IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01381

DUDLEY KEENE ON BEHALF OF BROOKHAVEN ACADEMY & SHAREHOLDERS OF BROOKHAVEN ACADEMY — **APPELLANT**

V.

BROOKHAVEN ACADEMY, INC., BROOKHAVEN ACADEMY EDUCATIONAL FOUNDATION, INC., JEFF GATLIN, KEN POWELL, PHIL MCGEE, DEAN SNIDER AND JOHN DOES 1-11 — **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

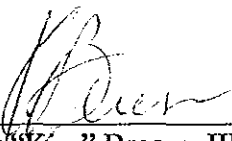
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Dudley Keene, Plaintiff/Appellant
2. Brookhaven Academy, Inc., Defendant/Appellee
3. Brookhaven Academy Educational Foundation, Defendant/Appellee
4. Jeff Gatlin, Defendant/Appellee
5. Ken Powell, Defendant/Appellee
6. Phil Magee, Defendant/Appellee
7. Dean Snider, Defendant/Appellee
8. Durwood McGuffee, Jr. and the McGuffee Law Firm, attorneys for Plaintiff/Appellant

9. Dudley Lampton, and Armstrong, Thomas, Leach & Lampton, Attorneys for Defendants/Appellees

10. Frank "Kim" Breese, III and Maison Heidelberg and Maison Heidelberg, P.A., Attorneys for Defendants/Appellees

11. Hon. Edward E. Patten, Jr., Chancellor of the Chancery Court of Lincoln County.



Frank "Kim" Breese, III
One of the attorneys for Appellees

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STATEMENT OF THE CASE

Appellees Brookhaven Academy, Inc ("Academy"), Brookhaven Academy Educational Foundation, Inc. ("Foundation"), Jeff Gatlin, Ken Powell, Phil McGee and Dean Snider (collectively "Appellees") agree with the statement of the case as presented by Appellant Dudley Keene ("Keene" or "Appellee") except as follows:

Keene asserts in his brief on numerous occasions, without citing any proof to that effect, that the Foundation is a "subsidiary" of the Academy. Appellees disagree. The Foundation is a stand-alone nonprofit corporation that is not a subsidiary and is not controlled by the Academy. In fact, a nonprofit corporation cannot be a subsidiary of a for-profit corporation since a non-profit is prohibited from generating profits for its members.

Keene asserts that "(in) corporate law terms of art, (the Academy) is a special purpose corporation rather than one organized for general business purposes...." Keene makes this assertion without citing any authority other than his own assertion. And his assertion flies in the face of the clear terms of the corporate charter that make it clear the Academy had full authority and power to take the actions to transfer operations of the school to the Foundation and to lease its assets to the Foundation.

SUMMARY OF THE ARGUMENT

The Academy's board transferred operations of the school it operated to the Foundation that had been set up to operate the school under a nonprofit structure thereby providing a number of financial benefits to the school and its students. Keene, who owned three shares of stock, objected to the way it was transferred and filed suit to enjoin the transfer. After Keene filed suit, the Academy, at a special meeting of its shareholders, overwhelmingly voted to ratify the actions of the board. Keene argues in his brief that the Foundation was not entitled to vote its shares in the Academy because it was a "subsidiary" of the Academy. In fact, the Foundation was not a subsidiary and had every right to vote its shares. The vote taken at the special meeting was valid and, as determined by the Chancellor, fully ratified the previous acts of the Academy's board.

Keene contends that the Academy was a "special purpose" corporation and that the Chancellor erred in finding the Academy was not a special purpose corporation. The Academy's charter clearly sets out the purposes for which the corporation exists including full authority "to have and to exercise all powers conferred by the laws of the State of Mississippi upon corporations." It specifically confers upon the corporation the power and authority to take the actions it took in transferring operations to the Foundation and leasing its assets to the Foundation for operation of the school.

Keene further argues that the Chancellor erred in finding the acts of the Academy's board were voidable acts and not void acts. Keene claims the acts were *ultra vires* in that they were outside the power and authority of the board. Given that the charter specifically authorizes and empowers to the board to take the actions it took and that the shareholders overwhelmingly approved the actions, Keene's argument must fail.

He further argues that the vote was invalid because the Academy shares obtained and owned by the Foundation were obtain by "unlawful coercion" of the Academy's shareholders. When the Academy operated the school, parents could not enroll their children unless they owned shares in the Academy. When operations were transferred to the Foundation, parents could continue to enroll their children if they transferred their Academy shares to the Foundation in exchange for membership in the Foundation. If they wanted, for some reason, to retain their shares, they could still enroll their children by paying a fee of $750. This is what, in Keene's view amounts to "unlawful coercion." He further reasons that if the shares were so obtained, the Foundation was not entitled to vote those shares at the shareholder meeting where the actions of the Academy's board were ratified. The chancellor found, rightfully so, that this requirement for enrollment did not amount to coercion, and Appellees agree with the chancellor's finding.

Finally, Keene argues that the vote to ratify was invalid because the notice of the special meeting was inadequate. The chancellor, after reviewing the notice itself and all other relevant evidence, found the notice to be sufficient under Mississippi corporation law. Appellees agree. The notice was clear and unambiguous and included the full text of the items to be voted on at the meeting.

Appellees contend that the chancellor did not err in finding (1) the acts of the Academy' board in transferring operations to the Foundation and leasing assets to the Foundation were all properly ratified by the shareholders; (2) the Academy was not a special purpose corporation; (3) the acts of the Academy's board were not void; and (4) the notice of the special meeting to ratify the acts of the board was adequate.

Appellees would further point to the following facts:

A. Keene's only complaint about the actions of the Academy's board is in the

procedure for conducting the vote in 2000. R 498, 508, 509.[1] He would have voted in favor but for the procedures for conducting the vote with which he disagreed. R 498, 523-527. He was not and is not opposed to obtaining tax-exempt status for the school. R 499, 517, 518.

B. Although there are some 2000 shares outstanding, he could not provide the names of any other shareholders or individuals who supported his lawsuit. R 498, 507.

C. He has no children, grandchildren or other descendants who attend the school. R 498, 505, 506.

D. He could not specify any damage suffered by anyone as a result of the setting up of the foundation and the transfer of school operations. R 499, 523-527.

E. When the shareholders voted on resolutions to ratify all the actions of the board, he did not attend the meeting, (R 499, 527-529) or vote against them (R 499-527-529, T 66[2].) nor did he make any effort to enjoin the meeting despite his claim the notice was defective. T 66, 67.

ARGUMENT

For the Court to reverse the chancellor of the Lincoln County Chancery Court, it must find that there exists some genuine issue as to a material fact. If there is no genuine issue of material fact, then the decision of the lower court must stand. The Mississippi Rules of Civil Procedure provide that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." MRCP 56(c). A fact is material if it tends to resolve any of the issues properly raised by the parties. *Palmer v. Anderson Infirmary Benevolent Ass'n,* 656 So.2d 790, 794 (Miss. 1995) (citing *Morgan v. City of Ruleville,* 627 So.2d 275, 277 (Miss. 1993)).

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[1] Pages from the official record are designated by the letter "R."
[2] Pages from the transcript of the hearing on June 19, 2008 are designated by the letter "T."

Thus, the Court may reverse only if it finds, upon review, that there is a genuine issue of a fact that tends to resolve any of the issues properly raised. Appellees contend, and the chancellor found, that no such issues of fact exist and that the ruling of the chancery court was proper. The issues of material fact raised by Appellant are as follows:

1. Was the ratification of the actions of board of the Academy done properly?

Appellant argues the voting for ratification was improper for three reasons: First, the Foundation should not have been allowed to vote its shares because it was a subsidiary of the Academy. Second, the notice of the meeting to vote on ratification was an improper notice. Third, the Academy shares obtained by the Foundation were obtained by "coercion" and, therefore, the Foundation was ineligible to vote its shares.

Subsidiary

At the special meeting of December 2005, with a quorum present, the actions of the Academy's board were overwhelmingly approved. (Two of the three resolutions passed 942-0 and the third 940-2. There were 166 abstentions for each vote. T 15,16.) Of the 1065 shares represented at the meeting and of the 942 shares that were actually voted, 805 were shares of the Academy owned by the Foundation obtained through transfer of shares to the Foundation by former shareholders of the Academy. R 397. Thus, if the 805 shares were disqualified, the resolutions would have still passed overwhelmingly.

But the Court should not have to even consider such an event because the shares were fully qualified to vote. There is no law in Mississippi precluding a subsidiary from voting its shares in matters regarding the parent. But, even if there were, the Foundation was in no way a subsidiary of the Academy. According to Black, a "subsidiary" or "subsidiary corporation" is one "in which a parent corporation has a controlling share." *Black's Law Dictionary* (Seventh

Edition 1999) p.345. In the present case, the Foundation is a separate corporation with its own board of directors. It is a nonprofit corporation and thus has no shares. So, the Academy has no shares in the Foundation. The Foundation has members, and the Academy is not a member. By definition, the Academy cannot be the parent of the Foundation because the Academy does not have a "controlling share." In fact, it has no share. In addition, a nonprofit corporation cannot even be a subsidiary of a for-profit corporation because a nonprofit corporation cannot pass on profits to its members.

Appellant cites a number of cases, none from Mississippi, whereby courts have stated the principle that a subsidiary may not vote shares in its parent. But all those cases involve a "subsidiary" which is not the case here. Also, all cited cases involve a for-profit corporation as parent of another for-profit corporation. Again, this is not the case here. The present case involves a for-profit corporation and a nonprofit corporation.

Notice

Keene asserts the notice of the special meeting was somehow deficient and that this deficiency renders the vote "ineffective." Mississippi corporation law states that when a corporation calls a special shareholders' meeting, it "is required to give notice only to shareholders entitled to vote at the meeting." Miss. Code Ann. § 79-4-7.05(a). The statute further states: "Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called." Miss. Code Ann. § 79-4-7.05(c). Those are the sole requirements for notice of a special meeting under Mississippi law – that notice be given and that the notice include a description of the purpose(s) of the meeting. Those two requirements were clearly met in this case. Notice was given, and the notice clearly included a "description of the purpose or purposes for which the meeting (was) called." R 406, 407.

Appellant cites one Delaware case regarding shareholder ratification. In that case, the Delaware Supreme Court stated: The settled rule in Delaware is that "where a majority of fully *informed* stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail." (Emphasis in original.) *Michelson v. Duncan,* 407 A.2d 211, 220 (Del. 1979). If the same rule were applied in Mississippi, Appellant's argument would fail. Not only was the notice clear and thorough as to what would be voted on (R 406,407), but also each resolution to be voted on was fully discussed at the shareholders' meeting (T 11). Surely, after receiving the notice, receiving a copy of each resolution and having the opportunity to fully discuss the resolutions before voting on them, the shareholders were "fully informed."

Coercion

Appellant relies on another Delaware case to state the principle that "to show unlawful coercion in a transaction, a plaintiff must show that the selling shareholder(s) were improperly induced to sell shares for reasons unrelated to the economic merits of the sale." *Ivanhoe Partners v. Newmont Mining Corp.,* 533 A2d 585, 605 (Del. Ch. 1987), *affirmed* 535 A2d 1334 (Del. 1987). This case involved a large public corporation that was the target of a hostile takeover attempt and in which the target company employed a takeover defense known as a street sweep. This is hardly precedent for a case involving a small private school in Mississippi that is taking steps to provide the school nonprofit status.

Interestingly, the Delaware court, in its decision states: "To establish that the selling stockholders were actionably coerced, the plaintiffs must prove that the sellers' decision to sell to Gold Fields was influenced in some material way by a wrongful or inequitable act of the defendants." *Ivanhoe* at 605,606.

So, even were this Delaware case considered precedent in Mississippi, Plaintiff/Appellant would have to show the reason for the stock transfer was influenced "by a wrongful or inequitable act of the defendants."

There is nothing in the record to show any "wrongful or inequitable act." Nor did plaintiff introduce any evidence from any shareholder claiming to have been coerced into transferring his or her stock to the Foundation.

Those who were shareholders in the Academy were shareholders for one reason: to enable them to enroll their children in the school. Certainly no shareholders invested in Academy stock believing they would receive dividends (which were never paid) or that their stock would increase in value. (In its 30+ year history, the Academy never turned a profit. R 206, 211.) So, when the school decided to operate in a nonprofit structure, it simply offered those shareholders the opportunity to exchange their Academy shares for membership in the new nonprofit corporation and thereby enable their children to continue to be enrolled in the school.

Appellees contend there was no coercion, and that Appellant's argument must fail.

2. Was the Academy a "special purpose" corporation?

Appellant asserts, and has asserted throughout the course of the litigation, that the Academy is a "special purpose" corporation without once presenting authority to define a special purpose corporation or presenting evidence to show that the Academy is a special purpose corporation, whatever such a corporation might be. Instead, Appellant simply states that the Academy is a special purpose corporation and then begins arguing what a special purpose corporation can and can't do.

The two cases cited by Appellant[3] deal with regulated companies restricted by statute in their operations. Such is not the case here, and the cases are not applicable.

Appellant states in his argument that the Academy is a special purpose corporation formed solely for the purpose of operating a school or schools, as opposed to one formed for general purposes. He goes on to say the Academy's charter does not allow the Academy to engage in any other corporate business or purpose. This bold statement by Appellant flies in the face of the clear language of the charter itself, quoted here in full:

> (1) To organize, own and operate primary schools, secondary schools and/or colleges and other educational institutions for the education of youth.
> (2) To fix the curricula for such schools, colleges and other such institutions and the standards and qualification of admission of pupils and students and for their retention in such schools, colleges and other such institutions and to reject any applicant for admission or to expel any person so enrolled and attending for any cause whatsoever.
> (3) To select and employ such principals, teachers, professors, instructors and other employees as the corporation may deem necessary and advisable and to deny or terminate such employment at the will of the corporation.
> (4) To prescribe, charge and collect such fees as the corporation may find necessary and proper to be collected from pupils and students and to vary such charges in any or all individual instances as may be determined by the corporation so that it shall not be necessary for all the pupils or students in the same grade or classes to pay the same or identical fees or tuition, but such fees or tuition as may be charged in each case and each instance to be solely within the discretion of the corporation.
> *(5) To have and to exercise all powers conferred by the laws of the State of Mississippi upon corporations.*
> *(6) To purchase, own, lease, hire, or otherwise acquire real and personal property, improved and unimproved, of every kind and description, and to sell, dispose of, lease, convey, encumber and mortgage said property, or any part thereof. To acquire, hold, lease, manage, operate, develop, control, build, erect, maintain for the purposes of said corporation, construct, reconstruct or*

[3]*Tallahatchie Valley Electric Power Ass'n*, 812 So.2d 912 (Miss. 2002); *Blue Cross and Blue Shield v. Protective Life Ins. Co.*, 527 So2d 125 (Ala App. 1987)

> *purchase, either directly or through ownership of stock in any corporation, any lands, buildings, offices, stores, warehouses, plants, machinery, rights, easements, privileges, franchises and licenses, and to sell, lease, hire or otherwise dispose of lands, buildings or other property of the corporation, or any part thereof.*
> *(7) To do all and everything necessary and proper for the accomplishment of the objects herein enumerated or necessary or incidental to the benefit of the corporation.* (Emphasis supplied.)
> R 301.

The charter clearly gives the corporation the power and authority "to exercise all powers conferred by the laws of the State of Mississippi." (Section 5 of charter.)

The State of Mississippi has conferred certain general powers on every corporation in the state. The Mississippi Business Corporation Act specifically provides that a Mississippi corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

> ....
>
> (5) To sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property;
>
> (6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;
>
> ....
>
> (14) To transact any lawful business that will aid governmental policy;
>
> (15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation."

Miss. Code Ann. § 79-4-3.02.

So, if the charter provided the Academy with *all powers* conferred by the laws of Mississippi upon corporations, it has broad corporate powers, including the powers to take the actions that brought complaint from Keene.

In addition, the charter (Section 6) specifically provides the power to lease *real and personal* property. And the charter (Section 7) again grants broad powers to the Academy to do *all and everything* necessary and proper for the accomplishment of the objects herein enumerated or necessary or incidental to the benefit of the corporation.

In the face of the broad powers granted by the charter and by statute, it is difficult to fathom how Appellant can argue that the Academy is some sort of "special purpose" corporation with restricted authority.

Accordingly, Appellees assert that the chancellor was correct in determining the Academy was not a special purpose corporation and indeed had the powers and authority to take the actions taken.

3. Were the acts of the Academy voidable or void acts?

Keene asserts that the actions taken by the Academy's board in transferring the operations of the Academy to the Foundation were void acts in that they were outside the authority of the board. He states that the Academy's "act in fundamentally altering the purpose of the corporation without the shareholders amending the charter is, by definition, *ultra vires* and not ratifiable."

This argument by Appellant is an extension of or another version of his argument that the Academy did not have the power and authority to take its actions under its charter. As discussed *supra*, the board of the Academy was well within its authority to transfer operations to the Foundation and to enter into the lease of all its property, real and personal, to the Foundation.

Appellant mentions certain parts of the operation of the school that were not specifically mentioned in the lease of real and personal property to the Foundation such as staff contracts, executory contracts for tuition, intellectual property rights, goodwill, accounts payable, taxes, liabilities and the like. Some or all these may be considered in the category of personal property. If not, it is clear that the transfer of these necessary elements of the operation was made by the Academy, and the Academy had the power under its charter to do so. In addition, when the special shareholders' meeting was held in December 2005, the shareholders overwhelming approved a resolution "(t)o ratify the actions of Brookhaven Academy, Inc., officers, directors, and employees regarding the transfer of educational activities formerly conducted by Brookhaven Academy, Inc, to Brookhaven Academy Educational Foundation, Inc." T 16.

Appellees assert that the "transfer of educational activities" would necessarily include all operations necessary to operate a school. The directors had the power to transfer the operations and the shareholders ratified the transfer.

Appellant's argument that the Academy's acts were void must fail. The chancellor correctly and properly found the acts were merely voidable and therefore were properly ratified by the shareholders.

CONCLUSION

The granting of summary judgment by Judge Patten was proper and correct in all aspects. All acts of Brookhaven Academy, Inc in transferring school operations to the Foundation and leasing the Foundation all its property were well within the power and authority of the Academy's board, and all actions were properly ratified by the shareholders. There are no genuine issues of material facts as to any of the actions. Summary judgment should be confirmed.

Respectfully submitted this 23rd day of June, 2009,

Frank "Kim" Breese, III [redacted]

Dudley F. Lampton [redacted]

Attorneys for Appellants

OF COUNSEL:

MAISON HEIDELBERG, P.A.
795 Woodlands Pkwy., Suite 220
Ridgeland, MS 39157
601-351-3339
Fax: 601-487-6942

ARMSTRONG, THOMAS, LEACH & LAMPTON
246 W. Gallatin St.
Hazlehurst, MS 39083
601-894-4061
Fax: 601-894-4792

CERTIFICATE OF SERVICE

I, Frank "Kim" Breese, III, one of the attorneys for Appellees, do certify that I have served a copy of Appellees' Brief, by depositing the same in the U.S. Mail, postage prepaid, to the following:

Durwood McGuffee
McGuffee Law Firm
P.O. Box 4219
Brandon, MS 39047
Attorney for Appellant

Hon. Edward E. Patten, Jr., Chancellor
Chancery Court of Lincoln County
P.O. Box 707
Hazlehurst, MS 39083

This the 23rd day of June, 2009.

FRANK "KIM" BREESE, III