's claims were barred by the statute of limitations; that punitive damages should not have been awarded; and that attorney's fees should not have been awarded – all of these were premised upon the erroneous conclusion that the merits of Respondent's appeal of his counterclaims had been addressed or adjudicate during the prior appeal. Because there was never a ruling on the

merits of Respondent's appeal about the applicability of Rule 23, these claims were neither final nor fully adjudicated. As such, they were not barred by the statute of limitations, and the Court's award of punitive damages and attorney's fees was proper.

CONCLUSION

To this day, no appellate court has addressed the merits of Petitioner's appeal about the applicability of a pleading requirement in Rule 23 to closely-held corporations. Because there was no ruling on the merits, the trial court's 2011 order was neither final nor *res judicata* to the proceedings which took place when the case was remitted back to the trial court. Respectfully, the Court of Appeals erred in holding otherwise.

Respectfully submitted,

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January 27, 2022

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Mar 11 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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March 11, 2022

VIA EMAIL ONLY: supctfiling@sccourts.org

The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

Re: *H. Hugh Andrews v. Quentin S. Broom, Jr.*
Appellate Case No.: 2018-002223

Dear Ms. Howard:

I am attaching for the filing fee for the Petition for *Writ of Certiorari* for the above referenced matter along with my Proof of Service for same.

By copy of this letter to The Honorable Jenny Abbot Kitchings I am attaching a copy of the same for filing with the SC Court of Appeals.

By copy of this letter to other counsel, I am attaching a copy of the same.

The $250.00 filing fee has been mailed separately.

Please accept my best regards.

Very truly yours,

Pillsbury Law Firm, LLC

Rodney F. Pillsbury

RFP/tpd
cc: The Honorable Jenny Abbot Kitchings (Via Email Only) ctappfilings@sccourts.org
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