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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-002223

H. Hugh Andrews, Respondent,

v.

Quentin S. Broom, Jr. Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On September 16, 2005, Appellant filed his original complaint alleging legal malpractice against the lawyers and law firm which organized and administrated off-shore entities for the benefit of Appellant and Respondent. [R pp. 76-94] Appellant also alleged claims against Respondent for fraud, constructive fraud, negligent misrepresentation and civil conspiracy. [*Id*.] Respondent filed his answer on November 16, 2005.

On May 30, 2006, Respondent filed an Amended Answer and Counterclaims. Respondent asserted claims against Appellant for himself individually and on behalf of their closely-held corporation, Tri-Star Communications, Inc. On behalf of himself, Respondent alleged claims against Appellant for promissory estoppel, fraud, negligent representation. [R pp. 95-108] On behalf of Tri-Star, Respondent alleged claims against

Appellant 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, Respondent alleged ten (10) counterclaims: four (4) individually, and six (6) on behalf of Tri-Star. [*Id*.]

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

> [Respondent's] 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 [Appellant].
>
> *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 Respondent, 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 Appellant raised any issue that Respondent failed to comply with the shareholder derivative notice requirements under Rule 23 SCRCivP. was not until five (5) years after his original reply, immediately before the case was scheduled to go to trial. [R

pp. 2480–2482] Tri-Star had ceased to do 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 Appellant's motion to dismiss based upon non-compliance with the class action rule, Rule 23. [R pp. 1 - 9] Respondent filed a motion to alter or amend, a motion to reconsider and motion to amend his pleadings. [R, pp. 2483-2513] On February 1, 2013, the trial court entered an order denying Appellant's motion to alter or amend and motion to reconsider; however, the court did not rule upon Appellant's motion to amend. [R pp. 10 - 11] Respondent appealed the trial court's orders of November 1, 2011 and February 1, 2013. [R pp. 1576-1603]

In 2015, the Court of Appeals issued an unpublished opinion remanding the case back to the trial court with specific directions to rule on Respondent's motion to amend his pleading. Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015) [R pp. 12 – 14]. 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].

The case was remitted back to the trial court on December 15, 2015. Respondent began seeking a ruling on his motion to amend after the Supreme Court issued the remittitur. In 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, Appellant dismissed his legal malpractice claims against Ten State Street and dismissed his claims against Respondent. [R pp. 41 - 42] The only remaining issues to be tried were Respondent's claims against Appellant, 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 Respondent's request for attorney's fees. [R pp. 49 - 67] Respondent filed his motion for attorney's fees on December 15, 2017. [R pp. 2695-2703]

The court granted Respondent'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 Appellant and entered a judgment in favor of the Respondent against the Appellant in the amount of $1,214,406.53. [R pp. 68 - 76]

Appellant filed his notice of appeal on December 18, 2018. [R. p. 2706]

RELEVANT FACTS

In the 1980s and 1990s, Respondent Andrews owned numerous video poker machines. [R. p. 267 l.22 – p.271 l.24] Respondent's business model was that he would 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 Respondent Andrews began working with Broom via Tri-Star, the compensation was similar. [*Id*.] The corporate and personal tax returns reflect that Appellate and Respondent 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, Tri-Star operated video poker machines primarily in South Carolina during the 1990s. [R. p.50] Following a ban of these machines in South Carolina, Appellant and Respondent transferred them to the Dominican Republic and began operating them through a separate foreign entity (Worldwide Entertainment or "Worldwide" hereafter). [*Id.*] Worldwide began with a capital contribution of $600,000.00, whereby Respondent and Appellant each caused to be invested $300,000.00. [R, p. 423, ll. 5-11; p. 327, ll. 7-9; p. 273, ll. 20-23] It was generally established the business had 1,122 video poker machines in the Dominican Republic in the year 2005 via Worldwide, which Broom *de facto* controlled. [R. p. 56]

The core of the dispute arose in 2005 when Worldwide needed $600,000 of additional capital. Respondent had the funds; Appellant did not. [R pp. 273-274; p. 424, ll. 3-22] Respondent made the entire $600,000 contribution; however, the parties did not agree how the additional capital contribution should be treated. [*Id.*] Because Respondent now had invested $900,000.00 to Appellant's $300,000.00, he wanted their memberships to reflect this 75/25 ratio. Appellant disagreed; he wanted Respondent's $600,000.00

contribution to be treated as a loan, and the parties maintain their equal ownership. [*Id*. and R p. 327, ll. 7-18]

Appellant later discovered paperwork prepared by the law firm reflecting a reduction in his membership interest to 25%. [R pp. 80-81] Thereafter, Appellant set into motion a plan to liquidate Tri-Star of its assets, so he could cut Respondent out of doing business in the Dominican Republic. [pp. 55-58]

Appellate began by 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] Importantly, 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 with 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]

Respondent 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 Appellant's plan to close down the Dominican operations and re-open them without Respondent 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 Appellant Broom contended.

In September 2005, Appellant Broom unilaterally sold all of the video poker machines (1,132) for $400,000.00. [R. p. 1441] The parties stipulated that Respondent did not receive notice of any potential sale until after the sale had already occurred. [R. p.

364, ll. 13-25] Respondent Andrews vehemently objected to the sale because he believed the machines were worth considerably more. [R p. 998] Respondent's 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 Appellant 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, Appellant 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 Appellate 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]

STANDARD OF REVIEW

The parties tried the case non-jury by consent. 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 (S.C., 1976). Thus, the appellate court's review generally extends merely to corrections of errors of law. Abbeville County Sch. Dist. v. State, 767 S.E.2d 157, 410 S.C. 619 (S.C. 2014), *citing*, Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011).

Legal Arguments

I. RESPONDENT'S CLAIMS WERE NOT PRECLUDED BY THE 2011 APPEAL.

Broom argues, in essence, that Andrews should not have been permitted to do exactly what the South Carolina Supreme Court instructed by way of its remittitur – obtain a ruling on his motion to amend his pleadings (filed on November 14, 2011). Appellate

repeatedly incorrectly labels the Court's 2011 dismissal of Andrews' counterclaims a "final judgment." This is a misstatement of the law.

"Final judgment" is a term of art with a definite meaning. A final judgment terminates the entire case: it "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013) (quoting *Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). This is not a new definition. Other frequently cited cases include *Good v. Hartford*, decided in 1942, see 201 S.C. 32, 21 S.E.2d 209, and *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A final judgment happens when a case reaches the "end of the road." *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). This case has never reached the end of the road.

The trial court's November 1, 2011 order dismissed Andrews' counterclaims, holding they were improperly pled as individual claims when they were in fact derivative. Importantly, that order was not the end of the case. It was not even the end of Andrews' pleading, which remained pending, until the case was remanded back to the trial court in 2015. At the time of the order dismissing the counterclaims, Andrews had a pending motion to amend his pleading to add additional facts supporting those counterclaims. In the prior appeal, Appellate insisted that the motion to amend had not been ruled on by the circuit court; necessarily acknowledging the story of Andrews' counterclaims would go on.

The South Carolina Court of Appeals recently articulated the same analysis. *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.

There are factual differences between the present case and *Tillman* to be sure. The counterclaims in *Tillman* were not dismissed with prejudice, but that distinction makes no difference. At the time of the original appeal, Andrews had a pending motion to amend his pleading. At no time did Broom identify any authority that would prohibit Andrews from bringing properly pled derivative counterclaims after his individual counterclaims were dismissed with prejudice. These counterclaims would obviously relate back to the filing of the original lawsuit under Rule 15(c), SCRCP.

Appellant's arguments, both here and on "law of the case," are an intellectually dishonest shell game. Until the Court entered its final order and judgment on November 20, 2018 following the three (3) day trial and determination of all post-trial motions, there was no final judgment entered in the case.

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.

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, 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.[1] The Supreme Court remitted the case back to the trial court, a remittitur which Broom inferentially concedes was by mistake.

Broom makes then argues that Andrews' failure to ask the Supreme Court to recall the mistakenly issued remittitur counts as abandonment of the appeal, citing no authority that is remotely similar. Moreover, Broom has failed to articulate—and cannot articulate—how he was prejudiced by allowing Andrews to amend his pleading to state counterclaims for corporate self-dealing when Andrews has consistently asserted those counterclaims since 2006. If Broom *had* articulated such an argument (and he has not), and if an appellate court *had* bought that argument (they have not), Broom's law of the case argument would have sticking power. But the appellate decisions readily disclose neither court decided anything of the sort.

If the trial court viewed its November 1, 2011 order as a final judgment on the merits following remittitur from the Supreme Court, the trial court could have denied Andrews' motion to amend the pleadings and granted Broom's motion for summary

[1] It should be noted that on appeal to the Supreme Court, Broom adamantly maintained in that appeal that Andrews' motion to amend had not been decided by the trial court. Andrews' petition for rehearing asked the Supreme Court to consider the case's age and, in the interest of economy, rule that Andrews' amendments should be allowed before remanding. The Supreme Court simply remanded.

judgment on that basis. However, the trial court recognized that Andrews should be allowed to amend his pleadings, and then permitted the case to go to trial on the merits.

Rather than help the case towards a final judgment, Broom chose on remand to be obstructionist: first, contending the Court could not hold a hearing on the motion to amend, then forcing two additional hearings on the topic, and ultimately filing no fewer than four motions re-litigating the point. This "law of the case" argument is a sham. The circumstances are difficult only because Broom seems happy to take different and inconsistent positions depending on the forum, telling the Court of Appeals and Supreme Court the motion to amend is pending but, after the case was remanded because of the pending motion to amend, arguing that the motion to amend is "dead."

The trial court correctly saw through Broom's contradictory positions. By granting Andrew's motion to amend in June 2016, clearly the trial court recognized that its November 1, 2011 order was not a full and final adjudication on the merits. Adhering to the liberal principle of allowing motions to amend, and following the Supreme Court's directive remanding the case, the trial court properly permitted Andrews to amend his pleadings, thereby allowing Andrews to proceed to trial on its merits.

II. RESPONDENT'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS, BECAUSE THEY RELATE BACK TO THE ORIGINAL FILING OF THE CASE.

Derivative of Appellant's previous argument, Broom argues that the 2016 claims are barred by the statute of limitations – as if the second amended answer and counterclaims filed in 2017 were being alleged against Broom *de novo* on a new filing. As stated above, because the first appeal never addressed the merits, the November 1, 2011 order was not a

final ruling on the merits. Permitting Andrews to amend his pleadings related back to the original allegations set forth Andrew's Amended Answer and Counterclaims, filed in May 2006. Indeed, the 2017 Second Amended Answer and Counterclaims allege substantially the same misconduct by Broom, with different statutory claims.

Upon remand from the South Carolina Supreme Court, the fact that the case maintained its original 2008-CP-42-3397 further supports that the second amended complaint related back to the original filings of this case against the same parties, and was not a new or separate pleading on a new action. Under Rule 15(c) of the South Carolina Rules of Civil Procedure, the claims relate back to the original filing and the timeliness is proper.

III. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANT BREACHED HIS FIDUCIARY DUTY TO RESPONDENT AS AN OFFICER AND DIRECTOR OF THEIR CLOSELY-HELD CORPORATION.

Broom argues that the trial court's findings of fact and application of those facts to the law are unsupported by the evidence. This argument underscores why the trial court's finding of facts is given such great deference on appeal. The trial court acknowledged that the parties presented vastly diverse accounts about Broom's unilateral liquidation of Tri-Star and his unilateral payment of over a million dollars in salary to himself during the process. [R. p. 55]

In his brief, Broom proffers the evidence at trial in the light most favorable to Broom. Broom testified that it was a struggle for operations in the Dominican Republic to be profitable. [R p. 327, l. 21 – p. 333, l. 9; p. 359, l. 1 – p. 361, l. 10] There were problems converting Dominican profits to U.S. dollars and there were problems related to import and

export taxes. [*Id*.] Broom also testified about legal issues Worldwide's poker games ran into in the Dominican Republic. [*Id*.]

Broom said he worked for years without taking a salary to help the business get on its footing. [R p. 336, ll. 13-25] Broom also said the parties always contemplated his being entitled to a salary, both prospectively and retroactively. [*Id*.] As to the latter point, Andrews testified that he consented to a salary for Broom only after Andrews was paid for the video poker machines he sold to Tri-Star. [R p. 462] Because Andrews was never paid for those games, Broom should not have taken a salary.

Broom controlled the financial operations of Tri-Star. [R p. 56, p. 275, ll. 6-18] He admitted that when he began paying himself a salary, he did not consult with Andrews as to the amount (because he believed he was not obligated to) [R pp. 281, l. 23 – p. 283, l. 7]; nor did he even notify Andrews he had begun paying himself. [*Id.*] Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. [*Id.*] From December 31, 2004 until December 31, 2005, Broom paid himself a total of $1,020,000.00. [R p. 56; p. 836 and p. 850]

Broom testified he believed these were justified because the company had achieved profitability. 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*.]

This transaction by itself clearly and convincingly evidences Broom's bad faith and fraudulent intent. There is no legitimate business reason a company would borrow $325,000.00 from family members to make a self-dealing $400,000.00 salary payment to an employee on the last business day of the year.

Other financial transactions demonstrated Broom's bad faith and fraudulent intent. 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, the purchase was made as part of Broom's plan to close down the Dominican operations and re-open them without Andrews. 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 testified.

Finally, there is the purported sale of the video poker machines themselves. Broom testified that he sold 1,122 video poker machines for the sum of $400,000.00, in September 2005. [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. 436, l. 25 – p. 437, l. 2, p.

439, ll. 2-8] Andrews vehemently objected to the sale, because he believed the machines were worth considerably more. [R. p. 439, ll. 2-13] 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.[2] [R p. 202, ll. 7-22]

When testifying about the difficulty of operating the machines in the Dominican Republic to justify his salary, Broom 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) single slip 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, p. 397, ll. 9-22] Although Broom testified the $400,000.00 was paid in cash to Dillinshaw in the Dominican Republic, there were no title transfers; no bank deposit slips of the money received; no other documents of any kind evidencing the sale of 1,112 video poker machines. [*Id*.]

Meanwhile, back in South Carolina, Broom never deposited the $400,000.00 from the alleged sale in Tri-Star's account. In his unilateral decision to liquidate Tri-Star, Broom made a $400,000.00 deposit in Tri-Star's account on November 3, 2005. [R. p. 398, l. 2 – p. 401, l. 2] 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

[2] Broom argues at length that the involuntary bankruptcy action foreclosed all claims Andrews had related to the sale of the video poker games themselves. The trial court largely agreed. [R. pp. 58-59] However, the trial court found that the bankruptcy action did not address Broom's unilateral salary payments to himself, and based Andrews recovery as to that item alone. [R. pp. 59-60]

multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [R pp. 936 and 937]

The Court had good reason to question if a sale ever, in fact, did take place. Broom testified that he invested $150,000.00 (from his net share of the sale proceeds) in a business with Frank Dillashaw – specifically in a venture that did not involve Respondent's video poker games. [R. p. 295, l.4 - p. 306, l.15] From that supposed $150,000.00 investment in late 2005, Broom's tax records reflect that he made a phenomenal return on his investment: over $3,588.101 over eight and a half (8½) years. [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]

Broom testified that he did not know what happened to the 1,122 poker machines formerly belonging to Tri-Star. [R. p. 355, ll.2-24] He testified that the money he made in the Dominican Republic after closing Tri-Star was a different video game machine. [R. pp. 356-357] The Court properly found this testimony lacked any credibility. Other than one manual, Broom did not provide <u>any</u> documented evidence to support his testimony that the machines from which he made millions were not the video poker machines formerly owned by Tri-Star: not one picture; receipt; title record or any other document which easily would have confirmed Broom's story.

Based upon the totality of the financial records and other evidence, the Court's finding that Broom's purported sale in September 2005 of the Tri-Star assets was a sham is supported by the evidence. The money Broom made for years following 2005 from the video poker operations in the Dominican Republic is entirely consistent with the income stream the machines from Tri-Star would have generated. In particular, the Court did not

find Broom's unsubstantiated contention that a simple $150,000 investment generated $224,000 in income[3] for only six (6) months of operations to be credible in the least.

The records of Tri-Star demonstrate that Broom was able to pull money out of Worldwide any time he wanted. Broom himself testified that he controlled Worldwide. Broom paid himself over $1,000,000.00 in salary at a time when Tri-Star owed Andrews significant sums for the video games.

Broom also moved significant money out of Worldwide at a time when that company owed significant sums for taxes in 2003 and 2004. [R pp. 291-292] The court justifiably found it to be incredulous to sell 1,132 video poker machines would be sold and the sole record is a single piece of paper stating $400,000 in US dollars cash was received for 1,122 video poker machines. [R p. 1098] Those funds, if ever received, were never deposited in Tri-Star's account.

When placed within the sequence of financial transactions, Broom's purchase in February 2005 of a $3.5 Million dollars of a luxurious waterfront estate in Miami, Florida fits neatly into his scheme to cut Andrews out of the Dominican operations. The large monthly salary payments that Broom unilaterally paid himself ($130,000.00 in January 2005; $130,000.00 in February 2005 and $185,000.00 in March 2005) correspond with the timeframe that Broom presumably would be attempting to secure a mortgage and needed to demonstrate a regular income stream.

[3]Broom testified that video poker did not become legalized in the Dominican Republic until June or July 2006. The $224,000 identified in his 2006 tax return represents his *share* of the income over a six (6) month period. Thus, the business in the Dominican Republic was making money at a rate of almost one million dollars ($1,000,000.00) per year.

Accordingly, the Court's finding that Broom acted fraudulently and in bad faith is clearly supported by the evidence. Tri-Star did not have the income to support the exorbitant salary Broom unilaterally began paying himself on New Year's Eve 2004. The only reasonable interpretation is that by the end of 2004, Broom began a scheme by which he would close Tri-Star and open operations in the Dominican Republic with Tri-Star's video poker games under a new entity deliberately designed to exclude Andrews. Broom conceived and executed a scheme to take all the cash out of the company Tri-Star, liquidate the company, keep the machines for himself, and cut Andrews out of the business.

IV. THE TRIAL COURT CORRECTLY FOUND RESPONDENT LIABLE UNDER THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE.

A. The Rationale Behind the Closely-Held Closed Corporation for Direct Actions by Shareholders.

Because the overarching policy goals of derivative actions and Rule 23 are inapplicable in most disputes arising in closely held corporations, certain well-recognized exceptions to this general rule have evolved. One of those exceptions (not applicable here) occurs when a stockholder suffers an injury as a result of a special relationship between the wrongdoer and the shareholder or an injury which is separate and distinct than that of the corporation. See Lesesne v. Lesesne, 307 S.C. 67, 68-69, 413 S.E.2d 847, 848, (S.C. App. 1991); see also Hite v. Thomas & Howard Company of Florence, Inc., 305 S.C. 358, 361-62, 409 S.E.2d 340, 342 (1991). The other exception arises 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:

> 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

[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); 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).

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.

Thomas v. Trio Sales, Inc., a Georgia corporation owned by three equal shareholders, one of which was Dickson, the plaintiff. Id. at 50-51. Each shareholder served as an officer and agreed to receive a monthly salary of $1,000 and to distribute profits equally as bonuses. Id. Dickson eventually died and his shares passed to his wife through his estate. Id. At the time of his death no bonuses had been distributed. Subsequently, the two other defendant shareholders began paying bonuses to themselves but did not convey any part of the distribution of profits to the estate. Id. Dickson's wife, individually and on behalf of his estate, filed an action against the corporation and the two shareholders for misappropriation and conversion of corporate assets. Id. The defendant shareholders sought a dismissal on the grounds that Dickson's action had to be brought derivatively and not directly. The trial court denied the motion and the two remaining shareholders appealed.

In its opinion, the Georgia Supreme Court set forth the reasons that shareholders must generally file derivative actions for losses suffered by the corporation:

> The reasons underlying the general rule are that (1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not

> a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares.

Id. at 51. After analyzing each of these reasons and whether or not they applied to Dickson's case, the court held that because Dickson was the sole injured shareholder and because the reasons underlying the general rule calling for corporate recovery did not exist, Dickson was properly allowed to bring a direct action. Id.

Our Court in Babb declined to adopt the Thomas exception based strictly upon the particular facts of that case. There, the Court determined that the claims of corporate creditors would be jeopardized, and thus the parties could not maintain the action directly because at least one of the reasons for the general rule was prevalent. Babb, 303 S.C. at 464-65, 401 S.E.2d at 419-20.

The Thomas exception was again discussed in Brown v. Stewart, and though our court of appeals declined to apply it under the facts of the case, the exception received favorable treatment:

> Brown may not rely on the Thomas exception. As a result of the damage to the corporation, Brown suffered a reduction in the value of his stock. The damage to Brown as a stockholder, however, was shared by all of the stockholders including Silvers and Altier, who were dismissed from this action. Permitting Brown to maintain his action as an individual action would not protect the interests of all stockholders because the diminution in the value of the stock was suffered by all of the stockholders. Thus, the reasons for requiring a derivative action described in Thomas were not absent. **Pursuant to Babb, where the reasons are not absent, we must rely on the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation.**

Brown v. Stewart, at 775. Again, the Court found that one of the underlying reasons for requiring a derivative action was present, i.e., the protection of all injured shareholders. The language in the opinion, however, clearly suggests that under the proper factual

scenario the Court would be inclined to apply the exception. The case at bar is easily distinguishable from both Babb and Brown and would thus fall within the framework of the Thomas exception.

In addition to Thomas, other courts have weighed-in in support the ALI/Thomas rationale and are similar to the case at bar. The case of Durham v. Durham, 871 A.2d 41 (N.H. 2005), is particularly persuasive as the New Hampshire Supreme Court was presented with facts nearly identical to the case at bar and chose to adopt the ALI's position for closely-held corporations. In Durham, the plaintiff shareholder brought a direct action against the other three shareholders of a closely held corporation for, *inter alia*, breach of fiduciary duty and unlawful distributions. The trial court determined that the plaintiff's claims should have been brought derivatively and dismissed them for failure to state a claim. On appeal, the plaintiff argued "that practical and policy reasons justify allowing a direct, as opposed to derivative, action against the defendants because the plaintiff is the sole aggrieved shareholder and is suing all the remaining shareholders." Id. at 44.

Setting forth its rationale, the New Hampshire Supreme Court explained:

> The corporation here is typical of other close corporations in that the shareholders are few in number, know each other, and actively serve in the management of the business as officers or directors. Because the corporation's shares are not publicly traded, the plaintiff as a minority shareholder does not have the opportunity to extricate himself from the corporation by selling his shares on the open market. In addition, construing all reasonable inferences drawn from the well-pleaded facts below in the plaintiff's favor, we conclude for purposes of this analysis that the corporation's board of directors is not disinterested. In these circumstances, the formalities of the derivative proceeding may be impractical and unnecessary because the corporation does not have a disinterested board of directors and a multiplicity of suits is unlikely.

Id. at 45. Citing Thomas and relying on the ALI rationale the Court concluded:

> We are persuaded that the derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become purely technical. In cases such as this one, where the principles underlying the derivative proceeding are not served, the trial court should have the discretion to allow the plaintiff to pursue a direct claim against the corporate officers. Courts that continue to require a derivative proceeding in this context generally do so to promote consistency and predictability in corporate law. While we agree that consistency in the law is important, we also recognize that the derivative proceeding involves burdensome, and often futile, procedural requirements when a minority shareholder seeks to redress wrongful behavior by the majority shareholders. Furthermore, any recovery from a derivative proceeding goes to the corporation and thus would be under the control of the alleged wrongdoers.

Id. at 46. (internal citations and quotations omitted).

Similarly, in W & W Equipment Co. v. Mink, 568 N.E.2d 564 (Ind. Ct. App. 1991), a shareholder in a closely held corporation brought a direct suit alleging a breach of fiduciary against the directors for wrongful termination, misrepresentation and extortion. Id. at 573. The court rejected the defendant's claim that the plaintiff's suit had to be brought derivatively, concluding that "the reasons for requiring a derivative action are not present in this case." Id. at 571. The Court emphasized that there were only two shareholders, that the plaintiff was the sole injured shareholder, and there was "thus no potential for multiplicity of shareholder suits …." Id. Further, "there [was] no evidence of any creditor in need of protection," nor was there "prejudice to other shareholders not a party to the suit since [the plaintiff was] the only injured shareholder …." Id. Moreover, the plaintiff "would not be adequately compensated by a corporate recovery because [the corporation was] a close corporation with no ready market for the sale of [the plaintiff's] shares." Id.

Finally, in Richards v. Bryan, 879 P.2d 638, 641 (Kan. Ct. App. 1994), a minority shareholder in a close corporation brought a direct suit against the majority shareholders alleging that the defendants had effectively frozen out the plaintiff, denied the plaintiff a reasonable return on investment, and fraudulently induced the plaintiff to enter a formation agreement. Id. The Court permitted the plaintiff to bring a direct suit for the derivative claims explaining that the suit "will not expose [the corporation] to a multiplicity of actions or interfere with a fair distribution of recovery because the [plaintiff is] the only minority shareholder in the corporation." Id. at 648. Furthermore, the Court said, "there is no indication that resolution of [plaintiff's] claims will prejudice any creditors' interests." Id.

B. The ALI/Thomas Rationale is Applicable to the Case at Bar.

The basis for allowing a shareholder to maintain an action directly against the fraudulent acts of an officer or director exists in the very limited circumstances when, as in the case at bar, four (4) criteria are present:

(1) The action does not create the possibility of multiple lawsuits by other shareholders;

(2) The action does not impair creditors of the corporation, because the proceeds of the recovery go directly to one shareholder, as opposed to the corporation;

(3) The action does not adversely impact other shareholders, by allowing recovery by one shareholder which might prejudice the rights of other shareholders not a party to the suit; and

(4) The action adequately compensates the injured shareholder by increasing the value of his shares.

In this case at bar, Andrews unique circumstances meets all four (4) requirements, as in Thomas and the ALI.

First, there is no risk of multiple lawsuits by other shareholders, because Andrews and Broom are the only two (2) shareholers.

Second, there were no other creditors of Tri-Star because corporation had been dissolved since 2009.

Third, the action did not impair other shareholders because Andrews and Broom were the only two (2) shareholders.

Finally, and perhaps most importantly to the facts of this case, allowing a direct action against the fraudulent officer/director was the only means by which Andrews *could* be made whole.

In this case, Andrews could not be adequately compensated by an increase in the value of his shares for three reasons. Presumably doing such would confer a benefit to Broom, the sole wrongdoer, in the form of an increase in the value of his shares as well.[5] Additionally, an increase in the value of shares is of little or no benefit to Andrews as there is no open market for shares of a closely held corporation. Finally, Appellate Broom had

[5] Cf. Lesesne, 307 S.C. at 67, 413 S.E.2d at 848:

> It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

unilaterally shut the corporation down. Although it was viable at the time Andrews filed his original claims, Broom allowed the corporation to be administratively dissolved. Thus, at the time of trial, the corporation technically could not recover the losses due to Broom's unilateral actions by his dissolving of the same. It would be the highest form of inequity to prevent Andrews from recovering for the wrongful acts of his partner Broom by rewarding Broom for closing the corporate door from which Andrews' recovery could be obtained.

Alternatively, as alleged in the pleadings, Broom was the primary operator, bookkeeper decision maker and Chief Executive Officer for Tri-Star and had control of Tri-Star's business relationships. (Amended Answer and Counterclaims, ¶¶ 15, 24 and 28). As such, Andrew is akin to a minority shareholder. As explained in Durham, a derivative proceeding under these circumstances would involve "burdensome, and often futile, procedural requirements" and "any recovery from a derivative proceeding … would be under the control of the alleged wrongdoers." 871 A.2d at 46. Based on Broom's misconduct as the controlling shareholder, Andrews certainly could not expect recovery by and through the corporation and thus his only remedy was and is through direct action.

For these reasons, the trial court ordered Broom to return one-half of the salary he unilaterally paid himself - when Tri-Star was otherwise insolvent - directly to the **only** other person harmed by his actions: Respondent Andrews. Because of the very unique facts of this case, allowing Andrews to recover directly from the corporate wrongdoer was the only realistic means the affected shareholder could be made whole. For these reasons, the trial court's finding of liability was both supported by the law and the evidence in this case and should be affirmed.

V. THE TRIAL COURT'S AWARD OF PUNITIVE DAMAGES WAS SUPPORTED BY THE LAW AND EVIDENCE.

As set forth in detail in Argument III, *supra*, the trial court's finding that Broom engaged in a deliberate pre-planned scheme to shut down Tri-Star. [R. pp. 56-61, 63-66] A detailed explanation of the purpose and legal requirements for awarding punitive damages can be found in Mellon v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008):

> Punitive damages, alternatively known as exemplary damages, are imposed as punishment. Clark v. Cantrell, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. *Id*. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. *Id*.
>
> At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. *Id*. The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.
>
> On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides: "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).
>
> There is no formula or standard to be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused

> or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. *See* Gamble v. Stevenson, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991); see also Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000) ("Under *Gamble*, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.").
>
> *Id.* at 289-291, 659 S.E.2d at 251-252.

Broom's willful and fraudulent scheme is evident even if Respondent's version of events is to be believed. According to Broom, the parties agreed in **May 2004** during a meeting where his CPA attended that Broom was entitled to receive a salary (including payments retroactive for his involvement with Tri-Star since 1997). [Brief of Appellant, p.24] Further, according to Broom, revenues at that time were $180,000 per month. [*Id.*]

If this was all true, when Broom paid himself $400,000 in salary on December 31, 2004, he would not have had to borrow $325,000 of that from his other businesses and from family members in order to fund his salary payment. [R. p. 56 and pp. 385, ll. 1-8, p. 386, ll. 23-25, p. 890 and 892] Furthermore, in April 2005 and in June 2005, Broom's Dominican Republic business partner (Edmund Yunes) had to wire money from his personal account to Tri-Star in order for Broom to make his salary payment. [R p. 390, l 24 – p. 391, l. 5; p. 911; and p. 911 and p. 921, respectively] Again, these transactions took place before any ban by the Dominican Republic government. If Tri-Star was truly making the money Broom claimed it was earning, the personal transfers from his Dominican partner would not have been necessary.

Finally, the sale of the machines themselves further evident Broom's insidious intent. Other than one loan receipt [R p. 1441], Broom produce no other evidence documenting the actual sale of the machines. The alleged $400,000 proceeds from the sale were never deposited in Tri-Star's account. However, the deposit slip for the $400,000.00 reveals that money came from multiple local accounts (money Broom borrowed from family and/or other companies he controlled). [R. p. 398, l. 2 – p. 401, l. 2; p. 936 and p. 937]

When applying the facts of the case to South Carolina case law, the trial court found Broom's scheme was pre-conceived well in advance (because it required his borrowing $325,000 from family members and his other companies in order to execute the first phase of paying himself $400,000.00 on Deccember 31, 2004. All were designed to cut Andrews out of the Dominican operations, which he executed all the way down to faking the deposit of the $400,000.00 of sale proceeds in Tri-Star's account.

The trial court found that awarding punitive damages would deter others who may seek to engage in similar misconduct. [R. p. 65] Even though South Carolina permits a punitive award to be ten (10) times the actual damages, the trial court determined that a punitive award equal to Respondent's actual damages (i.e., $510,000.00) fairly and adequately reflects the scope of Broom's misconduct, is reasonably related to the harm suffered by Respondent Andrews, and satisfied all other factors outlined in Gamble and Mellon. The Court considered the ratio and finds a 1 to 1 ratio of actual and punitive damages to be reasonable and proportional to the harm inflicted on Respondent Andrews.

The trial court has also considered the reprehensibility of Broom's conduct and found it was the result of an intentional design to deceive and defraud Respondent Andrews

for Broom's financial benefit. *See*, Mitchell v. Fortis Ins. Co., 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (requiring a court to consider the degree of reprehensibility when reviewing punitive damages).

When evaluating comparative penalty awards, the Court recognized that the harm to Andrews was purely economic. But, importantly, the trial court found that harm to be \the result of a meticulously-planned and executed scheme designed to siphon all the value out of Tri-Star while maximizing Broom's take and minimizing the extent to which the company would repay Andrews. South Carolina courts have long upheld punitive awards for cases involving fraudulent conduct. *See*, e.g., Jordan v. Holt, 362 S.C. 201, 608 S.E.2d 129 (S.C., 2005) (punitive award for self-dealing upheld).

Accordingly, the award of punitive damages by the trial court is both supported by the clear and convincing evidence of Broom's misconduct and self-dealing and by the applicable law of South Carolina.

VI. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES IS SUPPORTED BY THE LAW AND EVIDENCE.

Relying upon S.C. Code of Laws §33-18-410(b), the trial court found that because Broom acted "arbitrarily, vexatiously, or otherwise not in good faith," Andrews was entitled to an award of reasonable expenses, including attorney's fees and the expenses of experts fees, incurred in the proceeding. [R. pp. 68-73] In seeking to overturn the trial court's award of attorney's fees to the Respondent, Appellant proffers three (3) arguments: (1) attorney's fees was not plead; (2) Respondent failed to show that Tri-Star was a statutory closed corporation; and (3) Respondent failed to meet his burden to support the

award. The trial court properly rejected each of these arguments when Broom asserted them post-trial.

A. Plaintiff Adequately Pled Attorney's Fees

When Appellant commenced the litigation 2005, the Appellant brought several claims against the Respondent. The Appellant abandoned those claims shortly before trial. The Court entered an order re-aligning the parties the day after the trial concluded. [R. p.44]

The Respondent first requested attorney's fees in his amended pleading filed in 2006. [R. pp. 95-108] This request was repeated in his second amended pleading filed in 2016. [R. pp. 109-124] In both instances, the request was stated in regards to defending against the Appellant's claims. However, from the time this litigation commenced until shortly before trial, the Respondent was defending those claims and campaigning determinedly to keep his own claims in court. The Court properly found the specific request for attorney's fees provided straightforward notice the Respondent was seeking fees and costs.[6] *C.f.*, S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 654 S.E.2d 87 (Ct. App. 2007) (pleadings requesting attorney's fees is sufficient)

B. There is no Dispute that Tri-Star was Statutory Closed Corporation.

Evidencing the extent Appellant will go to avoid responsibility, Appellant argues there was no proof that Tri-Star was a statutory close corporation. It was not disputed that Appellant and Respondent were the sole shareholders of Tri-Star. [R. pp. 708-711] Also,

[6] Appellant can hardly claim prejudice from any alleged lack of notice, because during the twelve (12) years of hotly contested litigation leading up to the ultimate trial in June 2017, Appellant never once asked Respondent in discovery to explain or itemize the damages he sought under his counterclaims. [Plaintiff Broom's Interrogatories to Andrews].

during cross-examination of the Respondent, Broom's own counsel got Respondent to admit that Appellant was the sole officer of Tri-Star [R. p.303]

Furthermore, at a hearing on Broom's motion for partial summary judgment in 2011, Broom submitted the articles of incorporation for Tri-Star in support of his motion. [R. pp. 708-711] On the forth page of Plaintiff's own exhibit, the record clearly establishes Tri-Star was a statutory closed corporation. [*Id.* at 711] At the hearing on Respondent's post-trial motions, the trial court took judicial notice of the documents previously submitted by Appellant in prior matters on this case. [R. pp. 1755]

C. The Award of Attorney's Fees is Supported by the Record.

The trial court reviewed the fee affidavits of counsel and the six (6) factors set forth in Baron Data Systems v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) to approve Plaintiff's fee request. Importantly, since 2008, Judge Mark Hayes has been the designated presiding judge for this case. He was the judge who presided over the numerous hearings, conference calls, and, ultimately, the trial itself. Respectfully, the trial court knew better than anyone how much work the case required. The trial court knew first-hand that Respondent's successful pursuit of this matter extensive pre-trial proceedings, motions and discovery, and was extraordinarily complicated, both factually and legally. The case entailed detailed records of domestic and international companies, thousands of transactions, and a working knowledge of the video gaming industry. Legally, the appeal and remand of this case involved a novel issue for the appellate courts as it pertains to closely-held corporations.

A cursory review of the public record filings reflects the extensive and intensive effort this case has required. [R. pp. 1755-1766] Since Broom initiated the litigation in 2005, over thirty-three (33) motions have been filed resulting in twenty-four (24) orders.

Although Broom attempts to minimize Andrew's success at trial (characterizing the judgment a result of one cause of action when originally ten (10) were plead, the same work was entailed to produce that verdict – the same evidence supported all claims. Additionally, Appellant argues that Respondent did not prevail in his 2013 appeal. However, the appeal achieved exactly the result sought by Respondent – namely, remanding the case back for a trial on the merits.

Furthermore, it cannot be underscored enough to be mindful that, after twelve (12) years of litigation and numerous pre-trial motions and orders – that Broom voluntarily dismissed all claims against all parties literally on the eve of trial.

Given the trial court's twelve (12) year history with this case, Judge Hayes knew intimately the work involved. The trial court's finding of attorney's fees is supported both by the independent record and Judge Hayes' personal experience with this matter. Accordingly, the award for attorney's fees and costs should be upheld.

CONCLUSION

After twelve (12) years of litigation, Respondent Andrews finally had his day in court. The facts and evidence overwhelmingly support the trial court's verdict for actual and punitive damages, as well as its post-trial award of attorney's fees and costs. For these reasons, the trial court's order and judgment should be affirmed.

Respectfully Submitted,

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July 31, 2020