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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2021-001151

Greenville Dental Office Management Group, LLC, a limited liability company, proceeding pursuant to 33-44-1101 by and through its member, Bhaskar Savani, D.M.D……Respondent

v.

Jon Julian, D.D.S., Blake Julian, D.D.S., Greenville Dental Management Group, P.A…….Appellants

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

This action arises from a dispute over the mismanagement of a joint venture involving three dentists. The purpose of the venture, as presented by Respondent Dr. Bhaskar Savani ("Savani") to local South Carolina dentists, Appellants Dr. Jon Julian ("J. Julian") and Dr. Blake Julian ("B. Julian"), was to grow their practices and increase efficiencies by lowering their management costs through access to Savani's network of vendors, suppliers, processes, and systems and to allow Dr. Savani to expand his presence into the South Carolina dentistry market.

This litigation ensued after the Julians questioned multiple management decisions by Savani, including Savani's transfer of hundreds of thousands of dollars from the joint venture accounts into his own company account and Savani's refusal to provide any legitimate explanation or documentation to substantiate the misappropriation of funds. Left with little choice, the Julians initiated litigation in federal court to seek redress for Dr. Savani's misdeeds including, without limitation, claims for breach of his duties, shareholder oppression, and an accounting.

Thereafter, the Julians transparently operated their entities without further involvement of Savani and left him to operate his entities as he wished pending resolution of the disputes between the parties. Instead of staffing and operating his practices during the pendency of the dispute, Savani allowed his South Carolina offices to go dark and initiated this derivative litigation against the Julians in an attempt to gain access to the Julians' reserve funds and force them to carry his practices. As part of his effort to further siphon funds away from the Julians, Savani sought a prejudgment receivership on all of the income generated by the Julians by falsely claiming the Julians were wasting assets belonging to the joint venture. While the Julians could have distributed the entirety of the revenue derived from their own practices to themselves, they set aside all of the excess revenue and provided an accounting to Savani. As a reward for their transparency, Savani

portrayed the Julians as thieves of their own income to the trial court. Unfortunately, Savani's efforts to vilify the Julians were rewarded with the establishment of a prejudgment receivership based on findings of fact that are not supported by the record as a whole and conclusions of law that are contrary to the principles well-established by South Carolina jurisprudence.

The issues presented in this appeal are as follows:

1. Did the trial judge err in granting a prejudgment receivership without including any valuation of the property at issue as required by statute?

2. Did the trial judge err in granting a prejudgment receivership over all of the Julians' revenues where the Respondent failed to establish an apparent right to the property?

3. Did the trial judge err in granting a prejudgment receivership where the Respondent failed to demonstrate the property at issue was in danger of being lost or materially injured or impaired?

STATEMENT OF THE CASE

This case arises from a dispute among members of a joint venture gone wrong. On June 12, 2020, Appellants J. Julian, B. Julian, and the Greenville Dental Management Group, P.A. (the "Clinical Practice" and collectively, "Appellants") initiated litigation in federal court against Savani and his company, American Dental Management Group, LLC ("ADMG"), seeking redress for, *inter alia*, Savani's numerous breaches of his statutory duties of loyalty, obligations of good faith and fair dealing, and/or other fiduciary duties owed to Appellants. *See John Julian, D.D.S., Blake Julian, D.D.S. and Greenville Dental Management Group, P.A. vs. Bhaskar Bhaskar, D.M.D., and American Dental Management Group, LLC,* Case No. 6:20-cv-02229-BHH (the "Federal Action") (R. pp. 22-46).[1]

After Appellants initiated the Federal Action, on August 27, 2020, Savani commenced this litigation in state court in a derivative capacity (the "State Action") brought in the name of Respondent Greenville Dental Office Management Group, LLC. *See* Amended Complaint in State Action (R. pp. 56-64). In the State Action, Respondent alleges claims breach of contract against Appellants ("the "LLC" or "Respondent"). *Id*.

Respondent moved the trial court for a prejudgment appointment of a receiver on February 9, 2021. *See* Motion for Appointment of Receiver (R. pp. 119-121). The Court held a hearing on Respondent's Motion for Appointment of Receiver on April 8, 2021, and filed its initial order appointing a receiver on May 12, 2021 (the "May Order"). *See* Hearing Transcript (R. pp. 166-193) and May Order (R. pp. 4-10). Appellants made a motion to the trial court seeking to have the court reconsider, alter, and amend the May Order on the grounds that it contained errors of law,

[1] Since entry of the orders at issue in this appeal, Appellants amended their complaint in the Federal Action to add claims against an additional defendant, Nirajan Savani, related to allegations of wrongdoing in connection with a dental facility located in Duncan, South Carolina.

failed to consider, address, or make findings as to certain statutory requirements, and created manifest injustice for Appellants. *See* Motion to Alter or Amend (R. pp. 148-165).

After several informal conferences with counsel and review of proposed orders, the trial court denied Appellants substantive grounds for relief but amended the order to clarify certain issues regarding the appointment of the receiver in this case on September 8, 2021 (the "September Order" and together with the May Order, the "Receivership Order"). *See* Emails with Court (R. pp. 194, 208-211, 222), Proposed Orders (R. pp. 195-207, 212-221, 223-237), and September Order (R. pp. 11-21). This appeal followed.

STATEMENT OF THE FACTS

This case arises out of a business relationship between Dr. Savani, J. Julian, and B. Julian wherein the parties engaged in a joint venture at the suggestion of Savani. Shortly after commencing the venture in 2018, the Julians discovered that Savani was not the business mastermind that he portrayed himself to be and that the venture was being systematically mismanaged and dismantled at the hands of Savani and his company, ADMG through numerous acts of deceit, bad faith, and self-dealing. *See* Complaint in Federal Action (R. pp. 24-34); Appellants' Answer and Counterclaim in State Action (R. pp. 108-110).

J. Julian has practiced dentistry for more than forty years. (R. p. 24). He has enjoyed a long career operating successful dental practices in Kansas and, now, Travelers Rest, South Carolina. *Id.* J. Julian became acquainted with Savani in the fall of 2016, when Savani approached J. Julian about providing dental education to dentists associated with or managed by ADMG. *Id.* Shortly thereafter, Savani, J. Julian, and Blake began a joint venture wherein their individual practices would work cooperatively with Savani and ADMG with the goal of growing and

expanding their businesses through the collaboration. Complaint in Federal Action at ¶¶ 18-19 (R. p. 25).

The parties contemplated that J. Julian and B. Julian would continue their practices in South Carolina and provide dental education to dentists associated with or managed by Savani and ADMG, and, in exchange, Savani would provide the Julians and their practices with business management and administrative assistance to make their practices more efficient and profitable. In reliance upon Savani's representations and promises regarding management support systems, business experience, and cost savings, as well as Savani's assurance of sound, legal, and fair business management, the parties undertook a Memorandum of Understanding (the "MOU") on June 26, 2017, which purported to outline a general plan for business relationship between the parties with the details of the relationship to be determined based on specific written agreements and future, mutual understandings between the parties. (R. p. 25).

The preamble of the MOU expresses that it merely "memorialize[d] [the parties'] understanding of the terms and conditions the parties intend to agree to in subsequent specific agreements." MOU at Preamble (emphasis added) (R. p. 65). Paragraph 16 of the MOU further provides "It is understood that the parties shall enter into specific agreements and that this MOU sets forth the general understanding of the parties. The terms and provisions of the specific agreements shall be deemed controlling unless stated otherwise." MOU at ¶16 (R. p. 70). The only specific agreements executed by the parties consisted of entity formation filings differing from those described by the MOU, two Service Agreements, and three Dental Director Agreements setting forth the parties' respective roles in the venture. *See* Services Agreements (R. pp. 74-96); (R. p. 25). The parties' understanding regarding the proposed business arrangement as set forth in the MOU was premised and conditioned upon Savani's fulfillment of his capital contributions to

what was intended to become the LLC and payment of compensation to the Julians. *See* MOU and Services Agreements (R pp. 65-96).

As a testament to the incomplete status of the MOU, the parties formed two entities which differed in membership composition and function from the statements contained in the MOU. Savani and J. Julian organized the LLC, with ownership interests allocated as follows:

J. Julian	Thirty-Six Percent (36%)
B. Julian	Twenty-Four Percent (24%)
Savani	Forty Percent (40%)

This entity notably differed from the entity described in the MOU, which characterized the LLC as an entity to be "formed to provide the clinical practice of dentistry." MOU at ¶1 (R. p. 65). Instead, the LLC operated as the entity responsible for managing the operations and finances of the venture. *See* Complaint in Federal Action (R. pp. 26-27); Appellants' Answer and Counterclaim in State Action (R. pp. 98-99).

Also differing from the MOU, J. Julian and B. Julian organized the Clinical Practice, Greenville Dental Management Group, P.A., with J. Julian and B. Julian each owning a 50% interest and Savani having no ownership interest. The Clinical Practice operated the clinical aspects of the venture. (R. pp. 26-27) More specifically, the Clinical Practice facilitated the actual practice of clinical dentistry at the four office locations in South Carolina. *Id.* These offices included J. Julian's solely owned company, The Dental Retreat at Mountain Park, LLC; B. Julian's solely owned company, Signature Smiles, LLC, d/b/a Signature Smiles Family Dentistry; and two dental offices located in Columbia and Taylors, South Carolina, which were acquired by Savani through ADMG shortly after the venture began operating in 2018. *Id.*

As operated by the parties during the term of their business relationship, the LLC was responsible for providing business support and administrative services to the Clinical Practice. *Id.*

Each of the four aforementioned practices remained its own separate entity, instituting differing operational protocols, and maintaining ownership of their assets without ever actually transferring any assets to the LLC as conceptualized in the MOU. *Id.* However, the practices did pool certain revenues and expenses. The LLC and Savani, as a managing member of the LLC, managed those pooled revenues and expenses, maintaining complete and total control over every aspect of the LLC's expenditure of funds, including control of all financial information and accounts of the Clinical Practice until Appellants revoked Savani's authority to take any actions on their behalf in June of 2020. (R. pp. 28-30; 150-151)

In early 2020, J. Julian and B. Julian became aware of inconsistencies in the financial records of the LLC and Clinical Practice. (R. pp. 30-34; p. 171, l. 20-p. 172, l. 20) J. Julian was also questioned by governmental agency regarding Savani's other businesses, including businesses to which Savani transferred funds from the venture for purported goods and services. (R. p. 34) J. Julian also learned that Savani had caused the Management Company to pay tens of thousands of dollars of improper expenses for equipment, supplies, and services that the Management Company never received and discovered a host of other unexplained transactions involving transfers of funds to other businesses in which Savani has a financial interest. *Id.* When J. Julian requested information related to these expenditures, Savani provided indecipherable financial statements and refused to provide documentation supporting the figures in the statements. *Id*. Fearing detrimental harm to their professional reputations and practices, the Julians repeatedly requested Savani provide an accounting of the venture's business affairs and assurance that Savani's own business affairs were being conducted in a legitimate manner, but Savani failed to provide the requested information and assurances. *Id*. As a result, the Julians were forced to sever ties with Savani and seek judicial resolution of the disputes between them. *Id*.

Despite the revocation of his authority to act on behalf of the Julians, Savani remained in sole control of the two dental practices he owns through ADMG in Taylors and Columbia, South Carolina. (R. p. 146; 152) Although Savani has the authority to hire dental professionals and staff to provide services in those offices, he has failed to do so in any consistent manner since the Julians terminated his authority to act on their behalf. (R. p. 104); Hearing Transcript (R. p. 171, l. 20-p. 172, l. 20); Motion to Alter or Amend (R. p. 152). When Savani has staffed his dental offices, he received all revenue from those practices without accounting to J. Julian or B. Julian regarding the revenues and expenses of those locations and without following the provisions of the MOU that he contends governs the Julians' actions. (R p. 162)

Similarly, J. Julian and B. Julian continued to operate The Dental Retreat and Signature Smiles, depositing all revenues from the practice of dentistry into the Clinical Company accounts, and they only use the revenue to pay documented expenses and payroll. *See* J. Julian Affidavit (R. pp. 146-47); Hearing Transcript (R. p. 171, l. 9-p. 173, l. 7); Motion to Alter or Amend (R. pp. 150-52). Despite their challenge to the validity of the MOU, J. Julian and B. Julian only paid salaries to themselves at the rates set in the Services Agreements and preserved all excess revenues in a separate bank account. *See* J. Julian Affidavit (R. pp. 146-47). The funds from J. Julian's and B. Julian's practices have always been allocated in accordance with the legitimate needs of their businesses. *Id*. The funds are not, and have never been, in danger of being mismanaged or wasted by J. Julian and B. Julian, who have always been and continue to be completely transparent with how the funds are allocated by periodically providing to Respondent detailed accounting records, including bank statements, which show revenues and expenses. *Id*.

Although there was no evidence of mismanagement of the practice revenue at the hands of the Julians, Savani, through Respondent, sought to impose the instant prejudgment receivership to

deprive the Julians of the income from their own labor and to gain access to the revenue generated by the Julians to support Savani's businesses during the litigation. *See* Motion to Appoint Receiver (R. pp. 119-121); Memo in Support of Motion to Appoint Receiver (R. pp. 142-145); Hearing Transcript (R. p. 169, l. 11-p. 170, l. 21).

The Julians reposed great trust and confidence in Savani to carry out his responsibilities to them and the joint venture honestly, lawfully, and to the best of his ability. See Complaint in Federal Action (R. p. 29). Rather than carrying out his duties, Savani used his role to enrich himself and advance the interests of his own entities to the detriment of Appellants. *Id.* Through this prejudgment receivership, Savani is continuing to abuse his membership in the venture, causing further harm and hardship on the Julians. This appeal seeks to curb Savani's misuse of the judicial system by reversing the drastic imposition of a prejudgment receivership to allow this litigation to be resolved in due course without further interruption.

STANDARD OF REVIEW

The appointment of a receiver is fundamentally an action in equity. *See Wadsworth Industries, Inc. v. Westgate Knitting, Inc.,* 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975). In its review of an action in equity, the appellate court has jurisdiction to find facts and rule upon issues of law in accordance with its own views of the preponderance of the evidence. *See Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

S.C. Code Ann. § 15-65-10(1) establishes the circumstances under which a court may make a prejudgment appointment of a receiver.

> A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> Before judgment is rendered, on the application of either party, when [the applicant] establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, . . .

Id. § 15-65-10(1). The appointment of a receiver is a drastic remedy, only allowed under the most compelling circumstances, and only should be granted with great caution and reluctance. *See Midlands Utility, Inc. v. S. C. Dept. of Health and Environmental Control*, 301 S.C. 224, 391 S.E.2d 535 (1989); *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957); *Wrenn v. Wrenn*, 228 S.C. 588, 91 S.E.2d 267 (1956). The appointment of a receiver is fundamentally an action in equity, and one who has unclean hands is not entitled to use the sword of equity to his benefit. *See Wadsworth Industries, Inc. v. Westgate Knitting, Inc.,* 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975).

ARGUMENT

Summary of Argument

The Order issued by the trial court imposes the drastic remedy of a receivership without any evidence in the record warranting such appointment and under circumstances that do not begin to approach the instances in which our appellate courts have approved such appointments. The result of the appointment has created a hardship for the Julians and is manifestly unjust because it inequitably punishes the Julians for continuing the work their businesses during litigation while allowing Savani to profit from neglecting his practices. Accordingly, Appellants ask this Court to reverse and vacate the Receivership Order to align with the well-established law of South Carolina.

I. The Trial Court Erred in Appointing a Receiver Because the Order Fails to Set Any Value for the Property Contrary to South Carolina Statute.

The Receivership Order issued by the trial court must be vacated because it does not comply with the statutory requirements for the appointment of a receiver. Specifically, the Order fails to set a value for the property at issue and South Carolina law prohibits the appointment of a receiver under such circumstances. *See* May Order and September Order (R. pp. 4-21). South Carolina law unequivocally provides that:

> No receiver of the property of any person or corporation shall be appointed before final judgment in the cause if the party claiming the property so sought to be placed in the hands of a receiver or the party in possession thereof shall offer a bond, in the penalty of double the value of the property, with sufficient security, approved by the clerk of the court of common pleas of the court in which the action is brought, fully to account for and deliver over, whenever thereafter required by any final adjudication in the cause, the property sought to be placed in the hands of a receiver and to meet and satisfy any decree or judgment or order that may be made in the cause.

S.C. Code Ann. § 15-65-50. The Code of Laws continues in noting that "[w]henever the court or judge before whom such application is made shall appoint a receiver before final judgment in the cause there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in § 15-65-50." S.C. Code Ann. § 15-65-60 (emphasis added). "The provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void." *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928) (emphasis added). The purpose of § 15-65-60 is to protect the interest of the person or entity from whom property is taken and placed in the hands of a receiver. *Id*. It provides a method for the party to retain possession of the property during litigation. *Id*.

Here, despite express statutory requirement to do so, the Receivership Order wholly fails to include any value for the portion of property which Respondent contends to be at risk and fails to provide any explanation for why this required valuation was not made before appointing a receiver. By failing to make this determination, the trial court has deprived Appellants of any method to relieve themselves from the burden of the receivership and has committed reversible error. Therefore, the Receivership Order is void and must be set aside.

II. The Trial Court Erred in Appointing a Pre-Judgment Receiver Because Respondent Failed to Establish an Apparent Right to the Property.

The trial court incorrectly found that Respondent proved its apparent right to Appellants' property based solely on the existence of the MOU. See Receivership Order. In so ruling, the trial court failed to recognize the contested nature of the MOU and overlooked South Carolina law rejecting the appointment of a receiver in cases concerning contested rights.

Our legislature authorized the pre-judgment appointment of a receiver only under exceptionally narrow circumstances requiring the movant to demonstrate: 1) an apparent right to property in possession of an adverse party and; 2) that the property is in danger of being lost or materially injured or impaired. *See* S.C. Code Ann. § 15-65-10. In examining the application of the statute, our South Carolina Supreme Court has long held that "as a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." *Pelzer v. Hughes*, 27 S.C. 408, 3 S.E. 781, 785 (1887). In reversing the trial court's appointment of a receiver in the *Pelzer* case, the Court further explained that the appointment of a receiver "is a stronger measure than that of injunction. . . . [I]t is not allowable in every case, but is confined to those of a particular class or classes. It is universally conceded 'that the power of appointment is a delicate one, and is to be exercised with great circumspection.'" *Id.*; *see also Richland Cty. v. S.C. Dep't of Revenue,* 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (affirming the trial court's refusal to appoint a receiver, citing *Pelzer* as controlling precedent).

Since setting forth the foundational principles guiding the pre-judgment appointment of receivers in *Pelzer*, our courts have consistently required the party seeking the appointment of the receiver to show it holds legal title to or equivalent ownership interest in the property at issue

before an apparent right may be found to exist. *See Greenwood Loan and Guarantee Ass'n v. Childs*, 45 S.E. 167, 168, 67 S.C. 251 (1903) (rejecting the plaintiff's argument that a mortgage was sufficient to show any apparent right because a mortgage does not convey legal title). *See also, Hardin v. Hardin*, 34 S.C. 77, 80, 12 S.E. 936 (1890) ("Now, as we have seen, the mortgage gives to the mortgagee no real or even apparent right to the mortgaged premises, and certainly none whatever to the rents and profits thereof"). Indeed, South Carolina courts have been reluctant to appoint receivers when asked to protect only a contested right. *See DeWalt v. Kinard*, 19 S.C. 286 (1883) (finding the appointment of a receiver unwarranted where there was no clear establishment of a right to the property at issue but only a disputed claim). In instances where legal title has not been established by unrefuted evidence, the court may not rely solely upon the allegations of the complaint but must also consider the facts as alleged in the answer or other filings in the case. *See Peeples v. Agricultural Loan Association*, 156 S. C. 429, 153 S. E. 283, 285 (1930) (providing that while "[t]he facts alleged in the complaint taken alone, perhaps, would have justified the appointment of a receiver, [it is proper also for the court] to consider, in connection, the matters alleged in the answer of the respondent.").

Here, Respondent presented the trial court with no evidence of its apparent right to the property at issue – namely, J. Julian's and B. Julian's income from their own labor. Although Respondent submitted an affidavit made by Savani, the affidavit substantially repeated the allegations of the operative complaint and relied solely on language from one section of the MOU as the source of the apparent right to the exclusion of all other terms of the MOU and the specific agreements that directly contradicted Savani's attestation. Indeed, the MOU, which by its own terms was incomplete and was subject to the specific agreements entered by the parties, never conveyed to Respondent an apparent right, legal title, or an actual ownership interest in the

compensation duly owed and earned by the Julians. At most, the MOU provided for a contingent interest because any rights purportedly conveyed by the MOU were subject to conditions precedent and provisions of the specific agreements among the parties including, without limitation, Savani's obligation to meet his capital contributions, Savani's obligation to properly manage the venture, and payment of compensation to the Julians. *See* MOU at Exhibit A ("Savani's commitment shall be to acquire and contribute active dental practices in the region with combined gross revenues which shall be the equivalent of forty percent (40%) of the Total Julian Practice Valuation" . . . "Savani Practice Contribution @ 40%.....$2,000,0000.00"); and Services Agreement ("Contractor assigns . . . to Service Recipient subject to Contractor's right to receive compensation . . .")

Contrarily, Appellants presented the trial court with an affidavit from J. Julian that established a genuine dispute as to the force and effect of the MOU, among other issues raised in the litigation, as detailed in Defendants' Answer and Counterclaims filed in this case and the pleadings of the Federal Action. For purposes of determining whether a prejudgment receivership was warranted, the trial court was required to consider Appellants' claims against Savani and Respondent regarding Savani's failure to make his capital contribution, Savani's breaches of duties, and the wrongful acts committed by Respondent while under Savani's control, all of which directly called into question the enforceability of the MOU and the validity of any provision for the assignment of income. J. Julian's Affidavit further stated that the payment of any salaries to J. Julian and B. Julian for their work in their practices was limited to the terms set in the Services Agreements, that excess revenue was being preserved, and that they had provided Respondent with bank account statements and other information verifying the revenue and expenses. *See* Affidavit of J. Julian.

In support of its conclusion that Respondent met the burden of showing an apparent right to the property at issue, the trial court relied on *Andrick Dev. Corp. v. Maccaro,* 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). *See* Hearing Transcript and September Order (R. pp. 12-13; p. 190, l. 16-191, l. 16). However, *Andrick* is distinguishable from the instant case. *See* 280 S.C. 103, 311 S.E.2d 95. In *Andrick*, the parties were engaged in a dispute regarding specific performance for the sale of a condominium. *Id*. at 106. It was undisputed that the movant held legal title to the property. *Id*. However, the opposing party somehow obtained possession of the condo, began collecting rent on the property, and would not surrender the property or the rent to the movant. *Id*. The trial court determined that the movant had established an apparent right to the property because he held valid legal title to it. *Id*. ("As the holder of title to the property, Andrick had an apparent right to" it).

Unlike the circumstances described in *Andrick*, Respondent's claim to the property in this case is far from undisputed and there is nothing conveying unequivocal title or ownership of the property to Respondent. Instead, the pleadings and J. Julian's affidavit call into question the validity and enforceability of the MOU, and Respondent failed to provide the trial court with any evidence to show that Respondent actually had any enforceable rights, or apparent rights, under the MOU. More specifically, Respondent failed to present any evidence that it had complied with the MOU, the Services Agreements, or that Appellants' pleadings in this case and the Federal Action, alleging Respondent had no enforceable rights, lacked merit. Without presenting evidence that Savani and Respondent were, themselves, in compliance with the very MOU which they sought to have prematurely enforced against Appellants, including any evidence that the conditions precedent to the alleged assignment described in paragraph 4 of the MOU had been met, the MOU could not have served as the source of an apparent right to the property at issue. *C.f., Kirven v.*

Lawrence, 244 S.C. 572, 137 S.E.2d 764 (1964) (explaining that due to the contested nature of the case, the right to possession of the property at issue remained in the defendants until there had been a final determination of all issues at trial).

Where, as here, one party seeks a pre-judgment receivership despite that the entire crux of the litigation surrounds the enforceability and effect of the agreement which might establish that party's apparent right to property, the trial court should be exercise particular caution. "While a court of equity, in proper cases, has the power to place a debtor's property in the hands of a receiver, this power should be exercised with great caution, lest the injury thereby caused be far greater than the injury sought to be averted." *Miller v. Land Co*., 53 S. C. 367, 31 S. E. 282 (1898). In fact, prior to Respondent's filing of the instant litigation in state court, Appellants commenced the Federal Action against Savani and ADMG substantially relating to this same dispute. Accordingly, the most that can be said of Respondent's rights arising from the MOU is that such rights, if any, are contested.

Because Respondent did not establish an apparent right to the property at issue and contested rights are insufficient to provide a basis for dispossessing Appellants of their property – here, the income from their own labor – at the prejudgment stage of litigation, the Order should be reversed and vacated.

III. The Trial Court Erred in Appointing a Prejudgment Receiver Because Respondent Failed to Establish that the Property at Issue was in Danger of Being Lost or Materially Injured or Impaired

In addition to the previously discussed reasons, this Court also should reverse and vacate the Order because there is no evidence in the record to establish that the disputed property was in any danger of being lost, materially injured, or impaired. Sitting as a court of equity in this appeal, this Court has the authority and responsibility to assess the weight of the evidence and make its own factual determinations, and we urge the Court to do so.

Again, the only evidence presented by Respondent regarding any risk or danger to the property at issue consists of Savani's affidavit, which does not include any statements about the value of the property at issue, how the property is purportedly endangered, or how the Julians are supposedly mismanaging the property. The sole contention of the Savani affidavit is that the Julians will not give him unfettered access to the funds or allow him to use funds produced only from their work to support his dental practices while makes no attempt to actually operate those practices. *See* Affidavit of Savani (R. pp. 131-32).

The May Order provides, without explanation or support, that "[a] portion of the collections of the Clinical Company are in danger of being lost because Defendants admit paying salaries to themselves from the collections before paying the expenses of Plaintiff as required by the MOU." *See* May Order at ¶12 (R. p. 6). Similarly, the September Order further provides, without explanation or support, that "[b]ased on the Affidavit of Savani, it is clear that the Management Company does not have sufficient funds in excess of three months' working capital" and that "[i]f the Management Company does not have sufficient funds in excess of three months' working capital, then [Appellants] are not entitled to any compensation." September Order (R. pp. 13-14). As discussed above, the enforceability of the MOU is doubtful. However, notwithstanding the disputed nature of the purported terms of the MOU, there is no support in the record for the trial court's finding that the Clinical Practice's payment of compensation to the Julians violated the MOU or the Services Agreements or, more significantly, that the payment of the salaries puts the property at issue in this case in any danger of being lost.

To warrant the appointment of a receiver to take possession and control of property held by a party prior to the adjudication of the merits, the movant must show that the property at issue is in danger of being lost or materially injured or impaired. *See* S.C. Code Ann. § 15-65-10. In

analyzing this requirement for pre-judgment appointment of a receiver, our courts have consistently required more than a mere assertion of loss but also evidence of some actual loss and that the prospect of recovering the amounts upon judgment in the movant's favor is unlikely. *See Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (affirming the lower court's denial of a request to appoint a receiver because there was no evidence that the party in possession of the funds would be unable to repay them). *Accord S. Tr. Co. v. Cudd*, 166 S.C. 108, 164 S.E. 428 (1932) ("a receiver should not be appointed during the progress of a case unless it is made to appear that the rights of the plaintiff might suffer before he could obtain a judgment"); *See Greenwood Loan and Guarantee Ass 'n v. Childs*, 45 S.E. 167, 168, 67 S.C. 251 (1903) (finding no apparent necessity to appoint a receiver, because it does not appear that the mortgagor is insolvent, nor that the mortgaged premises are insufficient.).

Respondent presented the trial court with no evidence that Appellants' payment of compensation to the Julians resulted in any waste of the property at issue or that recovery of any award in Respondent's favor would be uncollectible. Savani's affidavit makes no mention at all of any working capital requirements, much less any statements about the necessary working capital amount that would be required under the MOU, or how Appellants allegedly failed to meet those requirements before paying salaries for their work. Instead, Respondent simply complained that Appellants would not pay bills for Savani's practices when he was refusing to make any effort to operate them and that damages were accruing because those bills were not paid. Respondent further argued that it was wrongful for the Julians to receive any compensation at all despite that they are the only members of the venture actually working. More significantly, Respondent never provided any evidence that Appellants' refusal to pay bills for Savani's dental practices or any payment of a salary to the Julians was actually in violation of the MOU. In this way, the trial court

conflates the alleged non-payment of certain bills and the payment of salary to the Julians with the alleged dissipation of funds ostensibly belonging to Respondent. This conclusion was erroneous and not an appropriate basis to appoint a receiver in the prejudgment context.

Specifically, paragraph 4 of the MOU, clearly provides that the "Clinical Company shall deposit **all revenue after payment for Clinical Company payroll and compensation for dental professionals** to GDMG." (R. p. 67) This is directly contrary to Respondent's assertions that the MOU requires Appellants to deposit all revenue with the Management Company.

The MOU further provides in paragraph 6 that:

> GDMG shall at all times maintain three-months' working capital (based upon average monthly overhead/expense/liability of Clinical Company) in operating the Practice. No party shall take a draw, compensation or share of profits unless Clinical Company/GDMG has sufficient funds in excess of three months' working capital. *Id*.

As noted in J. Julian's Affidavit, J. Julian and B. Julian only received salary in compliance with the Services Agreement. Additionally, J. Julian undisputedly attested that Appellants had provided Respondent with bank statements showing revenues and expenses in detail at that point in the litigation. Despite having access to the documentation about Appellants' revenues, expenses, salary payments, and reserves, Respondent failed to provide the trial court with any evidence actually demonstrating that Appellants were not observing the working capital provision of the MOU or that Appellants were compensating the Julians beyond what was contemplated by the Services Agreement. In fact, there is no evidence in the record to contradict J. Julian's affidavit providing that Appellants had simply paid the Julians consistent with the provisions of the Service Agreements (which are virtually identical in regard to the amounts of compensation provided in the MOU) and no evidence that Appellants had not carefully reserved the excess revenue for distribution upon final judgment in this case, if so awarded. Again, Respondent knew what money

was coming in, what was going out, and how much was left over but never once provided that information to the trial court in an effort to meet its burden to show that the property at issue was in danger of being lost or wasted.

If Respondent had any evidence that the property was in actual danger of wrongful dissipation, including any evidence that Appellants failed to observe the working capital provisions of the MOU, it was required to bring that evidence to the trial court's attention in support of its motion. It is telling that Respondent made no such offer either before or at the hearing.

Respondent's failure to come forth with any evidence to support its arguments that the property was at risk of loss, impairment, or material injury or that Respondent will be unable to collect if judgment is rendered in its favor should have been fatal to its motion. Therefore, because the Receivership Order's statements regarding the danger of the property are without evidentiary support and are inconsistent with our appellate courts' application of the law, the Receivership Order should be reversed and vacated. Quite simply, the circumstances of this case do not warrant the appointment of a receiver and the imposition of a prejudgment receivership under these circumstances in manifestly unjust.

CONCLUSION

Respondent did not demonstrate an apparent right to the property and failed to establish that the property was in danger of being lost. This matter is not of type where our courts have found prejudgment appointment of a receiver to be appropriate. Consequently, this Court should reverse and vacate the Order appointing a receiver and remand the matter with instructions for the trial court to order the receiver to return all funds to Appellants and finalize invoices for his services, which Appellants may seek to have assessed against Respondents for instituting the receivership process in bad faith.

Respectfully submitted,

s/Meliah Bowers Jefferson

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