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CASE NO. 3D22-1898

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

FAHED FAYAD, M.D.,

Appellant/Cross-Appellee,

v.

UNIVERSITY OF MIAMI,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit
in and for Miami-Dade County, Florida

Circuit Court Case No. 2013-04086 CA 31

REPLY BRIEF OF CROSS-APPELLANT, UNIVERSITY OF MIAMI

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ARGUMENT

I. DR. FAYAD FAILED TO PROVE DAMAGES

The *only* damages evidence presented at trial was of alleged injury to Fayad PA. Dr. Fayad adduced no evidence of damages *he* directly suffered. He asserted that the jury could award all of the entity's lost profits to him simply because it is a wholly-owned Subchapter S corporation. That clearly is an issue of standing. The only cases cited which are directly on point are those set forth in the University's Cross-Appeal Initial Brief, at pp. 78-83, all addressing standing where an S corporation's shareholder seeks an award of damages suffered by the corporation. Because his position is unsupported, Dr. Fayad resorts to arguments that make no sense.

Dr. Fayad's expert calculated *only* profits allegedly lost by Fayad PA. He actually stated that he had been "asked by … *Fayad PA* to determine the damages *it* has incurred." [R 4849]. His damage calculations were set out in a chart entitled "Fahed Fayad MD, PA Calculation of Lost Profits." [R 4870-72]. Thus, the lower court expressly limited the expert's allowable testimony to encompass only damages suffered by the corporation, stating:

> I am not going to exclude him. ***But it's going to be quite clear that he is talking about and the analysis he did on the lost profits looking at that S corporation and leave it as that.*** I think … he should be allowed to go forward and - - and ***speak as to the revenues that went through the S corporation***.

[SR 7965]. The expert, however, testified:

> [A]ll of the income that Dr. Fayad earned on his P.A.'s tax return was included on a K-1 form which was attached to his P.A. tax return which flowed through 100 percent to his personal income tax return. So, therefore, all of the loss that was incurred by the P.A. was incurred by Dr. Fayad.

[SR 8828]. Testimony that all of the income shown on Fayad PA's tax return was income to Dr. Fayad for purposes of calculating *his* losses was legally incorrect.

While income received by an S corporation "passes through" to the shareholder *for tax purposes*, that does not mean all such income was actually distributed and is income to the shareholder from which his losses can be determined:

> [I]n accordance with section 607.06401(3), an S corporation is prohibited from making distributions of income under certain circumstances, despite the fact that "pass-through" income has been taxed to shareholders on their individual federal income tax returns. Even if an S corporation is not expressly prohibited by section 607.06401(3) from distributing some or all of its "pass-through" income, the corporation may nonetheless determine that a distribution cannot be made and that the income should be retained for corporate purposes.

Zold v. Zold, 911 So. 2d 1222, 1232 (Fla. 2005). Thus, "[a]lthough all of the corporate income must be reported and taxed, the individuals do not necessarily receive distributions of cash equal in amount to the income subject to taxation. Only that amount of cash is distributed in excess of what

must be retained for corporate purposes." *Kusterer v. Kusterer*, 933 So. 2d 542, 548 (Fla. 1st DCA 2006) (quoting *Zold v. Zold*, 880 So. 2d 779, 780 (Fla. 5th DCA 2004)). "Although an S corporation's net income is taxed directly to the shareholders, … the shareholders do not necessarily receive distributions in an amount equivalent to what is taxed pursuant to the Subchapter S election." *Zold*, 911 So. 2d at 1227. Dr. Fayad cites *Zold* and *Kusterer* for the proposition that "Florida courts … recognize that S Corporation revenue and shareholder revenue are treated the same precisely because they 'pass through' to the person." [Ans. Br. p. 25]. That statement is incorrect.

In *Zold,* the issue was "whether 'pass-through' income of an S corporation that is not distributed to shareholders constitutes income within the meaning of chapter 61, Florida Statutes (2004), for purposes of calculating alimony, child support, and attorney's fees." *Zold,* 911 So. 2d at 1226. The Court explained that, pursuant to Chapter 61, "[i]n evaluating the amount of alimony, where applicable, the trial court is instructed to consider and make findings regarding, *inter alia*, '[a]ll sources of income *available* to either party.'" *Id.* at 1228. "Similarly, the child support guidelines establish that the presumptive amount of support is based on the parties 'combined

monthly *available* income.'" *Id.* "[B]oth statutory provisions focus on income that is *available* to a spouse." *Id.*

Other than for the payment of taxes, undistributed pass-through income is not automatically attributed to the shareholder as income. *Id.* at 1232-33. In evaluating whether undistributed pass-through income should be considered in calculating alimony, support and fees, courts must determine whether such income is "available" to the shareholder because it is income retained by the corporation, not for corporate purposes, but merely to avoid obligations related to the dissolution. *Id.*

It was Dr. Fayad's burden to prove *his* damages, and only income actually distributed to him was relevant to that analysis. The concept of undistributed but "available" income held by the corporation has no place in this analysis as it uniquely does in dissolution cases. Dr. Fayad cites to *Zold* and *Kusterer* for a proposition for which neither stands.

There are well-established legal principles this Court must ignore in order to accept Dr. Fayad's position that he may automatically recover his S corporation's alleged damages. First, "[t]he plaintiff bears the burden of proving an entitlement to lost profits" and, where a plaintiff fails to meet that burden, judgment in favor of plaintiff on a breach of contract claim should be reversed. *Montage Grp., Ltd. v. Athle-Tech Comput. Sys., Inc.*, 889 So. 2d

180, 195 (Fla. 2d DCA 2004); *Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Invs., LLC*, 238 So. 3d 908, 913-14 (Fla. 2d DCA 2018).

Second, "shareholders of a corporation have no standing to bring a direct action for injuries allegedly suffered by the corporation." *Angelino v. Santa Barbara Enters., LLC*, 2 So. 3d 1100, 1104 (Fla. 3d DCA 2009) (citing *Chaul v. Abu-Ghazaleh*, 994 So. 2d 465, 467 (Fla. 3d DCA 2008)). Thus, "[i]f the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual." *Alario v. Miller*, 354 So. 2d 925, 926 (Fla. 2d DCA 1978).

Third, Dr. Fayad cites *Bova v. Gary*, 843 N.E. 2d 952 (Ind. Ct. App. 2006), decided under Indiana law, to support his new theory that he can pierce the corporate veil of Fayad PA to recover corporate losses because "he is the entity's alter ego." [Ans. Br. p. 24]. However, under Florida law, "[t]he ownership of all of the stock and the absolute control of the affairs of a corporation do not make that corporation and the individual owner identical, in the absence of a fraudulent purpose in the organization." *Unijax, Inc. v. Factory Ins. Ass'n,* 328 So. 2d 448, 452 (Fla. 1st DCA 1976). "[S]eparate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice." *Eckhardt v. United States*, No. 08-21791-

CIV, 2010 WL 11504339, at *5 (S.D. Fla. July 7, 2010) (citing *Dania Jai-Alai Palace, Inc. v. Skykes,* 450 So. 2d 1114, 1121 (Fla. 1984)).

Dr. Fayad tries to bolster his newly minted "alter ego" argument by making the unsupported and legally incorrect statement that he is personally liable for Fayad PA's debt. [Ans. Br. p. 41]. Organization as a Subchapter S corporation "does not diminish its shareholders' insulation from liability for the corporation's debts." *Stock v. Stock,* 693 So. 2d 1080, 1085 (Fla. 2d DCA 1997). In *Ally v. Naim*, 581 So. 2d 961 (Fla. 3d DCA 1991), this Court held that the corporate veil of an S corporation could not be pierced to hold its shareholder liable for corporate debt absent evidence it was organized or employed to mislead creditors or to work a fraud upon them. *Id.* at 962.

Other jurisdictions agree that "[a] shareholder 'may not use the corporate form as both a shield and sword at his will.'" *Rohtstein Corp. v. KPMG, LLP.,* No. 04-3517, 23 Mass L. Rptr. 333, at *3 (Mass. Sup. Ct. 2007) (citing *XR Co. v. Block & Baldestro*. 44 F. Supp. 2d 1296, 1300-01 (S.D. Fla. 1999)). *See also Hofmann Water Techs., Inc. v. Twin City Fire Ins. Co.,* No. (X02)CV044004445S, 2005 WL 2082737, at *2 (Conn. Sup. Ct. Aug. 4, 2005) (Shareholder may not use the corporate form to shield himself from personal liability but use it a sword to prosecute personal claim); *Freedom Fin. Grp., Inc. v. Woolley*, 280 Neb. 825, 834 (Neb. 2010) (shareholder

cannot use corporate form to recover corporate damages). In *Create-A-Pack Foods, Inc. v. Batterlicious Cookie Dough Co.,* No. 20-CV-499, 2023 WL 4014430, at *4 (E.D. Wisc. June 15, 2023), an S corporation's shareholders asserted a claim for damages due to the corporation. Citing *Ally v. Naim*, the court stated that, "[w]hile [shareholders] are not liable for [corporate] obligations, they also are not able to personally assert its claims." *Id*.

Fourth, "[t]he law of this jurisdiction as to corporate structure is not amended or engrafted upon by the intricacies of tax advantages or disadvantages of the Federal Internal Revenue Code." *Little v. Caswell-Doyle-Jones Corp.,* 305 So. 2d 842, 844 (Fla. 1975). Indeed, "the characterization for Federal income tax purposes cannot be said to control the substantive character of a matter. For example, *the tax treatment afforded to certain corporations under Subchapter S of the Internal Revenue Code does not make the business organization any less a corporation for purposes of state law.*" *Lake Region Packing Ass'n, Inc. v. Furze,* 327 So. 2d 212, 216 (Fla. 1976).

Dr. Fayad clearly failed to prove damages. He relied solely on evidence of alleged injury to Fayad PA, claiming those damages as his own simply because it is a Subchapter S corporation. He lacked standing to bring a direct action for injuries allegedly suffered by the corporation.

Finally, although Dr. Fayad always sought lost profits, he now argues that this is a case of "impaired earning capacity." He cites about a dozen cases, all from other jurisdictions, for the proposition that, in a personal injury/negligence action, loss of profits from the victim's business may be used as an aid in calculating the victim's lost earning capacity. [Ans. Br. pp. 27-31]. He asserts that a holding that he could not use "evidence of the PA's profits to establish a value for Dr. Fayad's individual losses … would unreasonably deny recovery of lost earning capacity for persons engaged in businesses." [Ans. Br. p. 41]. The suggestion that Dr. Fayad was awarded damages for lost earning capacity demonstrates the lengths to which he will go to avoid relevant and controlling law.

Under Florida law, "[t]he amount of an award for loss of future earning capacity should be measured by the plaintiff's diminished ability to earn income in the future, rather than the plaintiff's actual loss of future earnings." *Auto Club Ins. Co. of Fla. v. Babin*, 204 So. 3d 561, 564 (Fla. 5th DCA 2016) (citing *Subaqueous Servs., Inc. v. Corbin*, 25 So. 3d 1260, 1267 (Fla. 1st DCA 2010)). "[T]he plaintiff 'must demonstrate a reasonable certainty of injury and 'present evidence which will allow a jury to reasonably calculate lost earning capacity.'" *Id.* (quoting *Eagle Atl. Corp. v. Maglio*, 704 So. 2d 1104, 1105 (Fla. 4th DCA 1997)). "[T]he measure of damages is the loss of

capacity to earn by virtue of any impairment found by the jury and the jury must base its decision on all relevant factors including the plaintiff's age, health, habits, occupation, surrounding, and earnings before and after the injury." *Id.* (quoting *Miami-Dade Cnty. v. Cardoso,* 963 So. 2d 825, 828 (Fla. 3d DCA 2007)).

Dr. Fayad adduced no evidence to support diminished earning capacity. His earning capacity was *unaffected* by the closure of UMH's radiation oncology department. Dr. Fayad was offered privileges that would have allowed him to continue uninterrupted to treat patients at Sylvester West. Had he accepted, he would not have become a University employed physician [SR 8671-72], he would not have been required to join a medical group [SR 9212], and he would have continued operating as an independent physician, billing for and collecting his own professional fees. [SR 9212-14]. Only two things would have changed. He would have had access to Sylvester's superior equipment and technology and a broader scope of practice. [SR 9214]. And, he would have had the benefit of practicing pursuant to Sylvester's higher standard of patient care. [SR 9182-83]. Dr.

Fayad chose not to continue his practice. This is not a case of diminished earning capacity.[1]

In sum, Dr. Fayad failed to adduce any evidence of damages *to him* -- an essential element of his claim. That failure mandates judgment in favor of the University on his breach of contract claim.

II. A VERDICT SHOULD HAVE BEEN DIRECTED ON THE BREACH OF CONTRACT CLAIM

Dr. Fayad asserts that there was competent substantial evidence to support his theory that the closure of UMH's radiation oncology department was a "sham," yet he identifies no such evidence. He simply points to his own speculative testimony that, because Sylvester West occupied the same physical location as the former UMH radiation oncology department, some of the same equipment utilized at UMH was used at Sylvester West and some of the same personnel who worked at UMH worked at Sylvester West, the closure must have been a sham. However, "[s]ubstantial evidence is evidence that is not uncertain, speculative, or conjecture." *Balogh v. ABC Liquors, Inc.*, 308 267, 268 (Fla. 1st DCA 2020). "The competent substantial

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[1] The trial evidence further established that, for more than three years after the closure of UMH's radiation oncology department, Dr. Fayad continued his medical practice at a private surgical center until he was banned due to his alleged misconduct. Any claim of diminished earning capacity is utterly without basis.

evidence standard 'is not satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent inferences.'" *Sunderwirth v. Sunderwirth*, 332 So. 3d 1087, 1090 (Fla. 2d DCA 2022) (quoting *Callwood v. Callwood*, 221 So. 3d 1198, 1202 (Fla. 4th DCA 2017)). Thus, "[a] jury verdict cannot be based on speculation." *Durrance v. R.J. Reynolds Tobacco Co.,* 286 So. 3d 916, 918 (Fla. 2d DCA 2019) (citing *Kia Motors Am., Inc. v. Doughty*, 242 So. 3d 1172, 1177 (Fla. 2d DCA 2018) (speculation is impermissible basis for jury decision) and *Realauction.com, LLC v. Grant St. Grp., Inc.,* 82 So. 3d 1056, 1059 (Fla. 4th DCA 2011) (inference drawn from speculative testimony is unreasonable)).

The *only* competent substantial evidence presented established that the University made a policy decision, permitted under UMH's Bylaws, to close UMH's radiation oncology department. As the lower court specifically found in its post-trial order: "The evidence established that the radiation oncology department at UMH was closed and, while Dr. Fayad remained a member of UMH's medical staff and retained his privileges to consult with patients, he no longer could provide radiation oncology services there because UMH no longer had a radiation oncology department." [S 6573]. That unequivocal finding, based on the evidence presented, alone required that the motion for JNOV be granted.

Once the decision was made to close UMH's radiation oncology department, UMH's Board of Governors preliminarily approved the closure and the transfer of UMH's radiation oncology department to Sylvester, to be operated under Sylvester's AHCA license. Official notice was provided to and recognized by all governmental regulatory agencies that UMH was closing its radiation oncology department and that Sylvester was opening Sylvester West as an additional site under Sylvester's license. With AHCA's approval, expenditures of over $1 million were immediately made to improve the facility. Sylvester applied to AHCA to add Sylvester West to its license as a new site of service and AHCA granted that application.

Effective February 4, 2013, UMH and Sylvester entered into an occupancy agreement setting forth the terms under which Sylvester would occupy UMH's former radiation oncology facility. UMH's LINAC machine was transferred from UMH to Sylvester and Sylvester took over its lease. All services performed at Sylvester West were performed under Sylvester's AHCA license. UMH's Board of Governors formally ratified by Board Resolution the creation of UHealth's radiation oncology service line operated by Sylvester, the closure of UMH's radiation oncology department and the transfer of UMH's former radiation oncology facility to Sylvester. Sylvester's

first license renewal listed Sylvester West as one of Sylvester's off-site outpatient facilities.

Since Sylvester took over the management and operation of all radiation oncology services and Sylvester West became an additional site of service under Sylvester's license, between $75 million and $100 million has been invested in that facility, upgrading and adding equipment and technology. Most importantly, since February 4, 2013, Sylvester West has operated in accordance with Sylvester's Bylaws and higher standards of patient care, a fact Dr. Fayad fails to even address.

The evidence established that the closure of UMH's radiation oncology department was not a "sham" but was a measure taken by the University, following a $250 million purchase of a hospital with a substandard radiation oncology department, to provide radiation oncology services at the highest level as those provided by Sylvester. The University should be lauded for that effort, not vilified or subjected to spurious liability, particularly when it took steps to ensure that the only two physicians who were affected by the decision were fully protected and offered privileges to continue their practices uninterrupted at Sylvester West.

Given his complete lack of evidence, Dr. Fayad now resorts to his primary argument that this Court's prior reversal of summary judgment in

Fayad v. University of Miami, 307 So. 3d 114 (Fla. 3d DCA 2020), is "law of the case" and precluded the lower court from directing a verdict in favor of the University. He is wrong.

In the Court's 10-page decision, only a single paragraph addressed summary judgment. All this Court said was that "both sides have pointed to matters contained in the discovery that could possibly support their respective positions" and, thus, "a genuine issue of material fact existed." The decision did not otherwise comment on the merits of the case or establish any point of law.

"[T]he doctrine of the 'law of the case' only bars reconsideration of an issue previously reviewed on the merits." *Ameriseal of Ne Fla., Inc. v. Leiffer,* 738 So. 2d 993, 994 (Fla. 5th DCA 1999). In rejecting that a reversal of summary judgment constitutes law of the case and precludes direction of a verdict, the *Ameriseal* court explained that, in its previous appeal, it "merely reversed a pre-trial ruling," because "there was a genuine issue of material fact." *Id.* at 995. It stated that "[t]he opinion, however, did not otherwise comment on the merits of the cause nor did it preclude the court from ruling on the sufficiency of the evidence presented at trial." *Id.*

In *Lauck v. Publix Market, Inc.,* 335 So. 2d 589, 590 (Fla. 3d DCA 1976), this Court reversed summary judgment because there existed

genuine issues of material fact and noted that that "[its] opinion should not in any way be construed as commenting otherwise on the merits of the cause." Similarly, in *Ponce Dev. Co. v. Espino*, 339 So. 2d 317, 319 (Fla. 3d DCA 1984), this Court reversed summary judgment based on the existence of genuine issues of material fact and noted, on a motion for clarification, that "[t]he discussion in the majority opinion considers only those facts which favor the nonmoving party, and the conclusion reached does not establish a law of the case." *See also Lindon v. Dalton Hotel Corp.,* 49 So. 3d 299, 303 n.4 (Fla. 5th DCA 2010) ("[T]he determination in a summary judgment context that a disputed issue of material fact exists is not dispositive of whether the plaintiff presented a case at trial sufficient to withstand a motion for directed verdict."); *Fraser v. Dept. of Highway Safety and Motor Vehicles*, 727 So. 2d 1021, 1024 n.1 (Fla. 4th DCA 1999) ("[O]ur prior decision in this case reversing a summary judgment did not conclusively establish any point of law under the law of the case doctrine."); *Warren v. Palm Beach Ctny.*, 528 So. 2d 413, 415-16 (Fla. 4th DCA 1988) (characterizing as "without merit" plaintiff's argument that an earlier opinion reversing summary judgment established law of the case).

While a prior appellate decision that resolves the same issue of law may be binding as the law of the case in subsequent appellate proceedings,

"[t]he reversal of a summary judgment on the ground that material facts remain in dispute merely resolves a procedural point" and does not constitute law of the case. Philip J. Padovano, 2 *Florida Appellate Practice* § 20:12 (2023 ed.). *See also* 49 Fla. Jur. 2d *Summary Judgment* § 86 (Mar. 2023) (49 Fla. Jur. 2d *Summary Judgment* § 86 (Mar. 2023) ("the determination in a summary judgment context that a disputed issue of material fact exists is not dispositive of whether the plaintiff presented a case at trial sufficient to withstand a motion for directed verdict.").

This is particularly true where, as here, reversal of summary judgment predates the May 1, 2021, change in Florida's summary judgment standard. Pursuant to the old standard, "*any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stopped the inquiry and precluded summary judgment, so long as the slightest doubt was raised." *Feldman v. Schocket*, 366 So. 3d 1104, 1107 (Fla. 3d DCA 2022). Under the new standard, "if the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted" for the movant. *Id.* Thus, when this Court reversed summary judgment in 2020, *any* evidence that created an issue of fact, however incredible, trivial or lacking in probative value, precluded summary judgment so long as the slightest doubt was raised. Conversely, in deciding the

University's motion for directed verdict and its motion for JNOV, the lower court was bound by the competent, substantial evidence standard. Dr. Fayad's speculation simply was not enough. A witness's statement regarding his own speculation and conjecture is not competent evidence. *A & A Elec. Servs., Inc. v. Jurado*, 198 So. 3d 37, 42 (Fla. 2d DCA 2015) [2]

CONCLUSION

Dr. Fayad failed to adduce competent substantial evidence that the closure of UMH's radiation oncology department was a sham and, thus, that there was a breach of contract, and he failed to prove damages, an essential element of his claim. The University respectfully submits that this case should be remanded with directions that judgment be entered in favor of the University.

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[2] Dr. Fayad asserts that the law of the case doctrine applies because the evidence presented at summary judgment was exactly the same as that presented at trial. The statement is untrue and belied by the record. The summary judgment motion was supported by sworn testimony of at least six witnesses who did not testify at trial and trial testimony was presented by witnesses whose testimony was not presented on summary judgment. The witnesses were different, and the evidence was different.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the foregoing Answer Brief of Appellee/Initial Brief of Cross-Appellant complies with the requirements of Fla. R. App. P. 9.210(a), as it has been prepared in 14-point Arial font and contains 3,862 words.

By: /s/ Teresa Ragatz
Teresa Ragatz

<u>**CERTIFICATE OF SERVICE**</u>

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served via the Florida Electronic Filing Portal on all listed on the Service List below on this 12th day of October, 2023:

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By: /s/ Teresa Ragatz
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