In the

Supreme Court of Virginia

Record No. 091172

ADNAN A. SYED, SHERIZA OUSMAN, and
ZEROWIRE TECHNOLOGIES, INC.,
Petitioners – Appellants,

v.

ZH TECHNOLOGIES, INC. and ABULALA K. NASER,
Respondents – Appellees.

BRIEF OF APPELLEES

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STATEMENT OF NATURE OF CASE

The Bill of Complaint (the "Complaint") asserted seven claims for relief, including breach of fiduciary duty and civil conspiracy, all based upon Appellant Syed's ("Syed") and Appellant Zerowire Technologies, Inc.'s ("Zerowire") misappropriation of Appellee Naser's ("Naser") and Appellee ZH Technologies, Inc.'s ("ZH Tech") business assets.

At trial, a variance appeared between the evidence and pleadings. Specifically, the evidence revealed that a fiduciary relationship arose out of Syed's partnership with Naser in addition to the evidence of a fiduciary relationship pled in the Complaint, and that Syed's and Zerowire's conspiracy to destroy Naser's and ZH Tech's business included third parties not named in the pleadings.

At the conclusion of the evidence, the trial court instructed the jury to find the facts based upon the evidence presented. The jury returned a verdict finding Syed and Zerowire liable upon the counts as reflected in the table in Syed's and Zerowire's Brief. The jury returned separate damage verdicts also reflected in the table in Syed's and Zerowire's Brief. The jury was then discharged without objection to the verdicts either as to liability or damages.

After the trial, Syed and Zerowire raised the issue of the jury's return of "0" compensatory damages on two counts on which the jury awarded punitive damages.

A trial court affirmed the jury's finding and ordered a new trial on the issue of damages. The second trial resulted in awards of compensatory and punitive damages as set forth in the table in Syed's and Zerowire's Brief. The trial court affirmed the jury's finding as to damages, awarded treble damages on the business conspiracy claim, and awarded attorneys fees.

QUESTIONS PRESENTED

I. Did the trial court abuse its discretion by permitting the jury to consider evidence in variance with the Complaint?

II. Did the trial court abuse its discretion by directing a new trial on damages to cure the defective jury verdict?

III. Does a corporation whose status was terminated have standing to seek relief upon reinstatement for claims that arose after termination and prior to reinstatement?

IV. Did the trial court abuse its discretion by failing to require counsel for Naser and ZH Tech to segregate their attorney's fees among the various counts?

STATEMENT OF FACTS

Syed's and Zerowire's version of the facts as set forth in the statement of facts was presented at trial. However, the jury did not find many of Syed's and Zerowire's claims credible, as their findings at trial would indicate (JA 1139-1145).

Instead, the evidence at trial revealed that Naser and ZH Tech and Syed entered into an agreement whereby Syed agreed to assist ZH Tech in installing and supporting high speed internet access ("HSIA") to hotels and motels nationwide. ZH Tech made Syed a signatory on the ZH Tech bank account.

In 2004, Syed began usurping ZH Tech's corporate opportunities with its clients. In mid-February 2005, Syed and his wife, Sheriza Ousman ("Ousman"), formed their own company, Zerowire, for the purpose of diverting ZH Tech's clients. Syed, often with the assistance of a third party, Trevor Warner ("Warner"), ultimately diverted *all* of ZH Tech's customers to Zerowire.

The evidence established a breach of Syed's fiduciary duty to Naser and ZH Tech. The record is replete with testimony and documentary evidence that Syed wrongfully diverted ZH Tech customers and contracts to Zerowire. *See e.g.,* JA 125-126. In one exhibit, Syed specifically asks a

customer:

> Would it be possible for you to send an email to aali.naser@zhtek.com or fax him a letter of cancellation again? You will be helping with the legalities of the situation and I will appreciate and shall never forget this help from you.

JA 796. The record also shows that through Zerowire, Syed issued quotes to prospective ZH Tech customers *before* he left ZH Tech. *See* JA 828–834. Prior to leaving ZH Tech, Syed stopped answering customer support calls to lure them to Zerowire (JA 132) causing ZH Tech to lose all of their remaining clients. (JA 794). Syed diverted ZH Tech's bank statements to his home address and failed to deposit customers' checks in that account. JA 124-125,128. While he acknowledged that he was merely a signatory on the ZH Tech bank account, Syed nonetheless testified that he was entitled to keep all of the funds in this account because "it's my account." JA 426. Syed's own testimony proved his breach of fiduciary duty to ZH Tech. *See* JA 452-454. Syed and Ousman used the converted monies for personal expenses, including lease agreements for luxury cars, (*see* JA 738 and 740), and the purchase of several homes. JA 424-425.

The record also demonstrates two distinct co-conspirators with Syed and Zerowire in their efforts to misappropriate funds and divert ZH Tech clients. The first is Ousman, who conspired with Syed to create a separate corporation, Zerowire, for the purpose of diverting ZH Tech's HSIA

customers. *See* JA 444-447, 511-512, and 828-834.

The second co-conspirator is Warner, who acted in concert with Syed to divert to ZH Tech money and customers to Zerowire. *See* JA 441, 779, and 784. At the end of March 2005, Syed informed Warner that "I have been advised by lawyer to start all new projects after April 1, 2005," then asked Warner, if "we can get all new agreements from all properties dated April." JA 798. In April, after receiving notification from Warner that a former ZH Tech client mailed a check to ZH Tech, Syed sent Warner the following email:

> I have had numerous discussions with [my lawyer] yesterday, trying to figure out how to do this. My case is very strong however this one thing can send me under. . . if ZH finds out in deposition that I took money from business I had done under there name, I will loose the case [sic]. If the checks are issued to ZH I will never see that money.

JA 799. Syed also testified that *all* of Warner's contacts, which were former ZH Tech clients, were then using Zerowire for support services. *See* JA 442. Syed further instructed Warner to inform Naser and ZH Tech that the reason for the loss of a number of clients was because they "found a cheaper better and approved provider." JA 784.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. Did the trial court abuse its discretion by permitting the jury to consider evidence in variance with the Complaint?

At trial, there was evidence of a fiduciary relationship between Syed, Naser and ZH Tech in addition to that alleged in the Complaint. Similarly, the evidence revealed participants in the conspiracy in addition to those named in the Complaint. Syed and Zerowire contend that the trial court abused its discretion by permitting the jury to "find the facts" based on the evidence introduced at trial.

A. In the event of a variance between pleading and proof, Virginia Code §8.01-377 permits a trial court to direct the jury to find the facts and give judgment according to the right of the case.

Variances between facts alleged in initial pleadings and evidence introduced at trial occur frequently. Trial courts are vested with the authority contained in §8.01-377 to resolve such issues. Appellate review of a decision to permit such variances is limited to whether the trial court abused its discretion. *See Smith by Rosen v. Smith,* 254 Va. 99, 105, 487 S.E.2d 212, 216 (1997), *Hensley v. Dreyer*, 247 Va. 25, 30, 439 S.E.2d 372, 375 (1994).

Va. Code §8.01-377 is remedial and should be liberally construed, especially where it will further the ends of justice and permit the controversy to be determined on its merits. *See, e.g., McKee v. Bunting, McNeal Real Estate Co.,* 114 Va. 639, 77 S.E. 515 (1913), *Russell Lumber Co. v. Thompson & Lambert*, 137 Va. 386, 119 S.E. 117 (1923). Further, where the parties have already had "their day in court and one fair trial on the merits" the application of §8.01-377 allows the trial court to end the litigation which is "...always desirable in the public interest." *Kennedy v. Mullins*, 155 Va. 166, 180, 154 S.E. 568, 572 (1930).

B. The fiduciary duty owed by Syed was created by the special confidence between the parties, not by the label placed on the relationship.

Establishing a fiduciary duty does not depend upon title or the definition of a relationship.

> A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.

H-B Ltd. P'ship v. Wimmer, 220 Va. 176, 179, 257 S.E.2d 770, 773 (1970), *See, also, Allen Realty v. Holbert,* 227 Va. 441, 446, 318 S.E.2d 592, 595 (1984) (an independent contractor could be a fiduciary based upon the special confidence between the parties).

Therefore, whether Syed was a partner, employee, or independent contractor, he owed a fiduciary duty to Naser and ZH Tech by virtue of the confidence placed in him, and the jury found that he breached it. The trial court correctly held it unnecessary that Naser and ZH Tech prove specifically that Syed was an employee to establish the fiduciary duty claim. JA 608.

When it is clear from the verdict that the jury understood the case, and only awarded allowable damages, despite any error in the instructions received, there is no need to disturb the verdict. *Kennedy,* 155 Va. at 179-180, 154 S.E. at 572. Further, as recipients of the favorable jury verdict, Naser and ZH Tech are entitled "to the benefit of all substantial conflict in the evidence, as well as all inferences that may be drawn therefrom..." *Graves v. Nat. Cellulose Corp.,* 226 Va. 164, 169-170, 306 S.E.2d, 898, 901 (1983).

C. Pleading practice does not require that a complaint set forth absolute particularity on the conspiracy count.

A complaint in Virginia need only contain allegations of material facts sufficient to inform a defendant of the nature and character of the claim asserted. *Catercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431

S.E.2d 277, 279 (1993). It is unnecessary for the pleader to descend into statements giving exacting details of proof in the complaint. *Id.*

Similarly, the validity of the conspiracy claim in Virginia does not depend upon the identification of all co-conspirators nor that each co-conspirator be named as a party to the suit. *See, e.g., Nedrick v. Jones,* 245 Va. 465, 429 S.E.2d 201 (1993). A plaintiff must simply allege "concerted action, legal malice, and causally related injury[,] ... set[ting] forth core facts to support the claim." *Atl. Futon v. Tempur-Pedic, Inc.*, 67 Va. Cir. 269, 271 (2005). Therefore, the jury's finding that Syed conspired with Warner is not defective because Warner was neither a co-defendant nor explicitly named in the pleadings.

D. Syed and Zerowire failed to demonstrate prejudice to a substantial right.

Pursuant to §8.01-377, after the return of the finding of the jury, if the trial court, "consider[s] the variance such as could not have prejudiced the opposite party, [it] shall give judgment according to the right of the case." A jury's verdict must not be reversed in the absence of injury that affects the substantial rights of the parties. *Kennedy*, 155 Va. at 178, 154 S.E. at 571. If it appears that Syed and Zerowire were not surprised by Naser's and ZH

Tech's' proof, a variance between pleading and proof cannot serve to overturn the jury's verdict. *Graves,* 226 Va. at 168, 306 S.E.2d at 900.

Syed and Zerowire fail to identify any substantive prejudice or unfair surprise that resulted from the trial court's decision to permit the jury to "find the facts." Instead, Syed and Zerowire make only generalized assertions of fundamental unfairness based upon their efforts to conduct "careful discovery" and trial preparation.

Syed and Zerowire claim that, at the first trial, they were suddenly "confronted" with new theories of breach of "partnership fiduciary duty" and with conspiracy with Warner. However, at every stage of the litigation, Syed and Zerowire pled, testified and argued that the relationship was a partnership, and even sought a jury instruction on the same. JA 51-53, 352-354, 358-359, 1053. Further, Syed and Zerowire actually called Warner as a witness and introduced testimony that would ultimately permit the jury to find that Syed conspired with him. (5-27-07, Tr. 51-101). A party cannot claim unfair surprise when he introduces the evidence that causes the variance. *Southern Ry. Co. v. Finley & Seymour,* 127 Va. 132, 102 S.E. 529 (1920).

This Court addressed the issue of "unfair surprise" in *Kennedy.*

> The rule that the proofs must correspond with the allegation is fully recognized, but like every other rule should be

> reasonably applied. Its purpose is to prevent surprise. Where there is no surprise to the party invoking it, there is no good reason for enforcing the rule.

Id. at 180, 572. In *Kennedy*, the plaintiff pled a breach of contract claim based upon an alleged partnership relationship between the parties. Though the plaintiff in *Kennedy* failed to prove the existence of a partnership, the trial court permitted the plaintiff to proceed forward and ultimately prevail on his breach of contract claim, despite the fact that evidence of the nature of the relationship between the parties varied from allegations in the complaint.

In permitting the variance, the Court in *Kennedy* reiterated that "in causes triable and tried by juries 'substantial justice' in a legal sense has been attained when litigants have had one fair trial on the merits." *Id.* at 179, 572 (quoting *Virginia Ry. & Power Co. v. Smith,* 129 Va. 279, 105 S.E. 532, 535 (1921)(internal citations omitted). Further, the Court stated, "only the essential rules of pleading should be applied. If the notice be such that the defendant cannot mistake the object of the motion, it is sufficient." *Id.* at 178-179, 572 (internal citations omitted).

In the case, Syed and Zerowire had notice of both the breach of fiduciary claim and the conspiracy claim. As in *Kennedy,* the label or nature of the relationship between the parties did not affect the essence of

the breach of fiduciary duty claim pled by Naser and ZH Tech. Further, as to the conspiracy claim, all elements of the claim remained the same despite the introduction of evidence of new conspirators by Syed's and Zerowire's own witness.

The trial court instructed the jury to "find the facts" and then entered judgment on the merits of the case. Because there was neither unfair surprise nor prejudice, the trial court did not abuse its discretion. Rather, the trial court appropriately applied §8.01-377 to further the ends of justice.

II. Did the trial court abuse its discretion by directing a new trial on damages to cure the defective jury verdict?

As conceded by Syed and Zerowire, the original jury found Syed and Zerowire liable on both the civil conspiracy and the tortious interference claims. Inherent in that finding is that Naser and ZH Tech had met their burden of proof on each element of the two claims, including that Naser and ZH Tech suffered damages in the civil conspiracy. JA 1143-1145.[1] Based upon the evidence, the findings and the award of punitive damages, there is no basis to suggest that Syed and Zerowire are not liable and therefore no basis to vacate the verdict finding Syed and Zerowire liable. It is evident that the first jury, despite its finding of liability, misunderstood or

[1] That Syed and Zerowire were not damaged cannot be maintained in light of the second jury's findings.

misconstrued the instructions as to damages. In light of the finding of liability and absent the timely objection of Syed and Zerowire to the inadequacy of the verdict, the trial court exercised its authority provided by the General Assembly[2] and this Court's precedent and awarded a second trial on the issue of damages only.

A trial court may set aside a jury's damage verdict "if the verdict is plainly wrong or without credible evidence to support it, and may only enter judgment when there is sufficient evidence before the court to enable it to decide the case upon its merits." *Jenkins v. Pyles*, 269 Va. 383, 388, 611 S.E. 404, 407 (2005). If the evidence is not sufficient to sustain a verdict finding for the defendant, the trial court may vacate a verdict for inadequacy and should then award a new trial limited to damages. *See Rawle v. McIlhenny*, 163 Va. 735, 748, 177 S.E. 214, 220 (1934). On the motion to set aside the verdict, the court should consider all evidence, including that bearing on a defendant's liability. *Kirn v. Bembury*, 163 Va. 891, 178 S.E. 53 (1935). The trial court is vested with the statutory authority to exercise discretion supervising jury verdicts to prevent miscarriages of justice. The ultimate test on appeal is whether that discretion has been abused.

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[2] §§ 8.01-430 ("If necessary to assess damages which have not been assessed, the court may empanel a jury at its bar to make such assessment.") and 8.01-383.

Johnson v. Smith, 241 Va. 396, 403 S.E.2d 685 (1991). Where a trial court has set aside a verdict, the "reviewing court will accord the recipient of the verdict the benefit of all substantial conflict in evidence, as well as all inferences which may be reasonably drawn from the evidence." *Rogers v. Marrow*, 243 Va. 162, 166, 413 S.E.2d 344 (1992).

The case of *Zedd v. Jenkins* provides guidance to trial courts on their role and authority over verdicts where punitive damages are awarded without an award of compensatory damages. The Court expressly recognized that the original finding of the jury was not a verdict for the defendant, but a finding for the plaintiff. 194 Va. at 708, 74 S.E.2d at 793.

This Court in *Zedd* stated that the trial judge

> should have rejected [the verdict], told the jury that their finding was contrary to the instructions on damages, and instructed them more fully on the question of damages, both compensatory and punitive, and sent them back to their room for further deliberation.

Id. at 707, 74 S.E.2d at 793.

In the instant case, however, the jury was discharged before the trial court was made aware of the defective return.[3] Having themselves failed

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[3] Either ignorantly or strategically, Syed and Zerowire failed to bring the defect to the Court's attention at a time when it was immediately curable. As the trial court observed, the question at hand is at least partially one of Syed's and Zerowire's' making. JA 1583-1589. If the problems with the verdict been brought to the court's attention prior to the jury's dismissal, the court could have reinstructed the jury or given supplemental instructions consistent with *Zedd*.

to raise the issue timely, Syed and Zerowire now argue that the only remedy is to vacate the verdict which would prejudice Naser and ZH Tech, in spite of the merits of their claim. Such a result ignores the findings of the jury and negates the jury's determination of liability.

As in *Zedd* and pursuant to the authority set forth in §§ 8.01-430 and 8.01-383, the trial court examined the evidence of liability of Syed and Zerowire and rejected those portions of the first jury's verdict that were plainly wrong and contrary to principals of law, specifically, the jury's failure to award compensatory damages. The trial court, in reliance upon the evidence and the jury's finding of liability, appropriately refused to set aside the verdict in its entirety. Unlike the trial court in *Zedd*, the trial court was not in a position to instruct the jury further or correct the jury's verdict and acted to prevent a miscarriage of justice.[4]

Rule 5:25 requires that those claiming prejudice by a ruling must contemporaneously object or otherwise waive the same. Syed and Zerowire should be deemed to have waived any objections to the trial court's receiving the award and should be estopped to contest any reasonable effort by the trial court to remedy the inadequacy of the verdict. JA 1564-1581.

[4] Syed and Zerowire continue to place undue reliance upon *Ulloa v. Q.S.P.*, 271 Va. 72, 624 S.E.2d 43 (2006), *O'Connell v. Bean*, 263 Va. 176, 556 S.E.2d 741 (2002) and *Murray v. Hadid*, 238 Va. 722, 385 S.E.2d 898 (1989). The facts in *Ulloa* are inapposite to this case in that the reviewing trial court struck the conspiracy claim pursuant to the jury instruction submitted by the parties. The trial court in the instant case did not strike

The cases of *Johnson v. Smith* and *Rawle v. McIlhenny* provide guidance in the application of the rules permitting trial courts to set aside jury verdicts as inadequate. In *Johnson*, the Court was confronted with the issue of an inadequate jury verdict when the award did not consider the full measure of the damages suggested by the evidence. This Court found "the evidence . . . was insufficient to sustain a verdict finding the defendant(s) not liable." 241 Va. at 401, 403 S.E.2d at 688. Thus, the Court could not conceive a rational basis for an award that was not on the full measure of damages. Such an award is "inadequate on its face" and the jury must have "misconceived or misunderstood" the facts or the law. *Id.,* 241 Va. at 400, 403 S.E.2d at 687. Similar to the case at bar, a new

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the claim for civil conspiracy nor did it enter judgment for the damages. The trial court ordered a new trial in order to have a jury determine the amount of damages. Further, *Ulloa* involved a unique jury instruction that did not require the jury to determine that the party had proven damages in order to render a verdict on the breach of contract theory.

O'Connell is readily distinguishable from the current case as the parties in that matter did not contest the jury's findings on the issue of damages. As such, they were barred from further litigating the claim of damages. In the instant case, the second jury returned a finding of compensatory damages on both contested counts.

The facts of *Murray v. Hadid* are also different from this case. There, the jury awarded compensatory damages for a fraud claim, which was later set aside by the trial court. 238 Va. at 730-731, 385 S.E.2d at 904-905. The case of *Rome v. Kelly Springfield Tire Co.* is different from this case because the court determined there was no preponderance of evidence in favor of either party. 241 Va. 943, 948, 234 S.E.2d 277 (1977).

trial solely on the issue of damages was deemed necessary.

In *Rawle*, this Court discussed the power and authority granted to courts to set aside a verdict as being inadequate or excessive where the verdict plainly resulted from:

> [The] jury's misconception of the merits of the case in so far as they relate to the amount of damages, if any, recoverable, as for instance, that it has taken into consideration improper items or elements of damage or has failed to take into consideration proper items or elements of damage, or that it has in some way misconstrued or misinterpreted the facts or the law which should have guided it to a just conclusion as to the amount of damages, if any, recoverable.

Id., 163 Va. 735, 744-745, 177 S.E. 214, 218-219 (1934).

The trial court in *Rawle* granted a new trial on the question of damages alone due to the inadequacy of the jury's verdict. In reviewing the decision, this Court concluded that the trial court acted within its discretion in setting aside the verdict on the ground that the damages awarded were so inadequate as to warrant the inference that the jury had misconceived the evidence or instructions. The Court went on to further approve the trial court's remedy in ordering a new trial solely on the issue of damages. The Court in *Rawle* reasoned that

> both the apparent cause for the return of an inadequate verdict and the state of the evidence relative to the liability of the defendant have an important, and to a considerable extent interacting, bearing upon the plaintiff's right to have the verdict set aside.

Id., 163 Va. at 748, 177 S.E. at 219-220. In cases where the evidence is

insufficient to sustain a verdict finding the defendant not liable, a court should "set aside the verdict on the ground of inadequacy and . . . the new trial should be limited to the question of the amount of damages." *Id.*

Just as in *Johnson* and *Rawle,* the jury in the first case failed to award adequate damages to Naser and ZH Tech despite clear evidence of and its finding of liability. Thus, the trial court acted within its discretion and authority in awarding a new trial only on damages to cure the inadequacy of the earlier verdict.

III. Does a corporation whose status was terminated have standing to seek relief upon reinstatement for claims that arose after termination and prior to reinstatement?

The claims asserted by ZH Tech occurred during a period of time after its corporate status terminated. Syed and Zerowire maintain that ZH Tech lacks standing to assert such claims. This proposition is inconsistent with Virginia law.

A. A reinstated corporation has standing to assert legal wrongs committed upon it while in a terminated status.

Virginia law is clear that if a corporation's status is terminated and it is subsequently reinstated, the corporation is deemed to have existed continuously since its termination. §13.1-754 states:

> Upon the entry by the Commission of an order of reinstatement, the corporate existence shall be deemed to have continued from the date of termination of corporate existence. . . .

The plain language of this section is consistent with courts which have examined the issue. In *Estate of Kenneth Levi*, 61 Va. Cir. 31 (Richmond 2003), the court held that "when a corporation fulfills the requirements for reinstatement, its corporate existence is to be deemed never to have ceased." *Id. at 33.* The court in *In re Wine Farms, Inc.*, 94 Bankr. 410 (W.D. Va. 1998) stated that following reinstatement: "in the eyes of the State of Virginia, it has been a corporation all along." *Id.* at 413. "The statute is clear, and the caselaw reinforces the principal that, upon reinstatement, the corporation is deemed to have continued from the date of termination of corporate existence." *Square Deal Demolition, Inc. v. Doxie*, 74 Va. Cir. 441 (Norfolk 2008).

While the corporate status of ZH Tech may have been terminated for a period of time, once it was reinstated, it is "as if the corporation had never been terminated." *Id.* As of the date of the trial, the corporate status of ZH Tech had been reinstated and was in good standing. Thus, there were no technical basis to prevent ZH Tech from affirmatively prosecuting claims that accrued during its terminated status.[5]

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[5] Indeed, to take Syed's and Zerowire's argument to its natural extension

Syed and Zerowire focus on the language in the second half of §13.1-754 is misplaced. The legislative history they cited affirms that the portion of §13.1-754 upon which they rely upon addresses merely the personal liability of corporate officers in the context of such terminated status.

B. Syed and Zerowire are barred from asserting ZH Tech's terminated corporate status as a defense.

Syed and Zerowire are barred from asserting an affirmative defense based upon termination of corporate status. Syed and Zerowire never previously raised the issue of ZH Tech's corporate status in their Answer and Grounds of Defense, despite identifying over 21 affirmative defenses. Syed's and Zerowire's failure to raise the issue is a waiver of the defense. *Lumbermen's Mut. Cas. Co. v. Hodge*, 205 Va. 36, 42, 135 S.E.2d 187, 191-92 (1964), Rule 1:4(d) of the Rules of the Supreme Court.

Syed and Zerowire are also judicially estopped from now arguing that ZH Tech is not a proper corporation in light of Syed's and Zerowire's cross bill against ZH Tech as a corporation. *Bentley Funding Group v. SK & R Group*, 269 Va. 315, 326, 609 S.E.2d 49, 54 (2005). *See Bluebonnet*

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would be to inoculate from liability the bookkeeper who first intentionally allows the corporate status of his employer to be terminated and then proceeds maliciously to misappropriate and divert corporate accounts or assets.

Farm, Inc. v. Gibraltar Sav. Assoc., 618 S.W.2d 81, 84 (1980) (appellant's failure to timely raise the issue combined with its prosecution of its counterclaim against corporation constituted waiver).

Further, Syed and Zerowire failed to comply timely with the requirements of §8.01-279(c), which states that "it shall not be necessary to prove the fact of incorporation unless with the pleading which puts the matter in issue there be filed an affidavit denying such. . . incorporation." Va. Code §8.01-279(c). No such pleading or affidavit was filed. As such, Syed and Zerowire failed to object timely to the prosecution of such claims and ZH Tech is deemed to have been a corporation at all times alleged in the pleadings.

IV. Did the trial court abuse its discretion by failing to require counsel for Naser and ZH Tech to segregate their attorney's fees among the various counts?

Attorney's fees were awarded by the trial court pursuant to §18.2-500 after the finding of Syed's and Zerowire's liability for their acts of conspiracy.[6] Syed and Zerowire claim the trial court erred by awarding

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[6] In addition to the conspiracy count, Naser and ZH Tech successfully maintained an action for fraud, which was not assigned error. The trial court found pursuant to *Prospect Development Co., Inc. v. Bershader,* 258 Va. 75, 515 S.E.2d 291 (1999), that an award of attorney's fees on the fraud claim was well taken and would have been made but for the fee

fees upon affidavits which failed to specifically segregate the services among the claims. (JA 1619-1705).

However, in cases where attorneys fees are granted, "the amount of the fee award rests within the sound discretion of the trial court," *Coady v. Strategic Res.*, 258 Va. 12, 18, 515 S.E.2d 273, 276 (1999), and deference is given to its judgment upon appellate review. Generally, when calculating attorney's fees, a court should consider successful and unsuccessful claims separately. However, when a case involves multiple claims based on a common core of facts, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) "Such a lawsuit cannot be viewed as a series of discrete claims." *Id., See also, Williams v. Kingston Shipping Co.,* 925 F.2d 721, 725-26 (4th Cir. 1991). In such a case, "the court should allow the recovery of the fees and costs incurred as a result of an attorney's attention to the litigation as a whole." *Moore v. Southtrust Corp.*, 392 F.Supp.2d 724 (E.D. Va. 2005) (internal citations omitted).

Such an approach has been recognized as appropriate in the context

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award given pursuant to the conspiracy claim. This issue is not considered on appeal, but an adverse ruling as to attorney's fees on the conspiracy count would clearly frustrate the trial court's intentions as to attorney's fees on the fraud count.

of successful conspiracy actions. See, e.g., *Tazewell Oil Co. v. United Virginia Bank*, 243 Va. 94, 413 S.E.2d 611 (1992). In *Tazewell*, as in the case at bar, the trial court did not allocate fees among "factually intertwined but legally distinct counts," *id.*, 243 Va. at 111, 413 S.E.2d at 620, some of which were unsuccessful. This Court approved the exercise of the trial court's discretion and affirmed the award of fees not specficially dedicated to the prevailing conspiracy count, stating:

> Where, as here, a statute authorizes recovery of attorney's fees and expenses, the fact finder is required to determine from the evidence the amount of the reasonable fees under the facts and circumstances of each particular case. *Mullins v. Richlands National Bank,* 241 Va. 447, 449, 403 S.E.2d 334, 335 (1991). "In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances." *Id.*

Tazewell, 243 Va. at 111-112, 413 S.E.2d at 621.

This litigation arose out of a core set of facts involving Syed's and Zerowire's fraudulent misappropriation of Naser's and ZH Tech's' business assets. The claims are intricately intertwined with a common factual basis, such that the trial court "could not find such costs to be segragable." JA 1740. In light of *Tazewell*, the trial court considered the total fees identified in the affidavit to be necessarily incurred and associated with litigating the conspiracy action. As such, the award of attorney's fees was appropriate

and not an abuse of the trial court's discretion.

In support of their argument, Syed and Zerowire cite two cases: *West Square, LLC v. Communication Tech.*, Inc., 274 Va. 425, 649 S.E.2d 698 (2007) and *Ulloa v. Q.S.P,* 271 Va. 72, 624 S.E.2d 43 (2006). In *West Square*, this Court upheld the trial court's discretion in *not* finding that certain fees were related to an underlying contractual claim. The holding in *Ulloa* was predicated upon the uniqueness of the parties' agreed upon jury instructions, in which the award of attorney's fees was an agreed upon remedy without evidence of damages.

Regardless of the questionable applicability of *West Square* and *Ulloa* because of their unique facts, the Court in neither case deemed it mandatory for a prevailing party to segregate their attorney fees affidavits among claims in order to be awarded the same, as Syed and Zerowire suggest. Further, the Court in neither case suggested it was overturning or modifying *Tazewell* on this issue.[7]

Indeed, with tightly intertwined claims such as those now before this Court, segregation of fees would often be at best a practical impossibility

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[7] Fees were clearly incurred and awardable on both the fraud and business conspiracy counts. To the extent that this Court finds that the trial court erred in determining that the fees could not be segregated between the various claims, then this Court should remand the matter to the trial court to calculate an appropriate award. *See, e.g., AMX Enterprises LLP v. Masters Realty Corp.*, 283 S.W.3d 506 (2009).

or likely fiction, thereby creating an unobtainable standard for litigants to meet in order to achieve the clear remedial legislative purpose of §18.2-500.

While segregation of fees between claims may ease such analysis, the prevailing party only has "the burden to establish to a reasonable degree of specificity," *West Square*, 274 Va. at 435, 649 S.E.2d at 435, those "fees associated with a particular claim for which an award of attorney's fees is allowed." *Id.* The determination of whether a prevailing party has met this burden remains within the discretion of a trial court. There is no evidence to suggest that the trial court abused such discretion when it found that Naser and ZH Tech had met that burden.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, your Appellees, ABULALA K. NASER and ZH TECHNOLOGIES, INC., respectfully request that this honorable Court determine:

1. that ZH Technologies, Inc., had standing to assert claims of relief accrued during a period of terminated corporate status;

2. that the trial court did not abuse the discretion in Virginia Code Section 8.01-377 by permitting the first jury to make findings based upon evidence at variance with the pleadings respecting issues of the specific nature of the fiduciary duty and of any conspiracy involving conspirators unnamed in the pleadings;

3. that the trial court correctly affirmed the finding of liability as to the business conspiracy count;

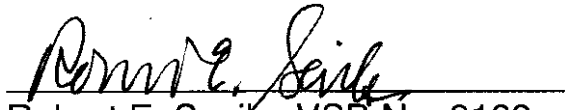
4. that the trial court did not abuse its discretion in awarding a new trial on issues of damages in response to the jury's defective damage verdict; and,

5. that the trial court did not abuse its discretion in its award of attorney's fees;

FURTHER, Naser and ZH Tech respectfully request that this honorable Court deny the Appeal, uphold the trial court's judgment and award in its entirety, and remand the matter to the trial court for the limited purpose of considering a further award of attorneys fees, costs, and expenses to Appellees for all matters related to the appellate proceedings associated with this litigation, or, in the alternative, remand the matter to the trial court for such further consideration as this Court deems just and appropriate.

Respectfully submitted,

ZH TECHNOLOGIES, INC., and
ABULALA K. NASER,
Respondent-Appellees
By counsel



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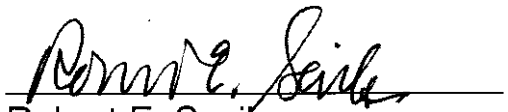
CERTIFICATE OF SERVICE

Pursuant to the Rule 5:26(d) of the Rules of the Supreme Court, I hereby certify as follows:

1. Fifteen (15) copies of the Brief of the Appellees have been mailed by certified mail (with return receipt) to the Clerk of the Supreme Court of Virginia, Supreme Court Building, 100 N. 9th Street, #4, Richmond, VA 23219, this 8TH day of January, 2010; and

2. One (1) electronic PDF copy of the Brief of the Appellees has been emailed to the Clerk of the Supreme Court of Virginia, scvbriefs@courts.state.va.us, this 8TH day of January, 2010; and

3. Three (3) copies of the Brief of the Appellees has been mailed postage prepaid to counsel for the Syed and Zerowire: Andrei J. Kublan, Esquire, KUBLAN & AUSTIN PLC, 6521 Arlington Blvd., Suite 503, Falls Church, VA 22042, this 8TH day of January, 2010.



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