**SECOND DIVISION**
**MILLER, P. J.,**
**ANDREWS, J., and RICKMAN, J.**



**April 24, 2018**

**In the Court of Appeals of Georgia**

A18A0778. WALLACE v. WALLACE et al.

MILLER, Presiding Judge.

This dispute arises from the forced sale of one brother's stock in a family-owned business, Wallace Electric Company. Dorsey "Doss" Wallace, and his brothers, Phillip and Gary, all worked for Wallace Electric and owned stock in the company. After Doss stopped working for Wallace Electric in 1994, he did not sell – and the company did not even attempt to buy – his stock as was required by the company Bylaws and the shareholders' Buy-Sell Agreement ("the Agreement"). When Phillip asked Doss about returning the shares in 2003, Doss unequivocally refused. Several years later, Doss filed a complaint alleging that Phillip and Gary breached their fiduciary duty towards him as a shareholder. During the ensuing litigation, both parties sought specific performance of either the Bylaws or the Agreement. Following a bench trial, the trial court found that Doss breached the Agreement when he did not return the stock in 1994, and it valued

Doss's shares as they would have been valued in 1994, with a reduction for the minority interest Doss held. Doss now appeals. After a thorough review of the record and the applicable law, we conclude that the trial court erred in determining that Doss was required to sell his shares at the 1994 value and in applying a minority interest discount to the value of the stock. Instead, the trial court should have valued Doss's shares in 2003 when he breached the Agreement by refusing to sell his shares. Moreover, because we conclude that Doss continued to hold his shares until he breached the Agreement in 2003, the trial court erred in finding that Doss's claims for breach of fiduciary duty and tortious interference were moot. Accordingly, we vacate the trial court's order, and remand the case for further proceedings.

"Appeals from bench trials, where the trial judge sits as the trier of fact and has the opportunity to assess the credibility of the witnesses, are reviewed under the clearly erroneous standard. We will not disturb a trial court's findings if there is any evidence to support them." (Citations and footnotes omitted.) *Jenkins v. Sallie Mae, Inc.*, 286 Ga. App. 502 (649 SE2d 802) (2007). Questions of law are reviewed de novo. *Lewis v. McNeely*, 336 Ga. App. 696 (783 SE2d 172) (2016).

The facts of this case are undisputed. Wallace Electric is a family-owned company that was incorporated in 1959 by the parties' father. The father was head of Wallace Electric and controlled the business until his death in 2000. After the father died, Gary, as president, and Phillip, as vice president, controlled

Wallace Electric, increasing the company's profitability substantially.

The stated purpose of the company is to make a profit. Additionally, because Wallace Electric was designed to be a family-owned business, only current employees of the company could retain stock. Pursuant to Wallace Electric's Bylaws, enacted in 1959, the retention and sale of stock were controlled as follows:

> [I]f the employment of any stockholder or officer is terminated, for any reason, the *corporation shall have the right and duty to purchase* all the stock of said employee or officer and the former officer or employee shall be obligated to sell his stock pursuant to these bylaws.
>
> The purchase price, in any event, shall be the *book value* of the stock (as of the time of said notice) as determined according to accepted accounting practices, and shall be binding upon the parties.

(Emphasis supplied.) ("Article V" of the Bylaws).

In 1988, Wallace Electric issued stock to all three brothers; Gary and Phillip received 30 shares (25 percent) each and Doss received 20 shares (16.67 percent).[1] Additionally, when Doss, Gary, and Phillip

[1] The father also received 40 shares of stock. When he died in 2000, he bequeathed his stock to his wife, but she later sold the stock back to Wallace Electric.

obtained their shares in 1988, the parties entered into the Agreement, which provided,

> Upon the . . . termination of employment of a Shareholder, such Shareholder . . . shall sell, and the Corporation shall buy, all, but not less than all, of the stock owned by such Shareholder for a purchase price equal to the *current value*.[2]
>
> . . .
>
> In the event of termination of employment of a Shareholder, the Corporation shall purchase all of the stock owned by such Shareholder *within sixty (60) days* after the date of termination of employment.

(Emphasis supplied.) Finally, the Agreement specified that damages for breach of the Agreement were "immeasurable," and thus, the Agreement contemplated specific performance or other equitable remedies. In signing the Agreement, the parties expressly waived any defense that they had an adequate remedy at law. By its own terms, the Agreement expired in 2008.[3]

All three brothers initially worked for Wallace Electric, but Doss left his employment in 1994. At the time Doss left Wallace Electric, he owned one-sixth of the issued stock. He did not offer to sell his stock to the

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[2] The Agreement defined "current value" as $1,806 per share. Per the terms of the Agreement, the "current value" was subject to annual review. It is undisputed that the value has never been amended.

[3] This lawsuit, which was filed within three years of the expiration of the Agreement, was timely. See OCGA § 9-3-24.

company as required by the Bylaws and Agreement, however, because he planned to return to the company "at some point." Nor did Wallace Electric attempt to buy Doss's stock when his employment ceased.

In 2003, during a review of the company's status, Gary and Phillip realized that Wallace Electric had not repurchased Doss's stock after Doss left the company. Phillip contacted Doss to inquire about Wallace Electric repurchasing Doss's stock, but they never discussed a purchase price because Doss adamantly refused to sell it. Phillip allegedly spoke to Doss again about selling the stock in 2006 or 2007, to no avail.

In August 2011, Doss filed a complaint for an accounting and damages against Gary and Phillip, alleging breach of fiduciary duty and tortious deprivation of his interest in Wallace Electric, and seeking punitive damages and attorney fees. He subsequently moved to add Wallace Electric as a defendant, and filed an amended complaint to add claims that are not relevant to the instant appeal.

Gary, Phillip, and Wallace Electric (collectively "the defendants") filed an answer, a counterclaim seeking damages and fees for abusive litigation, and an amended counterclaim. In the amended counterclaim, the defendants argued that, as a matter of equity, Doss should be ordered to sell his stock back to Wallace Electric at the 1994 value. Doss moved to dismiss the counterclaim as untimely, but the trial court denied the motion.

In 2015, Doss notified Wallace Electric that he wished to sell his shares back to the company at their present value. He also filed a motion for specific performance, demanding that Wallace Electric repurchase the 25 percent interest in stock that he now owned as a result of his father's shares being reabsorbed into the company, at Wallace Electric's 2015 book value. In response, the defendants tendered Doss a check in the amount of $54,200, which represented the 1994 book value of Doss's 16.67 percent interest in the company at that time. Doss rejected this offer. At the time, the book value of Wallace Electric was just over $8 million.

At a bench trial, the parties agreed that there should be a buyout of Doss's shares.[4] The parties disagreed, however, about which document controlled the buyout and the appropriate year for valuing Doss's stock. Doss contended that Article V of the Bylaws controlled the manner and value of the stock purchase, and that his offer to sell his stock in 2015 required Wallace Electric to purchase the stock at the 2015 value. The defendants argued that the Agreement controlled because the Bylaws expired prior to the effective date of the Agreement, the Agreement superseded the Bylaws, and therefore, Doss was obligated to sell his stock at the 1994 value.

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[4] Thus, the parties agreed that the bench trial would address only the buyout issue and not matters related to Doss's claims for breach of fiduciary duty, tortious interference, and punitive damages and attorney fees.

The trial court found in favor of Phillip and Gary, and ordered Doss to sell his shares at the 1994 value. In doing so, however, the trial court initially did not expressly rule on any of the parties' specific legal arguments. Doss appealed to the Supreme Court of Georgia,[5] which vacated the trial court's order and remanded for the trial court to make factual findings and state its legal conclusions. See *Wallace v. Wallace*, 301 Ga. 195 (800 SE2d 303) (2017).

On remand, the trial court found that (1) the Agreement governed the dispute because it superseded and replaced Article V of the Bylaws; (2) the Agreement was not executory in nature; (3) Doss breached the Agreement in 1994 when he failed to sell his stock upon leaving Wallace Electric; (4) the defendants' counterclaims were timely because Doss's breach continued through 2008, the complaint was filed within the statute of limitations, and the counterclaims related back to the timely-filed complaint; (5) an equitable remedy was appropriate to give effect to the parties' intent and required the conclusion that Doss be held to the terms of the Agreement as if he had sold his shares in 1994 when he left the company; and (6) in light of this conclusion, Doss's remaining claims were moot. This appeal followed.

1. In several related enumerations of error, Doss argues that the trial court erred in concluding that

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[5] At the time of Doss's first appeal, equity jurisdiction lay in the Supreme Court of Georgia. See *Wallace*, supra, 301 Ga. at 197 (I), n. 3. We now have jurisdiction. See OCGA § 15-3-3.1 (a) (2) (2017).

(a) the counterclaim was timely; (b) the Agreement controlled; and (c) he was in breach of the Agreement. We disagree.

To begin, we agree with the trial court that the equitable remedy of specific performance is appropriate here. "Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done." OCGA § 23-1-3. "Equity considers that done which ought to be done and directs its relief accordingly." OCGA § 23-1-8.

"Specific performance is an equitable remedy available when the damages recoverable at law would not be an adequate compensation for nonperformance." (Citations, punctuation, and footnotes omitted.) *Simpson v. Pendergast*, 290 Ga. App. 293, 297 (2) (a) (659 SE2d 716) (2008). Here, there is no adequate remedy at law given the nature of the stock in this small, family-owned business, and the explicit acknowledgment in the Agreement that specific performance was the appropriate remedy in the event of a breach. Moreover, given the failure of all parties to strictly follow the terms of either the Agreement or Bylaws, an equitable remedy "considers that done which ought to be done." See OCGA § 23-1-8. With this in mind, we turn to Doss's substantive claims on appeal.

(a) *Whether the trial court properly allowed the defendants' counterclaim*

Doss argues that the trial court abused its discretion when it permitted the defendants to file an amended counterclaim seeking specific performance of the Agreement. The trial court did not abuse its discretion.

Here, Doss's complaint alleged breach of fiduciary duty and tortious interference against Gary and Phillip. Doss did not originally name Wallace Electric as a defendant, but Wallace Electric was the proper party to demand that Doss sell or Wallace Electric repurchase Doss's shares. The amended counterclaim alleged that Doss wrongfully retained his shares in Wallace Electric despite repeated demands to sell his shares, and that equity required he be ordered to sell his shares at the 1994 value. OCGA § 9-11-13 (f) provides, "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." Thus, it was only after Doss added Wallace Electric that the counterclaim for specific performance became relevant and applicable in the present suit.

Moreover, given that Doss also seeks specific performance of Wallace Electric's obligation to repurchase his shares, there is no prejudice from allowing the counterclaim. *Martin & Jones Produce, Inc. v. Lundy*, 197 Ga. App. 38, 39 (2) (397 SE2d 461) (1990) (trial court should liberally allow omitted counterclaim

where no prejudice results). We thus conclude that the trial court properly exercised its discretion to permit the amended counterclaim. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 78 (4) (666 SE2d 420) (2008) (applying abuse of discretion standard of review to amendment to add counterclaim).

(b) *Whether the Agreement was the controlling document*

Doss next argues that the trial court erred by concluding that the terms of the Agreement controlled the sale of the shares. We find no error in the trial court's determination that the Agreement governed the sale.[6]

> Shareholder agreements are construed according to the principles of the law of contracts. The cardinal rule of contract construction is to ascertain the intent of the parties at the time they entered the agreement. Construction of a contract by the court involves three steps. First, if no ambiguity appears, the trial court enforces the contract according to its terms irrespective of all technical or arbitrary rules of construction. Secondly, if ambiguity does appear, the existence or nonexistence of an ambiguity is a question of law for the court.

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[6] We note that the trial court based its ruling that the Agreement controlled on its erroneous conclusion that the Bylaws had expired before Doss left the company. Contrary to the trial court's conclusion, the 20-year validity provision in OCGA § 142-732 does not apply to shareholder agreements in effect prior to the enactment of this statute. See *Ansley v. Ansley*, 307 Ga. App. 388, 390 (1) (705 SE2d 289) (2010).

> Finally, a question arises for the factfinder only when there appears to be an ambiguity in the contract which cannot be negated by the court's application of the statutory rules of construction.

(Citations and footnotes omitted.) *Foster v. Ohlwiler*, 266 Ga. App. 371, 375-376 (1) (b) (597 SE2d 481) (2004). Here, it is clear that the parties intended that a shareholder return his shares to the company when that shareholder was no longer an employee.

To effectuate this intent, however, the parties employed two different contracts with different terms, and we must determine which of these documents controls: the Bylaws or the Agreement.

"An existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the subject-matter embraced by the original contract." (Citation and punctuation omitted.) *Triple Net Properties, LLC v. Burruss Dev. & Constr., Inc.*, 293 Ga. App. 323, 327 (2) (a) (667 SE2d 127) (2008). Here, the Agreement contradicted Article V of the Bylaws in the manner of calculating the share valuation at the time of repurchase and by setting a specific time frame in which the repurchase was to occur. All parties signed the Agreement, and there is no dispute as to its validity. Thus, because the valuation as set forth in the Agreement is inconsistent with that set forth in Article V of the Bylaws, the Agreement superseded this portion of the Bylaws.

(b) *Whether Doss breached the Agreement*

Doss next argues that the trial court erred in finding that he breached the Agreement in 1994 by failing to sell his stock back to the company upon his termination of employment. We conclude that the trial court properly determined that Doss breached the agreement, but that it erred in its analysis of when that breach occurred.

We begin by noting that, contrary to the trial court's finding, the Agreement is an executory contract. See OCGA § 13-1-2 (b) ("An executory contract is one in which something remains to be done by one or more parties."); *Drennon Food Products Co. v. Drennon*, 101 Ga. App. 606, 607 (1) (114 SE2d 799) (1960). The Agreement placed an affirmative duty on each party: "the Shareholder . . . shall sell, and the Corporation shall buy" the former employee's stock. The contract required that the shares be repurchased within 60 days of Doss's departure from Wallace Electric.

Importantly, however, *no one* adhered to the Agreement's contractual obligation to buy and sell the stock within 60 days of Doss's termination of employment in 1994. Before we can address which of the parties breached, we must consider what effect that failure has on the parties' obligations.

> A waiver may be express, or may be inferred from actions, conduct, or a course of dealing. Waiver of a contract right may result from a party's conduct showing his election between two inconsistent rights. Acting on the theory

> that the contract is still in force, as by continuing performance, demanding or urging performance, or permitting the other party to perform and accepting or retaining benefits under the contract, may constitute waiver of a breach. However, all the attendant facts, taken together, must amount to an intentional relinquishment of a known right, in order that a waiver may exist.

(Citations omitted.) Forsyth *County v. Waterscape Svcs., LLC*, 303 Ga. App. 623, 630 (2) (a) (694 SE2d 102) (2010). "[W]here, as here, the facts and circumstances essential to the waiver issue are clearly established, waiver becomes a question of law." (Citation and punctuation omitted.) Id.

We may infer waiver where a party's acts or omissions are "so manifestly consistent with an intent to relinquish a then-known particular right or benefit that no other reasonable explanation of his conduct is possible." (Citation and footnote omitted.) *Eckerd Corp. v. Alterman Props., Ltd.*, 264 Ga. App. 72, 75 (1) (589 SE2d 660) (2003). Based on the evidence in the record, we conclude that there is no other reasonable explanation for the parties' inaction but to infer that the parties' mutual failure to adhere to the 60-day repurchase and sale term in the Agreement was a waiver of the breach and a decision to treat the remaining contract as in force. See *Ansley v. Ansley*, 307 Ga. App. 388, 393 (2) (705 SE2d 289) (2010); see also *Eckerd Corp*, supra, 264 Ga. App. at 75 (1); *Waterscape Svcs.*, supra, 303 Ga. App. at 630 (2) (a).

Having concluded that the 60-day term is no longer part of the contract, we turn to whether Doss subsequently breached the Agreement. Based on the undisputed facts, we conclude that Doss breached the Agreement in 2003 when he refused Phillip's request to repurchase the stock.

As noted, the Agreement was an executory contract. As such, an attempt by either party to perform under the contract triggered the other party's duty to perform. *Drennon Food Products Co.*, supra, 101 Ga. App. at 607 (1). The first time there was any discussion regarding the sale of shares was in 2003, when Phillip approached Doss about selling his stock.

> A party seeking specific performance must be ready, willing, and able to perform all provisions of the contract, including any payment. But it is a well-established rule that tender before suit is filed may be and is waived where the party entitled to payment, by conduct or declaration, proclaims that, if a tender should be made, acceptance would be refused.

(Citations, punctuation, and footnotes omitted.) *Simpson*, supra, 290 Ga. App. at 297 (2) (a). Because the Agreement is an executory contract, Phillip's request on behalf of Wallace Electric in 2003 triggered Doss's obligation to sell, and Doss's refusal to comply at that time constituted an anticipatory breach.

Doss claims that the defendants were not ready, willing, and able to perform in 2003 because they did not tender a purchase price. This argument is without

merit. Once Doss unequivocally indicated that he would never sell his stock, the defendants' obligation to tender payment in 2003 was waived. *Simpson*, supra, 290 Ga. App. at 297 (2) (a).

Thus, the relevant year for purposes of the breach is 2003, when Wallace Electric exercised its obligation to repurchase the stock, and Doss refused to sell.[7] See, e.g., *Capps v. Edwards*, 130 Ga. 146 (2) (60 SE 455) (1908) (in executory contract for sale of stocks, once tender is alleged, refusal to adhere to contractual obligation allows suit for damages to recover the value of the stock according to the contract terms).

2. Doss next contends that the trial court improperly determined the value of his stock by using the

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[7] The defendants also argue that Doss is not entitled to sell his stock at the 2015 value because he has unclean hands. "The doctrine of unclean hands is a well-established principle. 'He who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action.' OCGA § 23-1-10. The unclean-hands maxim which bars a complainant in equity from obtaining relief has reference to an inequity which infects the cause of action so that to entertain it would be violative of conscience." (Citation and punctuation omitted.) *Park v. Fortune Partner, Inc.*, 279 Ga. App. 268, 273 (6) (630 SE2d 871) (2006). Here, none of the parties have clean hands: No party attempted to adhere to the terms of the Agreement in 1994; Gary and Phillip then made no attempt to obtain the shares when they gained control of the company in 2000; and, once the issue was raised in 2003, Doss refused to sell his shares. Given the conduct of all the parties here, we find that the doctrine of unclean hands does not bar the equitable sale of the stock.

1994 value and discounting his percentage for minority interest.[8] We agree.

(a) *Relevant time period for valuation of stock*

Given our conclusion in Division 1 that Doss breached the Agreement in 2003, the trial court erred in considering Wallace Electric's value in 1994. The relevant year for valuation purposes is 2003.

According to the expert testimony at trial, the "fair market value" of Wallace Electric's stock in 2003 was $1,834,305. At that time, Doss owned 16.67 percent of the company, which placed the "fair market value" of Doss's stock at $305,700. Because Doss's 16.67 percent share of the company was not a controlling interest, the expert applied a minority interest discount to 15 percent, which he testified made Doss's shares worth $259,900.

We note that the Agreement required that the purchase price be the "current value" of the stock, which the Agreement quantified as $1,806 per share. The Agreement, however, also called for this figure to be reevaluated annually – a task that undisputably was never done. There is nothing in the Agreement that relates valuation to "fair market value." Therefore, on remand, the trial court must determine, in the first

[8] The defendants' expert testified that he used two approaches to calculate the value and that this was consistent with the Professional Standards and Code of Professional Conduct of the American Institute of Certified Public Accountants. Doss does not challenge this method on appeal.

instance, whether the parties waived this valuation provision establishing the current value. If the trial court determines that this provision establishing the "current value" has been waived, it must then determine how to establish the "current value."

(b) *Application of a minority interest deduction*

The expert explained that the minority interest discount was a factor in determining the fair market value because the value is "affected by the rights and privileges that interest has, and a minority interest cannot . . . dictate the course of the company" thus making the minority interest less valuable. We conclude that the trial court erred when it discounted the value of the stock based on a minority interest.

In discussing the minority interest discount in dissenting shareholder lawsuits, this Court explained:

> [M]inority and marketability discounts should not be applied when determining the fair value of dissenting shareholders' stock. [Other] courts have reasoned that using discounts injects speculation into the appraisal process, fails to give minority shareholders the full proportionate value of their stock, encourages corporations to squeeze out minority shareholders, and penalizes the minority for taking advantage of the protection afforded by dissenters' rights statutes.
>
> Reflecting this majority view, the Model Act definition of fair value . . . now expressly provides that fair value should be determined

> without discounting for lack of marketability or minority status. The Official Comment to the new Model Act explains . . . that valuation discounts for lack of marketability or minority status are inappropriate in most appraisal actions, both because most transactions that trigger appraisal rights affect the corporation as a whole and because such discounts give the majority the opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction. . . . [A]ppraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone.

(Citations and footnotes omitted.) *Blitch v. Peoples Bank*, 246 Ga. App. 453, 456-457 (1) (540 SE2d 667) (2000) (discussing minority interest discount in dissenter's rights suit). Although the instant case does not arise in the context of a dissenter's rights suit, we find the logic of our prior holding persuasive. Where, as here, the stock involves a small, family-owned business, with little marketability, the value of the shares necessarily accounts for the minority interest without further reduction. Thus, as *Blitch* makes clear, the trial court erred in applying a minority interest discount.

The defendants' reliance on *Atlantic States Constr., Inc. v. Beavers*, 169 Ga. App. 584, 588-589 (6) (d) (314 SE2d 245) (1984), to support the trial court's use of the discount is unpersuasive, as that case is physical

precedent only. Moreover, *Beavers* does not hold that a stockholder's minority interest must be considered; rather, the opinion warns the trial court to apply the minority interest factor with caution and explains that the valuation can account for the stock having a lesser value because of a lack of marketability. Id. at 588-589 (6) (d). Nothing in the record convinces us that the minority interest reduction should apply because the value already took into account the lack of marketability.

In summary, on remand, the trial court should determine the value of Doss's 16.67 percent share of the stock as of 2003 without the minority interest discount and taking into account that the Agreement provided that the purchase price of the stock would be "current value."

3. Doss next claims that the trial court's award constitutes an unconstitutional taking of his property. Although Doss raised this issue before the trial court, the trial court did not rule on it. Thus, it is not properly before this Court. *City of Brookhaven v. City of Chamblee*, 329 Ga. App. 346, 353 (4) (765 SE2d 33) (2014) ("a constitutional issue is waived for appellate review where the trial court fails to rule upon it."). We recognize that more recent Supreme Court of Georgia cases have suggested that remand is necessary for the trial court to rule on the constitutional issue, however, we find remand is unnecessary in this case because the takings argument is without merit. See id. A trial court's order issuing an award in a case pending before

it is simply not an unconstitutional *governmental* taking.

4. Finally, Doss argues that the trial court deprived him of his right to a jury trial on his claims for breach of fiduciary duty, tortious deprivation, punitive damages, and attorney fees.

In light of our conclusion in Division 1 that the breach occurred in 2003, the trial court's conclusion that the claims were moot is error. From 1994 through 2003, Doss retained a shareholder interest in Wallace Electric. Thus, his claims for breach of fiduciary duty during this time frame survive, and the trial court must evaluate them on remand.[9]

We are mindful that this litigation has been lengthy, and that our Supreme Court has already remanded this case once for further factual findings. Nevertheless, we must remand again. We urge the trial court to bring this lengthy dispute to an expeditious conclusion consistent with the directions in this opinion. Specifically, on remand, the trial court is instructed to determine the "current" value of the stock as of 2003, without applying any minority interest discount. Moreover, the trial court should allow Doss's claims for breach of fiduciary duty, tortious deprivation of his interest in the company, and for attorney fees and punitive damages from 1994 through 2003 to proceed.

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[9] We express no opinion on the timeliness or merit of those allegations.

*Judgment vacated and case remanded. Andrews and Rickman, JJ., concur.*

**Court of Appeals**
**of the State of Georgia**

ATLANTA, May 16, 2018

*The Court of Appeals hereby passes the following order*

**A18A0778. DORSEY EUGENE WALLACE v. GARY EDWARD WALLACE et al..**

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

*Court of Appeals of the State of Georgia*
*Clerk's Office, Atlanta, May 16, 2018.*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

[SEAL]

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

/s/ Stephen E. Castlen, *Clerk*.

**IN THE SUPERIOR COURT OF HENRY COUNTY**

**STATE OF GEORGIA**

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|---|---|---|
| **DORSEY EUGENE WALLACE,** Plaintiff, v. **GARY EDWARD WALLACE, PHIL HOWARD WALLACE,** and **WALLACE ELECTRIC COMPANY,** Defendants. | ) ) ) ) ) ) ) ) ) | CIVIL ACTION FILE NO. 2011-SU-CV-3281-BA |

**FINAL ORDER**

(Filed Aug. 3, 2017)

The above-styled action came before the Court for a final bench trial in equity on May 20, 2016. The scope of the trial in equity was limited to a determination of what price should be paid for Plaintiff's shares in Wallace Electric Company. The parties disagreed on the amount that should be paid to Plaintiff for such shares, and disagreed as to which governing document, if any, was controlling in this case. Upon conclusion of the trial and after considering the evidence presented and argument of counsel, the Court determined that Plaintiff should have sold his shares of stock back to Wallace Electric in 1994 and therefore ordered the buyout at the price of $54,200, representing the fair market value of Plaintiff's shares in 1994.

On appeal, the Supreme Court of Georgia vacated the judgment and remanded the case with direction. *Wallace v. Wallace*, No. S17A0528, 2017 WL 2061674 (Ga. Sup. Ct. May 15, 2017). Specifically, the Supreme Court directed this Court to "find the facts and state its conclusions of law, including whether the Bylaws, Buy-Sell Agreement, or any other document governs the parties' dispute." The Supreme Court did not rule on the merits of Plaintiff's enumerations of error. A remittitur was filed on May 31, 2017.

Therefore, upon review of the record as a whole, and in accordance with the direction from the Supreme Court of Georgia, the Court hereby enters the following findings of fact and conclusions of law:

## Findings of Fact

Plaintiff, Defendant Gary Edward Wallace ("Gary"), and Defendant Phil Howard Wallace ("Phil") are brothers. Wallace Electric ("Wallace Electric") is a family business, incorporated in 1959 by the parties' father, Hubert Dorsey Wallace, II, who owned and managed the business until his death in 2000. The Bylaws were also enacted in 1959. At the time the Bylaws were enacted, no one had stock in the company. Nevertheless, the Bylaws contained language that placed restrictions and obligations on shareholders of Wallace Electric, including requirements for a shareholder to sell his or her shares of stock back to Wallace Electric if the shareholder's employment at Wallace Electric terminates for any reason.

After their father's death, Gary and Phil took over the management of the family business and continue to manage it to this day. Gary and Phil have worked continuously at Wallace Electric since the early 1980s. Plaintiff, on the other hand, has been employed at Wallace Electric sporadically over the years, most recently from 1987 to 1994. In 1988, when all three brothers were working for Wallace Electric, their father awarded Gary and Phil each 30 shares (25%) of stock, awarded Plaintiff 20 shares (16.67%) of stock, and kept 40 shares (33.33%) for himself. In 1988, the parties and their father entered into the "Buy-Sell Agreement of Wallace Electric" (the "Buy-Sell Agreement"). The Buy-Sell Agreement covered many of the same shareholder duties and obligations that had previously been covered by the Bylaws. Among other things, the Buy-Sell Agreement required that any shareholder of Wallace Electric who stopped working at Wallace Electric for any reason "shall sell, and [Wallace Electric] shall buy" all of the stock owned by the shareholder. The Buy-Sell Agreement expired by its own terms twenty (20) years after the date of its execution. Plaintiff left Wallace Electric in 1994 and was never employed there again. In 1994, Plaintiff's ownership interest in Wallace Electric was a 16.6667% ownership interest (20 out of 120 shares). The parties agree that ownership of stock in Wallace Electric is intended to be reserved for employees of the company. Plaintiff testified that he has "known it from the very, very beginning," and testified that no other employee has ever kept stock beyond his or her period of employment.

The parties' father, Hubert Dorsey Wallace, II, died in 2000; however, his shares were not ultimately repurchased by Wallace Electric until 2009. After Wallace Electric's repurchase of Hubert Dorsey Wallace II's shares in 2009, the total number of outstanding shares were reduced to 80, and Gary and Phil's shares each increased to 37.5%, and Plaintiff's share increased to 25%.

The Court finds that Plaintiff refused at all times from the time he stopped working for Wallace Electric up through the time of trial to consummate the sale of his 20 shares to Wallace Electric. Before 2015, Plaintiff repeatedly refused to sell the stock. In 2003, Phil approached Plaintiff about selling his stock. Plaintiff testified that "Phil called me and told me that he thought it was time that I signed the stock back over to the company . . . [a]nd I said well, I'm not going to sign my stock back over . . . [a]nd he said, well, you need to sign it back over and I said no, that stock is mine." Plaintiff further testified that "I got mine the same way they goth theirs and I had no intentions of selling it back . . . [a]nd he got a little irritated and said, well, just what do you want for it then?" Phil testified that Plaintiff told him that the stock had "sentimental value" and that Plaintiff stated that he had "no intentions of giving it back."

Additionally, Phil testified that from 2003 to 2009 there were "multiple emails from [the Plaintiff] consistently saying that he wasn't giving his stock up," and around 2007 there was at least one phone conversation, and in 2006 Phil and Plaintiff had an in-person

conversation about selling the stock. Plaintiff further admitted to sending an email to Phil in 2009 stating that "I want to let it be known that at this point I do not intend to ever sell my stock in Wallace Electric." Due to Plaintiff's insistence that he was never giving up the stock, Phil and Gary never tendered a purchase price or found out the book value of the stock.

In fact, Plaintiff first offered to sell his shares at their then current book value to Wallace Electric by letter to the Defendants dated June 16, 2015. The Defendants responded by letter dated July 14, 2015 in which Defendants demanded again that Plaintiff sell his shares of stock to Wallace Electric and Defendants tendered $54,200 at that time to Plaintiff for his shares, which Plaintiff refused to accept.

Wallace Electric has been family-owned for many decades and has a longstanding history of making no dividend payments to any shareholders, but instead has consistently paid only salaries and performance bonuses to employees based upon their work performance, and this pattern of compensation was used both before, during and after Plaintiff worked as an employee of Wallace Electric.

After Plaintiff left the employment of Wallace Electric, Phil and Gary materially changed the business model of Wallace Electric, which resulted in substantially greater amounts of profit for Wallace Electric than Wallace Electric earned while Plaintiff was employed by Wallace Electric. Plaintiff admittedly did not contribute in any way to such increased profits

by Wallace Electric. Phil and Gary, on the other hand, worked long hours and sacrificed income in order to build the business.

The Defendants claim that the required repurchase of Plaintiff's shares should be valued based on a 16.6667% interest in Wallace Electric as valued in 1994, while Plaintiff claims that his shares should be valued at a 25% interest in Wallace Electric as valued in 2015. As of 1994, the fair market value of Wallace Electric's stock was $382,600.00, and the fair market value of Plaintiff's 16.6667% ownership interest was $54,200.00, after accounting for such minority discounts in value as William Black, the sole expert who testified about the stock's value, deemed appropriate in his expert opinion. As of July 14, 2015, the value of Wallace Electric was $8,308,794.00, and Plaintiff's 25% interest was $2,077,199.00. The Court further finds that William Black was a credible expert witness, that the valuation and methodology used by William Black to value Wallace Electric's stock was sound, and that Plaintiff did not tender any evidence to rebut William Black's valuation of Wallace Electric's stock as of the 1994 valuation date.

In addition to the above-stated Findings of Fact, the Court makes all such further findings of fact not specifically set forth above as may be set forth in its Conclusions of Law.

Conclusions of Law

## I. The Buy-Sell Agreement Controls the Dispute in this Case.

For the reasons set forth below, the Court finds that the Buy-Sell Agreement is controlling with respect to the sale of Plaintiff's shares back to Wallace Electric. The Court further finds that Plaintiff had an obligation to sell his shares back to Wallace Electric under the Buy-Sell Agreement beginning when he stopped working for Wallace Electric in 1994. Plaintiff repeatedly refused and failed to comply with his obligation under the Buy-Sell Agreement to sell his shares back to Wallace Electric, and this refusal constituted a breach of the Buy-Sell Agreement.

### A. Defendants' Counterclaims Were Timely Asserted.

The applicable statute of limitations for a breach of contract is six years. O.C.G.A. § 9-3-24. Certain equity-based claims have statutes of limitations of four years. Regardless, all of Defendants' counterclaims relate back to the filing of the original responsive pleading on October 20, 2011, which is well within both the four-year equitable statute of limitations and the six-year statute of limitations for contracts. O.C.G.A. § 9-11-15(c); *Jensen v. Engler*, 317 Ga. App. 879 (2012). Because Plaintiff's breaches of the Buy-Sell Agreement continued up through June 30, 2008, the Defendants' counterclaims were filed within any applicable statute of limitations.

The Buy-Sell Agreement expired by its own terms in 2008. Plaintiff refused (and admitted to refusing) to sell his stock back to Wallace Electric at all times from 1994 until well after the litigation in this case had commenced. In fact, the first time Plaintiff showed any willingness to sell his stock to Wallace Electric was in his attorney's letter in 2015. Therefore, Plaintiff's breach of the Buy-Sell Agreement was ongoing and continuous from 1994 through the expiration of the Buy-Sell Agreement on June 30, 2008.

A party can enforce the terms of a contract after its expiration as to a breach that occurs prior to the expiration of the contract. *Ladd Lime & Stone Co. v. MacDougald Construction Co.*, 29 Ga. App. 116 (1922). Although Plaintiff attempted to argue in briefs to this Court that said case holds that a party cannot sue for breach of a contract after the date it has expired, the Court rejects this argument, as the Court in *Ladd* held that "if it should appear from the evidence that the defendant's refusal to deliver amounted to a violation of the contract while the contract was in life, and before its expiration, and while the defendant was bound to perform, then the plaintiff would be entitled to damages for the breach." *Id.* at 119. In other words, the Court ruled that a contract can only be breached while it is in force, and cannot be breached after it has expired, but a party can still sue to enforce the terms of a contract after the expiration of the contract if the breach occurred during the term of the contract.

Accordingly, Plaintiff breached the Buy-Sell Agreement while it was in force, and his failure to sell his stock back to Wallace Electric continued throughout the entire term of the Buy-Sell Agreement.

B. The Buy-Sell Agreement Superseded and Replaced the Comparable Provisions in the Bylaws.

The cardinal rule of contract construction is to ascertain the intention of the parties. *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 673 (1945). If that intention is clear, and it contravenes no rule of law, and sufficient words are used to arrive at the intention, that intention shall be enforced, irrespective of all technical or arbitrary rules of construction. *Id.* at 674; *MacDougald Constr. Co. v. State Hwy. Dep't*, 59 Ga. App. 708 (1939) (rev'd on other grounds) ("It is a fundamental principle in construction of contracts that the meaning placed upon the terms of contract by the contracting parties is to be adopted.").

The basic principles of contract construction require treating the provisions of the Buy-Sell Agreement as replacing and superseding the provisions of Article V of the Bylaws. When the Plaintiff and Defendants became shareholders in 1988, they contemporaneously entered into the Buy-Sell Agreement, which explicitly covered many of the same duties and obligations regarding sale of stock that had previously been covered by Article V of the Bylaws. The Buy-Sell Agreement was signed by all the parties to this case (unlike

the Bylaws) and was created with the input and consent of the parties to this lawsuit (unlike the Bylaws). This distribution of shares in 1988 was the first time stock in Wallace Electric had ever been given to anyone. By entering into the Buy-Sell Agreement, the parties manifested a clear intent to replace and supersede the previously existing similar provisions that had been set forth in Article V of the Bylaws.

As such, the Court finds that the Buy-Sell Agreement expresses the most recent and agreed-upon intent of the parties that only employees of Wallace Electric can be shareholders of Wallace Electric, and that the Buy-Sell Agreement replaced and superseded the stock-sale provisions of the Bylaws.[1]

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[1] Even though this Court has found that the share purchase provisions of the Bylaws were superseded by the Buy-Sell Agreement, the Court notes for the record that neither the Bylaws nor the Buy-Sell Agreement appear to be executory in nature. But see, e.g., *Nash v. Greenig*, 108 Ga. App. 763, 764-65 (1963) (contract was executory where defendant was to lease property owned by the plaintiffs for a monthly rate and payment was to commence upon the completion of a building that plaintiffs were constructing on the property); *Mingledorff's, Inc. v. Hicks*, 133 Ga. App. 27, 27 (1964) (contract for the installation of heating and air conditioning systems in an apartment complex was "clearly an executory one" involving personal services); *Wheeler v. Layman Foundation*, 188 Ga. 267 (1939) (contract construed as executory when title to the land is retained until payment of the purchase price).

## II. Equity is the Applicable Remedy in this Case.

In this case, an equitable remedy is the only way to give effect to the parties' clear intent.[2] Section 8 of the Buy-Sell Agreement, the controlling document in this case, explicitly contemplates the use of an equitable remedy:

> "Stock subject to this agreement is not readily marketable, and for that reason and other reasons the parties will be irreparably damaged if the Agreement is not specifically enforced. In this regard, the parties declare that it is impossible to measure in money the damages that will accrue to a person having rights under this Agreement by reason of failure of another to perform any obligation under this Agreement. Therefore, this Agreement . . . shall be enforceable by specific performance or other equitable remedy. . . . If any person shall institute any action or proceeding to enforce the provisions of this Agreement, any person subject to this Agreement against whom such action or proceeding is brought hereby waives the claim or defense that the person instituting the action or proceeding has an adequate remedy at law, and no person

[2] Even though the Court has found that the Bylaws do not govern this dispute as they have expired and have been superseded and replaced by the Buy-Sell Agreement, for purposes of perfecting the record the Court notes that regardless of whether the Bylaws, the Buy-Sell Agreement, or neither document controls, equity is the only mechanism that can be used to give effect to the clear intent of the parties.

> shall in any action or proceeding put forward the claim or defense that an adequate remedy at law exists."

Accordingly, in addition to the clear expressed intent that only employees are to be shareholders (discussed *supra*), Plaintiff has expressly consented in the Buy-Sell Agreement to a Court exercising equity jurisdiction and providing equitable remedies with respect to enforcing the provisions of the Buy-Sell Agreement, and he has expressly waived any claim or defense that an adequate remedy at law exists with respect to enforcing his rights under the Buy-Sell Agreement. See *MacDougald Constr. Co. v. State Hwy. Dept.*, 59 Ga. App. 708 (1939) (rev'd on other grounds) (the "cardinal rule" of contract construction is to ascertain the intent of the parties from consideration of the entire contract and that meaning placed upon the terms of the contract by the contracting parties is to be adopted). Using principles of contract construction, it is clear that the parties intended for specific performance (or other equitable remedies) to be the mechanism by which disputes over sale of stock are resolved.

Furthermore, a balancing of the equities in this case compels the conclusion that Plaintiff should be ordered to turn over his twenty (20) shares of stock at the 1994 fair market value. This Court has wide latitude in fashioning an equitable remedy. "A superior court shall have full power to mold its decrees so as to meet the exigencies of each case and shall have full power to enforce its decrees when rendered." O.C.G.A. § 23-4-31. In fashioning such a remedy, a trial court

has broad discretion to balance the equities and enter an order. See *Nowlin v. Davis*, 278 Ga. 240 (2004).

Equity "considers that done which ought to be done and directs its relief accordingly," and "seeks always to do complete justice." O.C.G.A. §§ 23-1-8; 23-1-7. The Plaintiff failed to sell his stock to Wallace Electric when he stopped working there in 1994. What ought to have been done, and the clear intention and agreement of the parties, was that the Plaintiff sell and Wallace Electric purchase Plaintiff's twenty (20) shares of stock in 1994, when Plaintiff stopped working for Wallace Electric. Moreover, awarding Plaintiff a buy-out of his stock for its 2015 fair market value would constitute unjust enrichment to Plaintiff. Equity seeks to prevent unjust enrichment. *Sentinel Offender Services v. Glover*, 296 Ga. 315, 331 (2014) (no one ought to unjustly enrich himself at the expense of another). Plaintiff signed the Buy-Sell Agreement, which expressed the intent that only employees of Wallace Electric be shareholders. Plaintiff would be unjustly enriched at the expense of the Defendants if he were to profit from Wallace Electric's performance after his departure in 1994. It would also constitute unjust enrichment for this Court to allow the Plaintiff to receive a benefit in the form of payment for his stock at a value greater than the amount he would have received had the stock been returned to Wallace Electric when the parties intended.

Equity also does not allow Plaintiff to profit from his wrongful actions. See O.C.G.A. § 23-1-10 ("He who would have equity must do equity and must give effect

to all equitable rights of the other party respecting the subject matter of the action."); see also *Musgrove v. Musgrove*, 213 Ga. 610, 610 (1957) ("one will not be permitted to take advantage of his own wrong"). Plaintiff had a duty to sell his stock to Wallace Electric immediately upon his leaving the employment of Wallace Electric in 1994. Plaintiff is now trying to use his breach of the Buy-Sell Agreement to profit in an amount that is greater than what Plaintiff would have received if he had complied with the Buy-Sell Agreement in the first instance. Defendants were damaged by Plaintiff's continuing breach and failure to sell, and one result of Plaintiff's breach was an increase in the percentage of Wallace Electric which Plaintiff owned from 16.6667% to 25%. Therefore, in order to prevent the unjust enrichment of Plaintiff and prevent Plaintiff from benefitting from his own breach of the Buy-Sell Agreement, the valuation of Plaintiff's shares must be done using an ownership percentage of 16.6667% of Wallace Electric (which Plaintiff owned both in 1994 and during the pendency of the Buy-Sell Agreement) and not the 25% of Wallace Electric he came to own in 2009 after his longstanding breaches.

Finally, the Court notes that under the terms of the Buy-Sell Agreement, Wallace Electric also had an obligation to buy Plaintiff's shares. However, in an action seeking specific performance, a tender of money before suit is filed "may be and is waived where the party entitled to payment, by conduct or declaration, proclaims that, if a tender should be made, acceptance would be refused." *Simpson v. Pendergast*, 290 Ga. App.

293, 297 (2008). Plaintiff repeatedly refused to sell his stock up through at least 2008 while the Buy-Sell Agreement was in place. As such, Plaintiff's continuing refusal to sell his shares back to Wallace Electric causes the equities in this matter to be in favor of Wallace Electric.

## III. Plaintiff's Other Claims, Including Claims for Past Profits, Breach of Fiduciary Duty and Attorney's Fees are Null.

Since the Court ordered an equitable buy-out of Plaintiff's stock using a valuation date as of 1994, such a buyout also necessarily nullifies any remaining claims against Defendants arising out of Plaintiff's ownership of the stock certificates that occurred after the valuation date for the stock. The sale ordered by this Court is premised, among other things, on the idea that the stock *should* have been sold at the time he stopped being an employee at Wallace Electric, and thus Plaintiff *should not* have been a shareholder on subsequent dates. See O.C.G.A. § 23-1-8 ("Equity considers that done which ought to be done and directs its relief accordingly.").

Additionally, the Court of Appeals has repeatedly recognized that a shareholder must maintain shareholder status to raise claims for breach of fiduciary duties, claims for excessive salaries, and other derivative actions against the corporation. See, e.g., *Levy v. Reiner*, 290 Ga. App. 471, 474 (2008); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 264 Ga. 817, 821 (1994); *Paul &*

*Suzie Schutt Irrevocable Family Trust v. NAC Holding, Inc.*, 283 Ga. App. 834, 835 (2007). However, Plaintiff is equitably estopped and barred, both as a matter of equity and as a matter of public policy of the state of Georgia, from raising claims premised on his status as a shareholder when Plaintiff was only able to maintain his status as a shareholder by engaging in wrongful actions and breach of the Buy-Sell Agreement. If Plaintiff had sold his shares to Wallace Electric as required, then Plaintiff would not have had legal standing to bring any of his other claims raised in this lawsuit, which were premised on his status as a shareholder of Wallace Electric. To hold otherwise would incentivize bad faith actions for the sole purpose of accruing legal claims that would not otherwise exist. Furthermore, any such recovery by Plaintiff would be contrary to the equitable principles that people should not be permitted to benefit from their wrongdoing. As such, the Plaintiff's claims for breach of fiduciary duty, punitive damages, and attorney's fees are barred.[3]

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[3] The Court also specifically rejects Plaintiff's claim that the Articles of Incorporation required distributions of profits by Wallace Electric to him. First, the Articles do not require distribution of profits; they only state that "the object of the said proposed corporation shall be pecuniary gain to the stockholders," which is a general indication that Wallace Electric is intended to be for profit and that the shareholders benefit, generally speaking, from Wallace Electric. Shareholders can benefit from an increase in the overall value of Wallace Electric, not just from distributions of profit. Second, a shareholder of a corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or

Finally, Plaintiff has failed to carry the burden of proof in showing any bad faith, wrongful, dilatory or other actions on the part of Defendants that would justify an award of attorney's fees to Plaintiff.

## Conclusion

Plaintiff should have sold his stock to Wallace Electric in 1994 upon his leaving the employment of Wallace Electric, at its then-current value. Accordingly, for the reasons set forth herein, **IT IS HEREBY ORDERED** that Plaintiff shall sell and tender all his shares of stock in Wallace Electric to Wallace Electric, free and clear of all liens and encumbrances, and that Wallace Electric shall pay Plaintiff the sum of $54,200 for said shares of Plaintiff's stock in Wallace Electric. The Court rules that all of Plaintiff's other claims in this lawsuit are equitably barred and otherwise moot in light of the Court's ruling above, and all of Defendants' Counterclaims and Defenses have been fully accounted for in this Court's rulings.

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duration of the corporation. See O.C.G.A. § 14-2-1001. Third, O.C.G.A. § 14-2-640 gives the board of directors discretion as to whether and when to make distributions, and Article VI of the Bylaws also gives directors discretion as to when and whether to make distributions. Since its inception, Wallace Electric never made distributions to any shareholder, and Plaintiff was aware of this because he worked there.

SO ORDERED THIS 3rd DAY OF August, 2017.

/s/ Brian J. Amero
HONORABLE
BRIAN J. AMERO, JUDGE
HENRY COUNTY
SUPERIOR COURT

301 Ga. 195
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S17A0528. WALLACE v. WALLACE et al.

GRANT, Justice.

The fate of Dorsey "Doss" Wallace's stock in the family business, Wallace Electric Company, has caused a remarkable amount of disagreement between Doss and his brothers, Gary and Phillip Wallace. The parties offered competing narratives in the case below about which agreement, if any, governed the ownership of stock in Wallace Electric, and about what the terms of those agreements would require. The trial court ultimately concluded in a bench trial that Doss should be paid $54,200 for his stock. But because the court correctly admitted that its order did not reach the factual or legal conclusions required to resolve this case, we vacate the order below and remand for proper consideration of, and conclusions regarding, the legal questions at issue in this case.

I.

Wallace Electric Company was incorporated in 1959 by the parties' father. In 1988, when all three brothers were working for Wallace Electric, their father awarded Gary and Phillip each a 25% share of stock in the company, awarded Doss a 16.67% share, and kept a 33.33% share for himself. Their father owned and managed the business until his death in 2000. After their father's death, Gary and Phillip took over the management of Wallace Electric. Doss, on the

other hand, had been employed at Wallace Electric sporadically until his employment ended in 1994. The parties agree that the ownership of stock in Wallace Electric was intended to be reserved for employees of the company.

In 2011, following an apparent series of family disputes, Doss filed a complaint for accounting and damages against Gary and Phillip, alleging that they had deprived Doss of his lawful interests as a shareholder of Wallace Electric.[1] During discovery, Doss filed a motion seeking a court-supervised accounting and buyout of his minority shareholder interest in Wallace Electric. Doss argued that the Wallace Electric Bylaws, which were enacted in 1959, controlled the parties' dispute. He alleged that the Bylaws restricted the retention, sale, and disposition of a shareholder's stock, as outlined in the following provision:

> [I]f the employment of any stockholder or officer is terminated, for any reason, the corporation shall have the right and duty to purchase all the stock of said employee or officer and the former officer or employee shall be obligated to sell his stock pursuant to these bylaws.
>
> The purchase price, in any event, shall be the book value of the stock (as of the time of

[1] The record reflects that Doss's original complaint named only Gary and Phillip as defendants; Wallace Electric was added as a defendant in 2012. Gary, Phillip, and Wallace Electric are referred to collectively as "Appellees."

> said notice) as determined according to accepted accounting practices, and shall be binding upon the parties.

He argued that Wallace Electric had a duty to make an offer and purchase his stock after his employment ended, a duty that the company did not fulfill. Moreover, Doss contended that the Bylaws required that the price of the stock be determined at the time the company offered to purchase his stock. Therefore, Doss contended that the value of his stock should be determined based on the date the company offered to purchase it. He maintained that because Wallace Electric had never offered him the "book value" of his stock, it had not satisfied its duties under the Bylaws – and he, therefore, was not obligated to sell. Accordingly, in his view, the buyout should be calculated based on the stock's "book value" at the time the litigation began.

Doss admitted, however, that in 1988 the parties had entered into a Buy-Sell Agreement that also addressed the disposition of Wallace Electric stock. The Buy-Sell Agreement provided for the sale of any shareholder's stock upon death, total disability, or termination of employment. The Buy-Sell Agreement also set out a method for determining the current value of the stock in the event of a disagreement between the parties at the time of sale. Doss, however, contended that the Buy-Sell Agreement does not apply to the sale of his stock because it expired on June 30, 2008, before his brothers made any effort to purchase his stock.

Appellees, on the other hand, argued that Doss was not entitled to demand a buyout and had anticipatorily breached his duties under the Buy-Sell Agreement by retaining his stock after his employment with Wallace Electric ended in 1994. Gary offered to purchase Doss's stock in 2003, Appellees claim, but Doss continually refused to sell. Appellees maintain that the Buy-Sell Agreement affirmatively required Doss to sell his stock when his employment with Wallace Electric ended. Appellees eventually amended their filings to explicitly request that the court order Doss to resell his shares at their 1994 value, in accordance with what they saw as the terms of the Buy-Sell Agreement.

With respect to the Bylaws, Appellees argued that they constituted a shareholder agreement and had expired pursuant to OCGA § 14-2-732 (b) (3), a statute that sets out requirements and limits for shareholder agreements and includes a 20-year sunset provision for such agreements.[2] Alternatively, the brothers claimed that the Bylaws had been superseded by the

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[2] OCGA § 14-2-732 provides in relevant part:

. . .

(b) An agreement authorized by this Code section shall be:

. . .

(3) Valid for no more than 20 years. Failure to state a period of duration or stating a period of duration in excess of 20 years shall not invalidate the agreement, but in either case the period of duration shall be 20 years. Any such agreement may be renewed for a period not in excess of 20 years from the date of renewal by agreement of all the shareholders at the date of renewal.

later-enacted Buy-Sell Agreement. The brothers also maintained that because none of the parties owned stock when the Bylaws were enacted in 1959, the Bylaws did not constitute an executory contract between the parties. Instead, they argued, the parties were bound by the terms of the Buy-Sell Agreement, which was in effect and signed by the parties in 1988. Specifically, Appellees cited the following provisions of the Buy-Sell Agreement:

> Upon the . . . termination of employment of a Shareholder, such Shareholder . . . shall sell, and the Corporation shall buy, all, but not less than all, of the stock owned by such Shareholder for a purchase price equal to the current value.
>
> . . .
>
> In the event of termination of employment of a Shareholder, the Corporation shall purchase all of the stock owned by such Shareholder within sixty (60) days after the date of termination of employment.

Appellees maintained that the Agreement defined "current value" as $1,806 per share. Doss countered that the Agreement expired in 2008 and that its expiration resulted in a reversion to the Bylaws. He maintained that the Bylaws had not expired and were not subject to any subsequent laws restricting shareholder agreements to a 20-year span.

With the dispute between the parties centering upon the potential application and interpretation of these two documents, the trial court conducted a bench

trial in equity.[3] At the conclusion of that bench trial, the court issued an oral ruling. The trial court determined that all of the brothers understood that if you were not "working for the company, you should not take from the company" and that Doss had not "contributed in any meaningful way to the growth and development of the company since 1994." The court also concluded that in 1994, Doss's portion of stock was valued at $54,200, and that in 2015 Doss's stock was valued at over two million dollars. Based on those determinations, the trial court found that it was "reasonable to me that he should receive what he would have received at that time had he done what he was supposed to do, which was to return the stock to the company." The trial court awarded Doss $54,200 for his shares of Wallace Electric stock. But that award was not based on evaluation of the Buy-Sell Agreement or the Bylaws. Instead, the trial court announced that it would not decide the legal issues in the case:

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[3] The trial court conducted a bench trial in equity and ordered the sale of Doss's stock at its 1994 value as an equitable remedy. An appeal presenting an issue concerning the "legality or propriety of equitable relief sought in the superior court," when that equitable relief is not "ancillary to underlying issues of law," and in which a notice of appeal was filed before January 1, 2017, falls within this Court's former appellate jurisdiction in equity cases. *Williford v. Brown*, 299 Ga. 15, 15 (2) (785 SE2d 864) (2016); Ga. Const. of 1983, Art. VI, Sec. VI, Par. III (2). In cases in which a notice of appeal is filed on or after January 1, 2017, the Court of Appeals will have jurisdiction of "all equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death." (Citation and punctuation omitted.) *Williford*, 299 Ga. at 16 n. 1.

> I think that the issue of executory contracts and the issues of which of the governing documents would apply and when is to be left for the Court of Appeals. But I think it's very clear that neither of the parties did what they were supposed to do in connection with these governing documents.

In response to a request from Doss that the trial court enter findings of fact and conclusions of law, the court averred that the oral ruling contained its findings of fact and conclusions of law, and issued an order to the same effect. This appeal followed.

## II.

Although the trial court's written order fails to disclaim any responsibility for deciding the legal issues in this case, it also fails to actually do so. Much like its ruling from the bench, the written order does not make any findings of fact or conclusions of law regarding which document, if any, ultimately controlled the parties' dispute. While the written order determined that an "employee's share of stock in Wallace Electric ought to be returned to the company when the employee's term of employment is over," the trial court failed to include any written findings of fact or conclusions of law that Doss had a duty to sell his stock to Wallace Electric in 1994, or at any other point. Additionally, the trial court failed to conclude whether either of the documents at issue were executory. Although we also avoid such a finding as a court of review, the trial court's original order seems to recognize that the

outcome may depend on whether the governing documents gave the parties a *right* to buy or sell or a *duty* to buy or sell. Absent a determination of which document applied, if any, and what the terms of that document demanded of the parties, this Court cannot provide meaningful appellate review.

We do note that in its written order the trial court relied on the equitable maxim, codified at OCGA § 23-1-8, that equity considers that done which ought to be done and directs its relief accordingly. That maxim cannot be fulfilled where that which should have been done still remains to be determined. See *Burks v. Colonial Life & Acc. Ins. Co.*, 98 FSupp. 140, 144-145 (M.D. Ga. 1951), aff'd, 192 F2d 643 (5th Cir. 1951) ("To consider as done that which ought to have been done, the [c]ourt must determine what ought to have been done."). Moreover, "the first maxim of equity is that equity follows the law." *Dolinger v. Driver*, 269 Ga. 141, 143 (4) (498 SE2d 252) (1998). As this Court stated in *Dolinger*:

> [A] court of equity has no more right than a court of law to act on its own notion of what is right in a particular case. "Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity." [Cit.] Although equity does seek to do complete justice, it must do so within the parameters of the law.

Id. Equity does not permit a court to substitute its own notion of what is right in a particular case for a determination of what the law demands.

In this situation, Georgia law requires findings of fact and conclusions of law: A trial court presiding over a bench trial "shall upon request of any party made prior to such ruling, find the facts specially and shall state separately its conclusions of law." OCGA § 9-11-52 (a). One reason for that requirement is that it serves as an aid to the appellate court on review. *Gen. Teamsters Local Union No. 528 v. Allied Foods, Inc.*, 228 Ga. 479, 480 (1) (186 SE2d 527) (1971). Indeed, "a dry recitation that certain legal requirements have been met is insufficient to satisfy the requirements of the law. The trial judge is to ascertain the facts and to state *not only the end result of that inquiry but the process by which it was reached.*" *Beasley v. Jones*, 149 Ga. App. 317, 318 (1) (254 SE2d 472) (1979) (emphasis supplied). Here, the trial court announced an end result, but failed to mark the path that led to that result.

Simply put, it is not enough for a trial court to determine the end result based on its own notion of what is reasonable, leaving factual and legal decisions to the appellate courts in the first instance. In the present case, it is not possible from the state of the record and the trial court's order to determine what evidence or agreement the trial court relied upon in reaching its decision. As a result, meaningful appellate review is not possible. See, e.g., *SN Intl., Inc. v. Smart Properties, Inc.*, 311 Ga. App. 434, 437 (715 SE2d 826) (2011) (vacating and remanding where the trial court failed to make specific findings of fact and conclusions of law to

explain its judgment when such an omission made meaningful appellate review virtually impossible).[4]

Accordingly, we vacate and remand with directions for the trial court to find the facts and state its conclusions of law, including whether the Bylaws, Buy-Sell Agreement, or any other document governs the parties' dispute. We do not reach the merits of Doss's enumerations of error.

Judgment vacated and case remanded with direction. All the Justices concur.

Decided May 15, 2017.

Equity. Henry Superior Court. Before Judge Amero.

James L. Ford, Sr., for appellant.

Smith, Welch, Webb & White, John P. Webb, David M. Waldroup, for appellees.

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[4] We echo the caution previously issued by our Court of Appeals on this issue:

> We caution, however, that our decision is not to be read as a general rule allowing a party to dispense with the requirement that it formally request findings and conclusions pursuant to OCGA § 9-11-52 (a) or holding that a party will always be rescued from its failure to make such a request on the record.

*Gold Kist, Inc. v. Wilson*, 220 Ga. App. 426, 428 (1) (469 SE2d 504) (1996). Rather, because of the complexity of the facts and issues in this case and because the record clearly reflects that Doss requested findings of fact prior to the trial court's judgment, we remand for issuance of findings of fact and conclusions of law by the trial court.

[SEAL] SUPREME COURT OF GEORGIA
Case No. S18C1329

Atlanta, January 07, 2019

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

**DORSEY EUGENE WALLACE v.**
**GARY EDWARD WALLACE et al.**

**The Supreme Court today denied the petition for certiorari in this case. All the Justices concur.**

Court of Appeals Case No. A18A0778

**SUPREME COURT OF THE**
**STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Thomas S. Banus, Clerk

[SEAL] SUPREME COURT OF GEORGIA
Case No. S18C1329

Atlanta, February 04, 2019

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

**DORSEY EUGENE WALLACE v.**
**GARY EDWARD WALLACE et al.**

**Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.**

**All the Justices concur.**

**SUPREME COURT OF THE**
**STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Thomas S. Banus, Clerk

# BUY-SELL AGREEMENT
# OF
# WALLACE ELECTRIC COMPANY

## TABLE OF CONTENTS

SCHEDULE C – CURRENT VALUE OF STOCK
SCHEDULE D – STOCK PLEDGE AGREEMENT
SCHEDULE E – FORM OF PROMISSORY NOTE
SCHEDULE F – LIST OF SHAREHOLDERS

[1] AGREEMENT

THIS AGREEMENT is executed this 30th day of June, 1988, by and among WALLACE ELECTRIC COMPANY, a Georgia corporation (hereinafter referred to as "Corporation") and the undersigned stockholders of the Corporation (hereinafter called "Stockholders") with respect to the stock of the Corporation.

WITNESSETH:

WHEREAS, the Stockholders own all of the outstanding stock of the Corporation; and

WHEREAS, the parties hereto believe it to be in the best interest of each Stockholder and of the Corporation to make provisions for the future disposition of the stock of the Corporation; and

WHEREAS, the Stockholders and the Corporation desire to control the management of the Corporation for their mutual best interests;

NOW, THEREFORE, in consideration of the mutual promises and the covenants of the parties hereto and of the benefits to the parties to this Agreement, each agrees as follows.

1.

DEFINITIONS

Whenever used in this Agreement, the following terms shall have the meaning set forth below:

[2] 1.1 "Agreement" shall mean this Agreement together with any amendments made in the manner described in this Agreement.

1.2 "Corporation" shall mean WALLACE ELECTRIC COMPANY, a Georgia corporation.

1.3 Current value" of the stock is $1,806.00 per share. The Corporation and the Shareholders agree, diligently and in good faith, to review the current value at intervals of not more than twelve (12) months. If at any time and from time to time the Corporation and the Shareholders unanimously agree that the current value should be changed, they may change the current value by written amendment to this Agreement, which amendment shall set forth a new current value and the date on which the current value is to be effective. Any amendment evidencing a change in the current value shall be attached to this Agreement as Schedule C and shall be incorporated in and made a part of this Agreement upon attachment.

1.4 "Disability" as used herein refers to that time at which the Stockholder shall be deemed totally and permanently disabled as construed to coincide with any definition contained in a disability insurance policy or policies carried by the Corporation on the Shareholder. The term "total and permanent disability" and

phrases of similar input, as used in this Agreement, shall be construed to coincide with such insurance policy(ies).

[3] 1.5 "Disability Insurance" as used herein refers to those policies of insurance carriers upon the Stockholder for the purpose of acquiring the Stockholder's interest in event of a disability. Disability insurance policies owned by the Corporation on each Stockholder may vary from time to time and is to be recorded on Schedule B.

1.6 "Disposition" shall mean any transfer, whether outright or as security, inter vivos or testamentary, with or without consideration, voluntary or involuntary, or all or any part of any right, title or interest (including but not limited to voting rights in or to any stock).

1.7 "Permitted Disposition" shall mean a disposition to which all of the Shareholders consent in writing.

1.8 "Retirement" refers to that event after the age of sixty-five (65) years wherein the Stockholder ceases to be engaged in the business of the Corporation on a full-time basis.

1.9 "Shareholder" shall mean any person or entity in whose name stock is outstanding on the stock records of the Corporation.

1.10 "Shareholder's Interest" is defined to be the percentage of ownership of the Corporation in percent which is determined by dividing the Shareholder's

number of shares of the Corporation by the total aggregate shares held by all Stockholders at the Corporation.

[4] 1.11 "Stock" shall mean all shares of the capital stock of the Corporation authorized in its Articles of Incorporation, which are issued and outstanding.

1.12 "Termination of Employment" shall occur when a Shareholder who has been employed by the Corporation is no longer so employed, either as a result of voluntary resignation by such Shareholder or as a result of dismissal by the Corporation, with or without cause. Termination of employment shall be deemed to occur from the effective date of such resignation or dismissal.

1.13 "Treasury Stock" shall mean stock that has been issued and subsequently acquired by the Corporation, as defined in O.C.G.A., Section 14-2-2(18) (Michie 1982).

2.

REPRESENTATIONS AND WARRANTIES

2.1 Representations and Warranties of the Corporation. The corporation hereby warrants that at the time this Agreement is executed:

> (a) The shares of common stock of the Corporation owned by undersigned shareholders are the only shares of common stock of the Corporation outstanding;

(b) No outstanding proxies, voting trusts, loan agreements or other agreements affect, in any way, the right of the Shareholders to vote the stock or the right of the Corporation to perform its obligations under this Agreement;

[5] (c) No preferred stock, stock options, warrants or other equity interests in the Corporation are outstanding;

(d) The stock transfer records of the Corporation are accurate and reflect all requests to date for registration of shares of the stock;

(e) The Corporation has duly authorized the execution of this Agreement; and

(f) The Corporation has outstanding no bonds, debentures or other debt instruments of any type that are convertible into stock.

2.2 Representations and Warranties of the Shareholders.

Each Shareholder hereby represents and warrants that he owns his stock is the Corporation free and clear of all liens, restrictions, pledges and encumbrances, that he has made no disposition of the stock not recorded on the book and records of the Corporation, and that he has granted no proxy rights or other voting rights with respect to any of the stock.

2.3 Restrictions upon the Transfer of the Stock.

No Shareholder shall have the right to make any disposition of stock other than a permitted disposition, except as provided in this Agreement.

[6] 3.

RIGHTS OF TRANSFER

3.1 Right of First Refusal.

(a) Condition of Transfer. Any Shareholder desiring to make a disposition other than a permitted disposition of any stock shall offer such stock to the Corporation and other Shareholders by giving them notice of his intention to dispose of the stock. Such notice shall name the type of disposition, the proposed transferee, the number of shares to be transferred, the price per share and the terms of payment. Following receipt of such notice by the non-offering Shareholders and the Corporation, the non-offering Shareholders and the Corporation may exercise an option in the manner provided by Paragraph 3.1(b) to purchase all, but not less than all, of the offered stock in the discretion of each purchaser, either at the price and on the terms specified in the notice or at the current value and on the terms specified in Paragraph 3.1(c).

(b) Exercise of Option. The Corporation shall have first option to purchase all of the offered stock (or any party provided one or more Shareholders elect to purchase all offered stock that the Corporation does not purchase). The Corporation may exercise its option

by giving written notice, which must state the number of [7] shares the Corporation elects to purchase and the price and terms of purchase, to each Shareholder within ten (10) days after the offering Shareholder's notice. The offering Shareholder shall not participate in the determination by the Corporation whether to exercise the option and shall consent to the determination reached by the holder or holders of a majority of the outstanding stock, other than the offered stock. If the Corporation elects to purchase none or less than all of the offered stock, the accepting Shareholders (in the proportion that the stock owned by each accepting Shareholder bears to the stock owned by all accepting Shareholders) shall have an option to purchase all, but not less than all, of the offered stock that the Corporation elects not to purchase, exercisable by giving notice to all Shareholders and the Corporation within twenty (20) days after notice from the offering Shareholder. The Corporation or non-offering Shareholders or both may purchases all of the offered stock but may not together purchase less than all of the offered stock. If the Corporation elects to purchase more shares than any other offeree, it shall state in its notice of exercise the date for the closing of the purchase, which shall not be less than twenty-five (25) days nor more than forty (40) days after notice from the offering [8] Shareholder. If any Shareholder exercises his option to purchase more shares than any other offeree, including the Corporation, he shall state in his notice of exercise, with a copy to the Secretary of the Corporation, the purchase price of the shares and the terms of purchase and a date for the closing of the purchase by all accepting offerees.

Such date for closing shall be not less than twenty-five (25) days nor more than forty (40) days after the date of notice from the offering Shareholder. The Secretary of the Corporation shall promptly mail a copy of such notice of exercise to all the accepting offerees to advise them of the time of closing.

(c) Terms of Payment. The terms of payment by the offeree, in his sole discretion, shall be either payment in cash or in sixty (60) equal monthly installments of principal, together with simple interest on the unpaid principal balance at the rate of twelve percent (12%) per annum. Such purchaser, other than for cash, shall execute a promissory note to the order of the offering Shareholder in the amount of the purchase price, which note shall contain an acceleration clause permitting the payee to accelerate the entire unpaid balance upon the failure of the payor to make payments according to the terms of the note, and a prepayment clause permitting [9] prepayment, in whole or in part, without premium or penalty in full at any time and in part from time to time after the Calendar year of sale.

(d) Failure to Exercise. If the right of first refusal provided above is not exercised as to all of the offered stock, if the exercise by the non-offering Shareholders and the Corporation is not made within the time specified in 3.1(b), or if the purchase by the non-offering Shareholders or the Corporation is not consummated within the time specified in 3.1(b) through no fault of the offering Shareholder, the offering Shareholder may transfer the offered stock to the proposed purchaser, at

the price and on the terms and conditions set forth in the notice of intention sent by the offering Shareholder. As a condition to such transfer, the offering Shareholder shall obtain the written acknowledgement of the transferee that the transferee will be bound by, and the stock transferred will be subject to, this Agreement. In addition and as a condition precedent to transfer to the proposed transfer, Shareholder shall do or cause to be done all things and activities to assure the Corporation and remaining shareholders that the transfer of the offered stock shall not violate any Federal Securities and Exchange Rules, Regulations of the 1933 and 1934 [10] Securities Act or the State of Georgia Blue Sky Laws. If the transfer of stock by the offering Shareholder to the proposed purchaser named in the notice of intention is not made within thirty (30) days after the date the offering Shareholder became free to transfer, the right to transfer in accordance with the notice shall expire. In such event this Agreement, including without limitation Article 3, shall remain in full force and effect as to the offered stock.

(e) Closing. At the closing, the purchaser shall deliver the consideration required by 3.1(a), and the selling Shareholder shall deliver the offered stock, duly endorsed for transfer and with all required revenue stamps attached.

(f) Restriction upon Pledge. Any Shareholder who wishes to make a permitted disposition of the type described in 1.7(b) shll comply with all restrictions and

requirements imposed by the Corporation and Shareholders before such transfer or disposition shall be effective.

3.2 Mandatory Sale upon Death, Total Disability and Termination of Employment.

(a) Mandatory Redemption by the Corporation. Upon the death, total disability or termination of employment of a Shareholder, such Shareholder or his legal representative, as the case may be, shall sell, and the [11] Corporation shall buy, all, but not less than all, of the stock owned by such Shareholder for a purchase price equal to the current value.

(b) Closing. In the event of the death or total disability of a Shareholder, the Corporation shall purchase all of the stock owned by such Shareholder within twenty (20) days after the last to occur of the appointment of his personal representative or receipt of the proceeds of the insurance policies as set forth in Paragraph 3.2(e). In the event of termination of employment of a Shareholder, the Corporation shall purchase all of the stock owned by such Shareholder within sixty (60) days after the date of termination of employment. The closing of the redemption of such stock shall be held at the time and place and on the date specified by the Corporation by written notice to the Shareholder, which date shall not be later than that provided in Paragraph 3.2(b).

(c) Inability of Corporation to Redeem. If the Corporation shall be unable to purchase all of the deceased, disabled or terminated Shareholder's stock, as

required by Paragraph 3.2(a), it shall purchase all of the stock that it can lawfully purchase, within the period required in Paragraph 3.2(b), and shall notify each Shareholder and the personal representative, if [12] any, of a deceased Shareholder of the number of shares of stock that it cannot purchase. The remaining Shareholders, in that proportion which the number of shares of stock each owns bears to the number owned by all accepting Shareholder, shall have an option to purchase for the current value all, but not less than all, of the stock that the Corporation is unable to purchase, exercisable by giving notice of the deceased, disabled or terminated Shareholder or his personal representative, if any, within twenty (20) days after the Corporation has given notice of its inability to purchase all of the available stock. Each Shareholder represents, warrants and agrees that if the surplus of the Corporation becomes inadequate, under the laws of the State of Georgia, to purchase any of the stock as required or allowed under this Agreement, such Shareholders will take any and all corporation actions which may be effective to enable the Corporation to purchase the stock as so required or allowed.

(d) Purchase Price. The purchase price of stock pursuant to this paragraph shall be its current value. If a Shareholder's death, total disability or termination of employment occurs within eighteen (18) months after the last review of the current value, the price applicable to the sale shall be a price determined [13] by the buyer and seller or their representatives, and if they do not agree upon a price within sixty (60) days after

the death, total disability or termination of employment of a Shareholder, the price shall be determined by an appraiser appointed by agreement between the disabled, terminated, or deceased, Shareholder or his personal representative on the one hand and the remaining Shareholders voting as a group on the other. In the event agreement is not reached as to a single appraiser within ninety (90) days after death, total disability or termination of employment, the price shall be determined, and shall be binding on all parties, by the majority vote of a board of three (3) appraisers, the selling Shareholder or his personal representative appointing one (1) appraiser, the other Shareholders as a group appointing one (1) appraiser, and the two (2) appointed appraisers appointing the third (3) appraiser. If either of the two (2) appraisers refuse or fail to appoint the third (3rd) appraiser, the appointment or appointments shall be determined and made by the American Arbitration Association in accordance with its rules then obtaining, and the costs thereof shall be borne by the party or parties failing to make the appointment. Use of this procedure shall be a condition precedent to the right of [14] any Shareholder to enforce the provisions of this Paragraph 3.2. Appropriate adjustment in the purchase price shall be made for any stock dividend, stock split or issuance by the Corporation of additional outstanding shares occurring after the fixing of the last stipulated price.

(e) Cash Payment of Purchase Price; Funding by Life Insurance. Upon a sale of stock due to death or total disability, the purchase price shall be paid in cash

at closing. The Affirmative obligation of the Corporation to purchase stock upon death or total disability of a Shareholder shall in the sole discretion of the Directors of the Corporation be funded by certain policies of life and disability insurance, written on each individual Shareholder and owned by the Corporation. Such policies of life and disability insurance maintained by the Corporation with life insurance companies as listed in Schedules A-and B, and such insurance, or similar insurance, in an amount sufficient to fund the Corporation's obligation, shall be maintained by the Corporation throughout the term of this Agreement.

(f) Installment Payment of Purchase Price. Upon the termination of employment of a Shareholder, the Corporation may elect to pay the purchase price in cash [15] or in an initial installment, payable at closing, of not more than twenty-five percent (25%) of the total price, with the balance to be paid in five (5) annual installments of principal and with the first due one (1) year from date of the closing. The obligation to pay the balance of the purchase price shall be evidenced by a promissory note of the Corporation, in the form attached as Schedule E, to the order of the selling Shareholder with simple interest at the annual rate of twelve percent (12%) per annum. Such note shall provide for the acceleration of the sue date in the event of default in payment of any installment and shall give the maker the option of prepayment without premium or penalty, in whole or in part and at any time or from time to time after the calendar year of the sale. The Corporation shall pledge the purchased stock with the

selling shareholder to secure payment of the note, pursuant to a stock pledge agreement in the form which is attached hereto as Schedule D.

(g) Assumption of Funding Obligation by Individual Shareholders. It is mutually understood by the parties hereto that the Board of Directors of the Corporation may from time to time review the advisability of the assumption by the Shareholders of the Corporation's obligation to fund this mandatory redemption agreement.

[16] 3.3 Assumption of Funding Obligation by Individual Shareholders.

It is mutually understood by the parties hereto that the Board of Directors of the Corporation may, from time to time, review the advisability of the assumption by the Shareholders of the Corporation's obligation to fund the mandatory redemption agreement under Paragraph 3.2.

3.4 Delivery of Certificates.

Upon the payment of the purchase price or upon the down payment at closing and the delivery of the Corporation of its promissory note(s), the selling Shareholder or the personal representative of the selling Shareholder, if any, shall endorse, assign and delivery the certificate or certificates representing the shares of the Corporation to the Corporation or other Shareholders at closing. The Corporation shall do those things necessary in order to authorize the Board

of Directors of Officers to comply fully with this Agreement and the delivery of those documents to the selling Shareholder, or his personal representative, if any, that are called for by this Agreement.

4.

AGREEMENT WITH RESPECT TO
THE AFFAIRS OF THE CORPORATION

4.1 Sale to Unrelated Third Party.

In the event that holders of seventy-five percent (75%) of the outstanding stock of the Corporation shall receive a bona fide offer to purchase all of the outstanding stock of the [17] Corporation from a person who owns no stock in the Corporation and such holders desire to accept such offer and indicate their desire to do so in writing to the remainder of the Shareholders, such remaining Shareholders shall hereby agree to sell their stock to such purchaser on the same terms and conditions as those applicable to the sale by the holders of said seventy-five percent (75%) of the stock.

4.2 Intention of the Parties.

This Article 4 is an intention to restrict the actions of Directors as permitted by O.C.G.A Section 14-2-120 (Michie 1982).

## 5.

## LEGEND ON STOCK

5.1 Form of Legend.

Upon the execution of this Agreement, each Shareholder shall surrender to the Corporation all of his certificates representing the stock. The Secretary shall endorse each certificate with the following legend:

> "The shares of stock represented by this certificate are held subject to, and transfer of such shares is restricted by, the terms of an Agreement dated, _____, 1988, a copy of which is on file at the office of the Corporation. No transfer of any share represented by this certificate shall be valid unless made in accordance with the terms of the Agreement."

After such endorsement, each of the certificate so surrendered shall be returned to the Shareholder owning such certificate. Thereafter, all certificates representing stock of the Corporation shall bear an identical endorsement. A copy of [18] this Agreement shall be filed with the Secretary of the Corporation.

5.2 Intention of the Parties.

The parties to this Agreement intend that the legend conform to the provisions of Section 11-8-204 of the Uniform Commercial Code of Georgia. This legend may be modified from time to time by the Board of Directors of the Corporation to conform to any amendments to Section 11-8-204 or to this Agreement.

6.

TERMINATION AND AMENDMENT

6.1 Termination.

This Agreement shall terminate:

(a) If all stock of the Corporation is owned by any one Shareholder; or

(b) If the Corporation is adjudicated a bankrupt, the Corporation executes an assignment for benefit of creditors, a receiver is appointed for the Corporation, or the Corporation voluntarily or involuntarily dissolves; or

(c) If all Shareholders agree to terminate this Agreement.

Notwithstanding anything to the contrary contained in this Agreement, this Agreement shall terminate twenty (20) years from the date hereof unless this Agreement is removed within the twenty (20) year period provided in O.C.G.A., Section 14-2-120 [19] (Michie 1982). Amendments to this Agreement shall be deemed renewals of this Agreement unless the contrary is stated in the amendment. If not sooner terminated, this Agreement shall terminate twenty-one (21) years after the death of the last to die of the Shareholders of the Corporation living at the date of this Agreement.

6.2 Amendment.

This Amendment may not be amended or terminated orally, and no amendment, termination or attempted waiver shall be valid unless in writing and signed by the party sought to be bound.

7.

NOTICE

Any and all notices, offers, demands, or elections required or permitted to be made under this Agreement (notices) shall be in writing, signed by the party giving such notice, and delivered personally or sent by registered or certified mail to the other party at the address set forth below their names, in Schedule F, or at such other address as the other party may hereafter designate in writing. The date of personal delivery or the date of mailing, as the case may be, shall be the date of such notice. No notice shall be valid unless there shall be a dated receipt evidencing the delivery of same. Any and all notices to the Corporation shall be conspicuously marked on the face thereof: "Attention: Secretary of the Corporation."

[20] 8.

REMEDIES

Stock subject to this Agreement is not readily marketable, and for that reason and other reasons the parties will be irreparable damaged if this Agreement is not specifically enforced. In this regard, the parties

declare that it is impossible to measure in money the damages that will accrue to a person having rights under this Agreement by reason of failure of another to perform any obligation under this Agreement. Therefore, this Agreement, including without limitation the provisions of Paragraph 3.2, shall be enforceable by specific performance or other equitable remedy cumulative with and not exclusive of any other remedy. If any person shall institute any action or proceeding to enforce the provisions of this Agreement, any person subject to this Agreement against whom such action or proceeding is brought hereby waives the claim or defense that the person instituting the action or proceeding has an adequate remedy at law, and no person shall in any action or proceeding put forward the claim or defense that an adequate remedy at law exists. Should any dispute concerning the transfer of stock arise under this Agreement, an injunction may be issued restraining the transfer of such stock pending the determination of such dispute.

[21] 9.

LIABILITIES

If any Shareholder obtains stock from another Shareholder pursuant to the terms of this Agreement, the acquirer shall use his best efforts to obtain the release of such other Shareholder from all contingent liabilities incurred in connection with the business of the Corporation, including, but not by way of limitation, liabilities of such other Shareholder as guarantor

of surety upon obligations of the Corporation to lenders.

## 10.
## MISCELLANEOUS

10.1 Applicable Law.

This Agreement is executed and will be performed in the State of Georgia, and this Agreement shall be construed and enforced in accordance with the laws of the State of Georgia.

10.2 Captions.

Titles or captions of sections contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or prescribe the scope of this Agreement or the intent of any provision.

10.3 Counterparts.

This Agreement may be executed simultaneously in four or more counterparts, each of which shall be deemed an original, but all of which together shall constituted one and the same Agreement.

[22] 10.4 Further Acts.

Each party agrees to perform any further acts and to execute and deliver any instruments or documents that may be necessary or reasonably deemed advisable to carry out the purposes of this Agreement.

10.5 Gender.

Where the context so requires, the masculine gender shall be construed to include the female, a corporation, a trust or other entity, and the singular shall be construed to include the plural and the plural the singular.

10.6 Severability.

If any part of this Agreement shall be held in void, voidable, or otherwise unenforceable by any court of law or equity, nothing contained in this Agreement shall limit the enforceability of any other part. The parties agree that the rights of the Corporation to purchase its stock contained in this Agreement are subject to the restrictions contained in the Georgia Business Corporation Code, including without limitation O.C.G.A., Sections 14-2-89 through 92 (Michie 1982), and such other pertinent lawful restrictions as are now or may hereafter become effective. If for any reason the Corporation should be prohibited from exercising such rights, the remaining provisions of this Agreement shall remain in full force and effect.

[23] 10.7 Successors and Assigns.

This Agreement shall be binding upon and shall inure to the benefit of the Shareholders, their respective heirs, successors, successors-in-title, legal representatives and lawful assigns. No party shall have the right to assign this Agreement, or any interest under this Agreement, without the prior written consent of the other parties. Notwithstanding anything to the

contrary contained in this Agreement, no attempted disposition of stock shall be valid unless and until the acquirer of such interest agrees in writing to accept and be bound by all the terms and conditions of this Agreement, in which case all such terms and conditions shall inure to the benefit of and be binding upon such acquirer, his successors, personal representatives, heirs and permitted assigns to the same extent as if such acquirer had originally been a party to this Agreement.

10.8 Additional Shareholders and Additional Stock.

Any Shareholder who after execution of this Agreement acquires additional shares of stock agrees to be bound to the terms of this Agreement for all shares of after-acquired stock. Each Shareholder agrees that any person acquiring stock of the Corporation shall by separate Agreement be bound by the terms of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this [24] Agreement, under seal, on the date and at the place first above written.

/s/ Phillip H. Wallace Sr.
Shareholder

/s/ Dorsey E. Wallace
Shareholder

/s/ Gary E. Wallace
Shareholder

/s/ HD Wallace II
Shareholder

WALLACE ELECTRIC COMPANY

/s/ HD Wallace II
President

[CORPORATE SEAL]

/s/ Lynne P. Wallace
Secretary