In The

Supreme Court of Virginia

RECORD NO. 171708

SARAH YANCEY MAY,

Appellant,

v.

R. A. YANCEY LUMBER CORPORATION,

Appellee.

BRIEF OF APPELLANT

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NATURE OF THE CASE

This case is one of first impression involving the interpretation of Va. Code §13.1-724 which protects the minority shareholders of a Virginia corporation when its assets are sold other than in the usual and regular course of business. Appellant Sarah Yancey May ("Sarah") is a minority shareholder in a family-owned lumber mill business which was started by her deceased father over 65 years ago. Sarah filed an action in the circuit court seeking declaratory and injunctive relief to prevent the sale of the lumber mill business by her two brothers William Daniel Yancey ("Dan") and William Richard Yancey ("Dick"). The trial court denied Sarah's request for injunctive relief even though the sale of the lumber mill business was not approved by a vote of more than two-thirds of the Company's shareholders in violation of Va. Code §13.1-724, and the proposed sale would not leave the Company with a "significant continuing business activity" as required by the statute. In making its ruling, the trial court found that Sarah's brothers could, with less than two-thirds of the shareholder vote, amend the Company's bylaws to create a safe harbor with an alternative definition of "significant continuing business activity" they knew the transaction could fall within. The trial court's decision conflicts with the legislative intent reflected in the statute, and allows

a mere majority of shareholders of a Virginia corporation to circumvent the protection provided to minority shareholders by Va. Code §13.1-724.

MATERIAL PROCEEDINGS BELOW

On August 11, 2017, Sarah filed a Verified Complaint seeking a declaratory judgment and injunctive relief to prevent her two brothers from taking illegal corporate action to sell their family's lumber mill business over her objection. [App. 2-31] Sarah also filed an Emergency Motion for Temporary Injunctive Relief to stop the proposed sale until the trial court could fully address the merits of the Complaint. [App. 33-43] Sarah alleged that the proposed sale did not satisfy the requirements of Va. Code §13.1-724, and that her brothers had attempted to circumvent the statutory requirements by improperly amending the Company's bylaws with only a majority of the shareholder vote. [App. 2-31]

On September 15, 2017, the trial court held an evidentiary hearing on Sarah's Emergency Motion for Temporary Injunctive Relief, and on the Company's Demurrer and Special Plea in Bar. The facts were largely uncontested, and the Parties stipulated in writing to certain facts and exhibits. [App. 155-160 and App. 152-153] At the conclusion of the hearing, the trial court took all matters under advisement. [App. 455:18-20]

The trial court announced its ruling in open court on September 21, 2017. [App. 502:1-20] Sarah's counsel stated her objection to the ruling on the record. [App. 502:13-20] The Court's ruling was based on its findings that the corporate actions taken by Dan and Dick were permissible under Va. Code §13.1-724, and that the Proposed Sale fell within the new safe harbor they had created with the amended bylaws adopted with their majority vote. The trial court further ruled that Sarah as a minority shareholder, was already protected by Virginia law relating to the fiduciary duty owed by directors to shareholders. [App. 203-204; App. 502:1-10] On September 27, 2017, the trial court entered the Final Order[1] denying Sarah's Emergency Motion for Temporary Injunctive Relief [App. 502:7-10; App. 203, ¶1], denying the Company's Demurrer [App. 502:1-2; App. 203, ¶2], granting the Company's Special Plea in Bar [App. 502:2-6; App. 203, ¶3], and awarding judgment for the Company and against Sarah [App. 502:1-10; App. 203, ¶4].

[1] The transcript from ruling stated on September 21, 2017, is attached to the Final Order and incorporated by reference.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Company's Special Plea in Bar and entering judgment against Sarah on the ground that the Proposed Sale was not approved by the affirmative vote of more than two-thirds of the Company's shares as required by Va. Code §13.1-724, nor does it satisfy the criteria of the safe harbor set forth in Va. Code §13.1-724(A). [App. 203, ¶3; App. 33-43; App. 48-66; App. 161-168; App. 502:16-503:4; App. 502:2-6, 502:13-20]

2. The trial court erred in granting the Company's Special Plea in Bar and ruling that a mere majority of the Company's shareholders may amend or redefine the statutory safe harbor of Va. Code §13.1-724, or create its own safe harbor, through the amendment of the Company's bylaws. [App. 203, ¶3; App. 33-43; App. 48-66; App. 161-168; App. 490:12-493:14; App. 502:2-6, App. 502:13-20]

3. The trial court erred in granting the Company's Special Plea in Bar and finding that the general fiduciary duty owed by corporate directors and officers as recognized in Virginia caselaw, is a substitute for the protection of minority shareholders afforded by Va. Code §13.1-724. [App. 486:25-App. 488:12, App. 502:13-20]

4. The trial court erred in denying Sarah's Motion for Emergency Injunctive Relief on the ground that it is based on its misinterpretation of Va. Code §13.1-724 and the erroneous finding of laches which is not supported by the evidence. [App. 203, ¶1; App. 33-43; App. 48-66; App. 161-168; App. 493:15-498:6; App. 502:7-10, App. 502:13-20]

STATEMENT OF FACTS

The Mill Business

R. A. Yancey Lumber Corporation (the "Company") operates a saw mill business and lumber yard in Yancey Mills, Virginia (the "Mill Business"). [App. 155, ¶2] The Company was founded by Richard A. Yancey, Sr. in 1951 and was incorporated in 1959. [App. 155, ¶¶ 1, 2; App. 302:6-7, 14-15] The Company purchases loblolly and short leaf pine logs from third parties, saws the logs into lumber, dries it in kilns and planes it for a finished product. [App. 155, ¶4, App. 305:20-24] The Mill Business is operated on two parcels of land in Albemarle County where all its buildings and equipment are located, and it employs approximately 70 employees. [App. 157, ¶18; App. 304:17-22; 306:6-8]

In addition to the Mill Business, the Company owns approximately 2,465 acres of timber land in Albemarle, Nelson, Greene and Louisa counties (the "Timber Land") from which mostly hardwood trees are periodically harvested and sold – almost exclusively to third parties. [App. 156, ¶13; App. 308-310, App. 385:3-5] The Company also owns two vacant parcels in Albemarle County which are not timber land nor are they used in the Mill Business. [App. 621-622]

Ownership of the Company

The current shareholders of the Company are Sarah, Dick and Dan and their spouses. [App. Stipulation 155-156, ¶¶5-9] Sarah owns 542.07 shares, while Dan and Dick own 542.06 and 542.07 shares, respectively. [App. 3, ¶¶4, 6-7] Dick's wife, Dan's wife and Sarah's former husband, Bill May ("Bill"), each own 59.6 shares. [App. 3, ¶¶ 5, 8] Sarah and Bill collectively own 33.333335% of the shares - slightly more than one-third of the total shares of the Company. [App. 156, ¶9; App. 301:19-22]

Sarah's Brothers Attempt to Sell the Mill Business Through Improper Corporate Action

In 2015, Dan and Dick began efforts to sell the Company to which Sarah and Bill objected. [App. 315:23-25; 359:22-25; 360:1-2; 380:9-12; 391:5-10; 407:19-25; 408:4-6; 410:6-11] Seeking to circumvent the opposition by Sarah and Bill and obviate the need for their approval, in late 2015 and early 2016, Dan and Dick adopted amendments to the Company's bylaws with a mere majority vote with which they attempted to redefine what is a "significant continuing business activity" under the safe harbor provided in Va. Code §13.1-724 for transactions where a company's assets are sold other than in the usual and regular course of business. [App. 157-158, ¶¶22-24; App. 318:14-319:19; App. 320:3-23, App. 345:13-15; App. 346:12-347:3; App. 391:15-392:11; App. 408:7-409:1; App. 558-569 and 593-608] Indeed,

the Company concedes that a sale of the Mill Business would not meet the safe harbor test enumerated in Va. Code §13.1-724. [App. 286:22-25; 287:7-10]

In 2016, the Timber Land accounted for approximately 1.5% of the Company's gross revenues and 4.3% of the Company's total assets. [App. 646, App. 37-42; App. 386:19-387:5] The sale of the Mill Business would leave the Company with no saw mill, no lumber yard, no office, no employees, no equipment and no "operations" and Dan conceded the remaining operations would not be "significant." [App. 386:19-387:5] The "business" which would remain after the Proposed Sale would be the ownership of land with standing timber – which would be sold periodically – and two vacant lots. [App. 621-622; App. 313-315]

The Brothers Improperly Rewrite the Company's Bylaws to Create Their Own Self-Serving Safe Harbor

The Amended and Restated Bylaws proposed by Dan and Dick, were adopted on December 16, 2015, by only a majority vote of the shareholders. [App. 558-569] The amendment reflected in the Amended and Restated Bylaws was to Article XII of the original bylaws which was revised to state as follows:

ARTICLE XII
Business of the Corporation

> The Corporation engages or may engage in various business activities related to the commercial lumber business and real estate investment business, including without limitation (i) the ownership, management and operation of a lumber mill (the "Mill Business") and (ii) the ownership and management of real property on which timber may be grown and harvested (the "Timber Business"). Notwithstanding anything herein or any non-mandatory provisions of the VCSA [the Virginia Stock Corporation Act] to the contrary, either the Mill Business or the Timber Business alone, without the other or any other business activity, shall constitute a significant continuing business activity in the event such business is retained by the Corporation following the sale, lease, exchange or other disposition of the Corporation's other assets if the fair market value of the retained business assets constitutes at least twenty-five percent (25%) of the fair market value of all of the Corporation's assets in the aggregate prior to such sale, lease, exchange or other disposition, excluding for all purposes hereunder cash and cash equivalents. For purposes hereunder, the most recent assessed value for local tax purposes of real property owned by the Corporation shall be considered its fair market value, absent the existence of a fair market value determination by a qualified real estate appraisers made within one year prior to the relevant determination date, in which case the most recent of such determinations shall be used to establish the fair market value. This Article XII is intended to operate in lieu of the definition of "significant continuing business activity" set forth in Section 13.1-724(A) of the Code of Virginia (which statutory definition is provided for use in the absence of a defined term in the applicable articles of incorporation or bylaws). [App. 560-569]

Sarah and Bill objected to the adoption of the Amended and Restated Bylaws. [App. 158, ¶¶23, 24; App. 558-559]

The clear intent of Dan and Dick in proposing and orchestrating the adoption of the Amended and Restated Bylaws [App. 560-569] was to adopt an amendment which would create a new safe harbor and allow them to approve a sale of the Mill Business over Sarah's objection - i.e., without the affirmative vote of shareholders holding more than two-thirds of the Company's shares as required by §13.1-724(E). [App. 391:15-392:11; App. 408:7-409:1]

The Brothers Further Amend the Company's Bylaws to Ensure the Sale Would Fall Within the New Safe Harbor

In March of 2016, Dan and Dick proposed an additional amendment to Article XII of the Amended and Restated Bylaws in order to further define the calculation of what constitutes a "significant continuing business activity" by seeking to characterize the value of the real estate not being sold in a manner inconsistent with its use by the Company as timberland. Specifically, the proposed "clarification amendment" to the previously adopted Article XII of the Amended and Restated Bylaws was adopted by the shareholders on March 25, 2016 with Sarah abstaining.[2] The language clarification provided in pertinent as follows (changes noted):

[2] Although not relevant to the trial court's ruling, Bill testified that his understanding was that he was agreeing to was "housekeeping" and a "tweak" of what had already been adopted over his objection – and not a ratification or approval of the Amended and Restated Bylaws. [App. 361:19-362:2]

> For purposes hereunder, the most recent ~~assessed value~~ gross land and improvement values determined by local tax authority for local ~~tax purposes~~ taxation of real property owned by the Corporation, irrespective of any land use deferral (or land use applied, land use value, or total value designations), shall be considered ~~its~~ such real estate's fair market value, absent the existence of a fair market value determination by a qualified real estate appraiser made within one year prior to the relevant determination date, in which case the most recent of such determinations shall be used to establish the fair market value. [App. 599-608]

While Va. Code §13.1-724(E) provides that "The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection…" (i.e., two-thirds), the Company's Articles of Incorporation do not address the vote required to approve the sale of assets by the Company. [App. 525-532]

The Brothers Execute a LOI and Sarah Objects

On May 3, 2017, Dan and Dick caused the Company to enter into a Letter of Intent ("LOI") with a purchaser ("Purchaser") to sell the real property, buildings, operations and equipment used by the Company in the Mill Business (the "Proposed Sale"). [App. 159; App. 330:5-10] Sarah and Bill opposed the Proposed Sale and believed that the LOI was not enforceable because it was executed without proper corporate approval. [App. 159, ¶ 33; App. 160, ¶ 35; App. 318:14-319:2, App. 320:13-23, 329:8-19-71:4; App. 359:18-24]

The Brothers Proceed Despite Sarah's Continued Objection

Sarah communicated her objection to the LOI's execution [App. 159, ¶30] Nonetheless, on June 21, 2017, Dan executed an amended LOI which included a "break up" fee. [App. 159, ¶30; App. 329:23-330:4, 331:2-15; App. 393:5-394-11] Sarah again communicated her objection to the amended LOI. [App. 533-538]

On August 11, 2017, Sarah filed her Verified Complaint and Emergency Motion for Temporary Injunctive Relief in this case. [App. 2-30 and App. 33-43]

On August 25, 2017, after the filing of Sarah's lawsuit, the Company sent out a Notice of Special Meeting of the Shareholders to be held on September 11, 2017, to approve an Asset Purchase Agreement ("APA") with Purchaser. [App. 617-620] Sarah provided written objections to the meeting notice and the APA. [App. 617-620] At that meeting, the APA was approved with less than two-thirds of the shareholders' approval – Sarah and Bill voting against it. [App. 160]

The Trial Court's Ruling

After an evidentiary hearing, the trial court entered a Final Order denying Sarah's Emergency Motion for Temporary Injunctive Relief,

overruling the Company's Demurrer but granting its Special Plea in Bar. Sarah timely appealed the Court's decision.

SUMMARY OF THE ARGUMENT

In Virginia, the sale of a corporation's assets that is not in the usual and regular course of business triggers protections specifically granted to minority shareholders by the Virginia General Assembly in Va. Code §13.1-724. Such a significant transaction requires the affirmative approval of more than two-thirds of the corporation's shareholders - unless it falls within the statutory safe harbor (which obviates the need for shareholder approval) where the corporation still retains a "significant continuous business activity" after the sale. The criteria for the safe harbor enumerated in the second sentence of Va. Code §13.1-724(A) is very specific, and is designed to provide guidance on what would be deemed a "significant continuing business activity" – a term designed to protect minority shareholders.

The trial court's interpretation of Va. Code §13.1-724(A) effectively nullifies the statutory protections afforded to minority shareholders of a Virginia corporation, and eviscerates the plain and clear intent of the statute – because it ruled that a mere majority of shareholders could effectively rewrite the statute and eliminate the two-thirds approval requirement, through the amendment of the Company's bylaws. In this case, Dan and

Dick, with a mere majority, improperly amended the Company's bylaws, re-wrote the statutory safe harbor (twice) so that the Proposed Sale would fall within its boundaries. Their actions removed the need for Sarah's approval of the sale of the Mill Business and eliminated the protection provided to her as a minority shareholder by Va. Code §13.1-724. The trial court's clear error in interpreting Va. Code §13.1-724 allowed a majority of shareholders to circumvent the need for the affirmative approval of more than two-thirds of the shareholders for the Proposed Sale required by Va. Code §13.1-724.

The trial court erroneously found that despite the clear mandate in the first sentence of Va. Code §13.1-724(A) requiring the affirmative approval of more than two-thirds of the shareholders (subsection (E)) for the sale of assets outside the regular course of business unless the Company retained a "significant continuing business activity", Dan and Dick were allowed to circumvent that requirement with the amendment of the Company's bylaws with a mere majority vote of the shareholders. Significantly, subsection (E) allows for an alteration to the voting requirements if provided for in the "Articles of Incorporation" – not the bylaws.[3]

[3] The Company's Articles have no such provision, and they can only be amended with the approval of two-thirds of the shareholders.

The trial court also erred when it held that corporate bylaw amendments could alter the language and definitions provided in a statutory safe harbor and create an alternate safe harbor. This interpretation is nonsensical and effectively means that a simple majority of shareholders could write its own safe harbor for an asset sale, and effectively eliminate the protection given to minority shareholders by the Virginia General Assembly when it adopted Va. Code §13.1-724. The qualifying phrase at the beginning of the safe harbor provision which reads "unless the articles of incorporation or a shareholder approved bylaw otherwise provide," provides a corporation the opportunity to opt out of using the safe harbor but not to create its own. Any other interpretation of Va. Code §13.1-724 would allow a majority of a corporation's shareholders to rewrite the statute to include any test at all or to effectively eliminate the test by adopting one that any transaction would meet. The trial court's interpretation renders Va. Code §13.1-724 meaningless, which can hardly be what the Virginia General Assembly intended.

STANDARD OF REVIEW

This case raises a question of statutory interpretation and was decided on a special plea. The Court's review is *de novo. Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499 (2015); *Smith v. McLaughlin*, 289 Va.

241, 251 (2015). In considering a statute, the Court is "bound by the plain meaning of statutory language." *Alliance to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd.*, 270 Va. 423, 439 (2005). Any undefined term "must be given its ordinary meaning, given the context in which it is used." *Sansom v. Bd. of Supers.*, 257 Va. 589, 594-95 (1999). When susceptible to more than one interpretation, the "purpose for which a statute is enacted is of primary importance." *VEPCO v. Bd. of Supers.*, 226 Va. 382, 388 (1983). The Court "must apply the interpretation that will carry out the legislative intent behind the statute." *Conyers v. Martial Arts World of Richmond*, *Inc.*, 273 Va. 96, 104 (2007).

Indeed, the Court has a "duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." *VEPCO*, 226 Va. at 387-88. "[E]very word in the statute must be given its full effect if that can be done consistent with the manifest purpose of the act." *Home Ben. Life Ins. Co. v. Unemp. Comp. Comm'n.*, 181 Va. 811, 819 (1943). A "statute should never be construed in a way that leads to absurd results." *Ricks v. Commonwealth*, 290 Va. 470, 477 (2015) (citation omitted).

The trial court's denial of Sarah's Emergency Motion for Temporary Injunctive Relief (Assignment of Error 4) presents mixed questions of law

and fact. The Court must afford deference to the trial court's factual findings, but reviews de novo its application of the law to the facts. *Ferguson v. Stokes*, 287 Va. 446 (2014). However, the Court may decline to adopt the trial court's findings if the "are plainly wrong or without evidence to support them." *Westgate at Williamsburg Condo. Ass'n v. Phillip Richardson Co.*, 270 Va. 566, 573 (2005).

ARGUMENT

Actions taken by a corporation are accomplished through their officers and directors – with certain actions requiring the approval of the shareholders. In Virginia, corporations are governed by the Virginia Stock Corporation Act, Va. Code §13.1-601 *et seq*., their Articles of Incorporation and by the terms of their properly adopted bylaws. Va. Code §13.1-723 clearly states that the sale of a "corporation's assets in the usual and regular course of business" does not require shareholder approval. However, Va. Code §13.1-724 applies to the significant transactions outside the regular course of business which require not only shareholder approval – but the affirmative approval of "more than two-thirds" of the shareholders of a company. The history of the corporate statute and the language of Va. Code §13.1-724 reflect the recognition by the General Assembly that specificity and a heightened threshold of shareholder approval is necessary and

warranted to protect minority shareholders when there is a sale of assets which is not in the usual and regular course of business.

I. Va. Code §13.1-724(A) Requires that the Sale of Assets by a Virginia Corporation Outside the Usual and Ordinary Course of Business Must Be Approved by an Affirmative Vote of more than Two-Thirds of the Company's Shareholders or Fall Within the Safe Harbor Set Forth in the Statute. [Assignment of Error No. 1]

A. Voting Requirements and the Safe Harbor of Va. Code §13.1-724.

Virginia law has long provided protection to minority shareholders in transactions that are not in the "usual and regular course of business." Va. Code §13.1-724(E) speaks to the specific level of approval needed by the shareholders if the transaction does not fall within the "usual and regular course of business" category, and states:

> E. Unless the board of directors, acting pursuant to subsection C, requires a greater vote, the disposition to be authorized shall be approved by the holders of more than two-thirds of all the votes entitled to be cast on the disposition. The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the disposition by each voting group entitled to vote on the disposition at a meeting at which a quorum of the voting group exists.

Subsection (E) provides that the level of shareholder approval required can be altered in the Articles of Incorporation. There is no mention anywhere in

Subsection (E) that the voting requirement can be altered by a corporation's bylaws.

Va. Code §13.1-724(A) eliminates the requirement of the "more than two-thirds" affirmative vote if the corporation will retain a "significant continuing business activity" after the transaction. Va. Code §13.1-724(A) also includes a "safe harbor" with specific criteria for what is considered "significant continuing business activity," and provides as follows:

> A. A sale, lease, exchange or other disposition of the corporation's assets, other than a disposition described in §13.1-723, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. Unless the articles of incorporation or a shareholder-approved bylaw otherwise provide, if a corporation retains a business activity that represented at least 20 percent of total assets at the end of the most recently completed fiscal year, and 20 percent of either (i) income from continuing operations before taxes or (ii) revenues from continuing operations for that fiscal year, in each case of the corporation and any of its subsidiaries that are consolidated for purposes of federal income taxes, the corporation will conclusively be deemed to have retained a significant continuing business activity.

Because of the dearth of case law which could provide guidance in interpreting these particular provisions, the legislative history of the Act, and Va. Code §13.1-724 specifically, is relevant.

B. The Legislative History of Va. Code §13.1-724 Reflects the Intentional Retention of the Higher Level of Shareholder Approval Needed for Asset Sales Outside the Ordinary Course of Business.

The American Bar Association published a Model Business Corporation Act (the "Model Act") in 1950, and Virginia, like many jurisdictions, used the Model Act as a base when it modernized its statute in 1956. One of the significant expansions beyond the provisions of the Model Act which Virginia made to the Virginia Stock Corporation Act in 1956 was to apply the requirement of the approval of "more than two-thirds vote" by shareholders to all major corporate actions. Va. Code §13.1-77 (part of the 1956 Virginia Stock Corporation Act) specifically required "more than two-thirds" shareholder approval for any sale of "all or substantially all" of a corporation's assets that was not in the "usual and regular course of [a corporation's] business." This specific threshold has remained a part of the statutory scheme to this day. Indeed, in the Code Commission Commentary from 1985, it was noted that the Virginia requirement of "more than two thirds" was a departure from the majority required under the Model Act.

The Model Act was comprehensively revised in 1984 (the "Revised Model Act"). In 1985, the Virginia General Assembly adopted, in large part, the Revised Model Act by enacting the new Virginia Stock Corporation Act found at Va. Code §§13.1-601 *et seq*. The new Virginia Stock Corporation

Act retained the requirement that any sale of "all or substantially all" of a corporation's assets that is not in the "usual and regular course of business" be approved by "more than two-thirds vote" of the shareholders. However, in 2005, the Virginia General Assembly incorporated certain "refinements" made to the Revised Model Act which included the replacement of the "substantially all assets" test with the requirement that the remaining unsold assets of the corporation constitute a "significant continuing business activity." This language change reflects the analysis made by the courts in various jurisdictions after adopting the Revised Model Act which included not only the quantitative review of assets but also the qualitative review of revenue and income to determine if there was anything left of a corporation's business after the proposed asset sale.

C. The Virginia Legislature Provides a Specific Safe Harbor to Va. Code §13.1-724.

To provide guidance and certainty for corporations, the Virginia General Assembly also included within Va. Code §13.1-724(A) a "safe harbor" by which, if met, would eliminate the need for shareholder approval. If not met, under Va. Code §13.1-724(E), the transaction would require approval by more than two-thirds of the corporation's shareholders.

The history of Va. Code §13.1-724(A) and the change from the language of the previous version of the statute which did not have a safe

harbor and which focused on whether a corporation sold “all or substantially all of the corporation’s assets,” to the concept of a corporation retaining a business which is not only “significant” but also “continuing,” reflects the recognition by the General Assembly of two things: That minority shareholders should continue to be protected by preventing a corporation’s board of directors and a simple majority of its shareholders from approving an asset sale that would essentially gut the corporation’s business and leave it with no business activity; and that certainty was needed to eliminate disputes over what constitutes “significant continuing business activity” so that corporations would know what level and type of activity would need to remain in order to obviate the need for the higher level of approval by the shareholders. The Official Comments of the Revised Model Act confirm that the safe harbor was designed so that its application “should, in most cases, produce a reasonably clear result substantially in conformity with the approaches taken in the better case law developing the ‘quantitative’ and ‘qualitative’ analyses.” Model Business Corporation Act Annotated, Fourth Edition, Section 12.02, Official Comment 1, pages 12-15 to 12-16.

D. The Proposed Sale Does Not Meet the Safe Harbor Criteria in Va. Code §13.1-724, and Would Leave the Company Without a "Significant Continuing Business Activity."

First, it is not disputed that the Proposed Sale does not meet the safe harbor criteria in Va. Code §13.1-724. [App. 286:22-25; App. 287:7-10] The Company's concession that the Proposed Sale does not meet the statute's threshold criteria confirms that the Company would be left without a "significant continuing business activity." Clearly, the corporate action was taken by Dick and Dan to avoid the statutory voting requirements. Even under a full analysis of whether a "significant continuing business activity" would remain, the sale of the Mill Business would leave the Company with no saw mill, no lumber yard, no office, no employees, no equipment and no "operations" which the Company's president concedes is not "significant." [App. 386:19-387:5] The "business" which would remain after the Proposed Sale would be the ownership of land with standing timber – which would be sold periodically – and two vacant lots. [App. 156, ¶15]

Because the Proposed Sale would leave the Company without a significant continuing business activity, the Corporation cannot legally approve it without the affirmative vote of shareholders holding "more than two-thirds of all the votes entitled to be cast." The Proposed Sale has not

been approved by the required shareholder vote, and is therefore not properly approved and cannot be consummated.

II. The Trial Court Failed to Apply the Plain Language of Va. Code §13.1-724 in Determining that a Mere Majority of the Company's Shareholders Can Amend and Redefine the Statutory Safe Harbor of Va. Code §13.1-724, and Create its own Safe Harbor, Through the Amendment and Adoption of Bylaws. [Assignment of Error No. 2]

A. Va. Code §13.1-724 is Designed to Protect Minority Shareholders.

As stated above, Va. Code §13.1-724 includes the long-time requirement by the Virginia General Assembly that more than two-thirds of the shareholders must approve any sale of assets that would leave the corporation without a "significant continuing business activity."

The first sentence of Va. Code §13.1-724(A) is clear, unambiguous and unequivocal:

> "A. A sale, lease, exchange or other disposition of the corporation's assets, other than a disposition described in § 13.1-723, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity."

Before defining the parameters of the safe harbor in the second sentence, the Virginia General Assembly added the following language to the second sentence in §13.1-724(A): "**Unless the articles of incorporation or a shareholder-approved bylaw otherwise provide…."**

In doing so, it provided a mechanism for corporations to opt out of using the safe harbor which actually provides greater protection for minority shareholders. Admittedly, the qualification in the second sentence of Subsection (A) is less clear. However, the trial court clearly erred when it concluded that a mere majority of the Company's shareholders could rewrite the safe harbor with an amendment to its bylaws. Also significant is the inclusion of the words "shareholder-approved" in reference to a corporation's bylaws which suggests that shareholder approval – presumably proper shareholder approval – is an important factor.

The placement of that qualifying phrase is significant – at the beginning of the description of the safe harbor. There is no qualifier to the mandate of the first sentence of subsection (A) which requires a "significant continuing business activity" remain after a transaction. It is clear and unequivocal. It is the trial court's erroneous interpretation of the second sentence of Va. Code §13.1-724(A), which effectively guts the entire statute – not just the safe harbor.

B. The Trial Court's Decision is Inconsistent with the Purpose of Va. Code §13.1-724 and has Led to an Absurd Result.

This Court has consistently held that in interpreting a statute, courts must apply the plain meaning of the language, "unless the terms are ambiguous or applying the plain language would lead to an absurd result."

County of Albemarle v. Camirand, 285 Va. 420, 424 (2013) citing *Baker v. Commonwealth*, 284 Va. 572, 576 (2012) The first sentence of Va. Code §13.1-724(A) is clear and unequivocal that unless the Company would retain a "significant continuing business activity," the more than two-thirds vote would be required. The trial court's interpretation of the phrase "[u]nless the articles of incorporation or a shareholder-approved bylaw otherwise provide…", which it concluded could allow the majority of the Company's shareholders to "adopt a test that bears no reasonable relationship to the significant business activity," [App. 491:13-16] is an absurd result.

The trial court in this case, has erroneously interpreted Va. Code §13.1-724 to allow a majority of the Company's shareholders to rewrite the safe harbor through an amendment to the Company's bylaws so that the Proposed Sale would fit within its boundaries. If a bare majority could define "significant continuing business activity" to mean anything it desired, it could so enlarge the safe harbor that <u>any</u> asset sale—no matter how little of the corporation's assets, income, or revenue remained—would fall within its scope, thereby making the "more than two-thirds" shareholder approval requirement a nullity. That was clearly not the intention of the General Assembly, which designed §13.1-724 to protect minority shareholders by raising the shareholder vote required to approve asset sales from a bare

majority under the Model Act to a "more than two-thirds" vote in §13.1-724(E). The Court "must apply the interpretation that will carry out the legislative intent behind the statute." *Conyers v. Martial Arts World of Richmond*, *Inc.*, 273 Va. 96, 104, 639 S.E.2d 174 (2007). A "statute should never be construed in a way that leads to absurd results." *Ricks v. Com.*, 290 Va. 470, 477, 778 S.E.2d 332 (2015) (citation omitted).

C. The Trial Court Failed to Interpret Va. Code §13.1-724 Consistently with Legislative Intent.

This Court in *Sheppard v. Junes*, noted the well-established principle that a statute should be construed to "ascertain and give effect to the intention of the General Assembly…." and that "[t]ypically, this only requires applying the plain meaning of the words used in the statute because the General Assembly's intent 'is usually self-evident from the statutory language.'" 287 Va. 397, 403 (2014) citing *Rutter v. Oakwood Living Ctrs of Va.*, *Inc.*, 282 Va. 4, 9 (2011). However, when the legislative intent is not clear from the statutory language, a court must look at the statute in its entirety. Id. "Statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished." *Alston v. Commonwealth*, 274 Va. 759, 769 (2007) See also *Kohl's Dept. Stores v. Va. Dept. of Taxation*, 294 Va. 57, 67 (2017) recognizing that legislative intent must sometimes be gleaned from the "occasion and necessity of the

law…" (citations omitted) Therefore, Va. Code §13.1-724 must be read in its entirety – and in doing so, to interpret one phrase in the second sentence of subsection (A) which serves to allow the statute to be rewritten through a bylaw amendment is an absurd result and ignores the clear intention of the Virginia General Assembly when it crafted the statute. Indeed, such an interpretation would allow a mere majority to adopt a "safe harbor" which would eliminate the need for a shareholder vote under any circumstance.

The phrase in subsection (A) is "unless provided otherwise." It does not say "unless an alternative definition is adopted" or "unless the articles or bylaws do not require the affirmative vote of more than two-thirds of the shares." The only reasonable interpretation of the qualifying phrase in the second sentence of Va. Code §13.1-724 is that the Virginia General Assembly, being historically conservative, wanted to provide corporations the opportunity to opt out of using the safe harbor. The effect of that opt out would not gut the rest of the statute and the protection it provides to minority shareholders. It would mean that the transaction would require approval of more than two-thirds shareholder vote or a full analysis of the transaction without the benchmarks of the safe harbor on asset value, income or revenue to determine if a "significant continuing business activity" remains.

Significant to this analysis of the entire statute is the fact that Va. Code §13.1-724(E) does allow corporations to lower the shareholder approval voting requirement to less than the default "more than two-thirds" vote, but only by a provision in the corporation's articles of incorporation. The Company's Articles of Incorporation do not have such a provision, and pursuant to Va. Code §13.1-707, an amendment thereto would require approval by a "more than two-thirds" vote of its shareholders – the same threshold for approval of the Proposed Sale. Thus, any lowering of the shareholder vote required to approve such an asset sale would first require the approval of the minority shareholders that Va. Code §13.1-724 is intended to protect.

Because Va. Code §13.1-724(A) does not permit the Company to adopt an alternate safe harbor, it remains subject to the default safe harbor unless it chooses to opt out. Even if the Company's Amended Bylaws could be interpreted as an "opt out" of the safe harbor, the Proposed Sale would not meet the qualitative and quantitative analysis required under Va. Code §13.1-724(A). Accordingly, the Proposed Sale requires approval by a "more than two-thirds" shareholder vote, which it does not have.

The trial court's interpretation of Va. Code §13.1-724 effectively nullifies the statutory protections afforded to minority shareholders of a

Virginia corporation when its assets are sold other than in the usual and regular course of business. In such transactions, the affirmative vote of "more than two-thirds" of the corporation's shares is required unless the criteria set forth in the safe harbor found in Va. Code §13.1-724(A) are met. If the transaction meets the specific criteria of the statutory safe harbor which ensures that the corporation retains "a significant continuing business activity" after the transaction, the "more than two-thirds" vote set forth in subsection (E) is not required. The trial court's interpretation of Va. Code §13.1-724 in this case allows a mere majority of shareholders, in order to further their own agenda, to replace the statutory safe harbor and to write their own safe harbor by approving bylaws which serve to side-step the voting requirement designed to protect minority shareholders. [App. 485:19-487:11; App. 488:13-493:14]

III. The Trial Court Erred in Finding That the General Fiduciary Duty Owed by Corporate Directors and Officers as Recognized in Virginia Caselaw, is a Substitute for the Protection to Minority Shareholders afforded by Va. Code §13.1-724. [Assignment of Error No. 3]

The trial court erred in finding that the general fiduciary duty owed by corporate officers and directors to a corporation's shareholders under Virginia case law, adequately protects minority shareholders like Sarah where the "significant continuing business activity" threshold is manipulated

and the "more than two-thirds" shareholder vote required by Va. Code §13.1-724 is circumvented. [App. 486:25-488:12] This "substitute" protection for minority shareholders was found by the trial court to be adequate despite its own observation:

> "To a certain extent, the Court's interpretation does open the door for unscrupulous businesspeople to take potential advantage." [App. 487:4-7]

The trial court identified the problematic result of its ruling but then erroneously found Virginia case law provided a substitute remedy for minority shareholders in the form of fiduciary duty owed to minority shareholders. The trial court cites to and relies on the decisions in *Glass v. Glass*, 228 Va. 39 (1984) and *Adelman v. Conotti Corporation*, 215 Va. 782 (1975). While those cases confirm that corporate directors and officers owe a fiduciary duty to the corporation's shareholders, neither case discusses a fiduciary duty owed from one shareholder to another. Nor does either case discuss the concept of a fiduciary duty replacing a statutory protection. In fact, the quote from the *Adelman* case referred to by the trial court makes it clear that a director's duty of "good faith forbids placing himself in a position where his individual interest clashes with his duty to the corporation" and "… in their dealings with corporate shareholders." Id. at 790. Yet that is

exactly what Dick and Dan did as the majority shareholders in the Company by amending the bylaws to suit their personal agenda.

Based on the previous arguments and cases cited herein on statutory construction, the trial court erred in inserting into Va. Code §13.1-724 a fiduciary duty where none is even mentioned, and in finding such duty to be a substitute to the statutory protection offered to minority shareholders in that statute. [09/21/17 Tr. 5:7-6:12]

IV. The Trial Court Erred in Denying Sarah's Emergency Motion for Temporary Injunctive Relief on the Ground that it is Based on its Misinterpretation of Va. Code §13.1-724 and on the Erroneous Finding of Laches which is not Supported by the Evidence. [Assignment of Error No. 4]

The standards articulated by the Supreme Court for imposing a preliminary injunction is set forth in *Winter v. Nat. Res. Def. Council*, *Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) which requires parties seeking preliminary injunctions to demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest. See also *The Real Truth About Obama*, *Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *cert. granted*, *judgment vacated*, 559 U.S. 1089, 130 S. Ct. 2371, 176 L. Ed. 2d 764 (2010), and adhered to

in part sub nom. *The Real Truth About Obama*, *Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010) (per curiam).

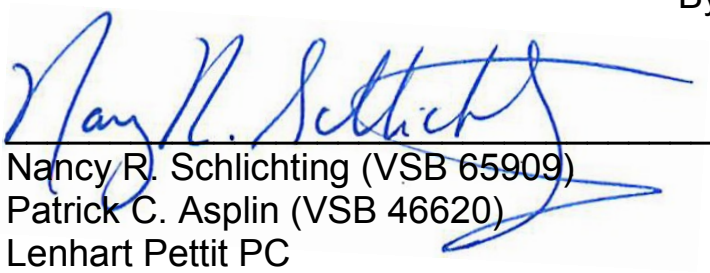
The trial court erred in denying Sarah's request for temporary injunctive relief because its erroneous interpretation of Va. Code §13.1-724 (as set forth above) is the basis for its finding that Sarah did not demonstrate that she was likely to succeed on the merits of the case. The trial court also erred in finding that Sarah was guilty of laches when the evidence was clear that the first time an asset purchase agreement was presented for shareholder approval was at a meeting on September 11, 2017, nearly a month after the Complaint was filed. [App. 106, ¶34] As the trial court recognized in its ruling, there was apparent reluctance by family members to engage in litigation and Sarah testified that it was only after they agreed to the breakup fee in the amended LOI that she realized her brothers were going to go through with the Proposed Sale. [70:19-72:12] Indeed, the Company's corporate counsel testified that the Company itself decided not to seek judicial approval of the bylaw amendments although it was an option. [App. 410:6-411:1] The trial court's factual findings are erroneous and not supported by the evidence. Therefore, this Court may decline to adopt those finding of laches on which the trial court's ruling is based. See, *Westgate at Williamsburg Condo. Ass'n v. Phillip Richardson Co.*, 270 Va. 566, 573 (2005).

Finally, the trial court erred in not entering a temporary injunction in order "to preserve the relative positions of the parties until a trial on the merits can be held." *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988), quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

CONCLUSION

For the foregoing reasons, Appellant Sarah Y. May respectfully requests that this Court reverse the trial court's decision, hold that the Company has not properly approved the Proposed Sale in violation of Va. Code 13.1-724, and remand the case to the trial court for entry of injunctive relief to enjoin the sale of the assets of R. A. Yancey Lumber Corporation.

Respectfully submitted,
SARAH YANCEY MAY
By Counsel



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CERTIFICATE

I hereby certify, pursuant to Rules 5:26 and 5:32(a)(3)(i), that on this 17th day of July, 2018, three (3) copies of this Brief of Appellant and Appendix has been hand-filed with the Clerk of the Supreme Court of Virginia as well electronically filed, via VACES. On this same day, a copy of this Brief of Appellant has been served, via email, and copies of the Brief of Appellant and Appendix on CD were served, via first-class mail, postage prepaid, to all opposing counsel.

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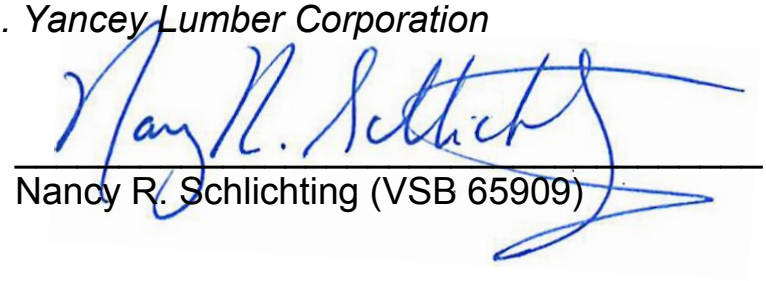

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