THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1646

Kyle Pertuis, ... Respondent/Appellant,

v.

Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond, ... Appellants/Respondents.

JOINT INITIAL BRIEF OF APPELLANTS

John S. Nichols, SC Bar # 4210
BLUESTEIN NICHOLS THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com
Attorney for Appellants/Respondents Mark Hammond and Larkin Hammond

Curtis Stodghill, SC Bar # 6458
STODGHILL LAW FIRM
P.O. Box 2431
Greenville, SC 29602
(864) 271-0966
curt@stodghill-law.com
Attorney for Appellants/Respondents Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

SOUTH CAROLINA

OTHER JURISDICTIONS

STATUTES

STATEMENT OF THE ISSUES ON APPEAL

I. Did the Trial Court Err in Finding an Amalgamation of the Companies but Then Ordering an Award to the Plaintiff Based upon a Separate Treatment of Each Company?

II. Did the Trial Court Err in Finding the "*Locus*" of the Amalgamated Business Was Greenville, South Carolina?

III. Did the Trial Court Err in Awarding Mr. Pertuis a 7.2% Interest in Front Roe?

IV. Did the Trial Court Err in Assigning a "Zero" Value to Beachfront?

V. Did the Trial Court Err in Finding Oppression of Mr. Pertuis by the Hammonds?

VI. Did the Trial Court Err in Ordering Payment to Plaintiff of $99,117 for Unpaid "Shareholder Distributions" Because Plaintiff Did Not Seek this Relief in His Amended Complaint or in His Testimony at Trial but Was Made for the First Time in Plaintiff's Post-Verdict Submission to the Trial Court and the Evidence Does Not Support the Award?

STATEMENT OF THE CASE

This case began on March 1, 2010, as a declaratory judgment action by Front Roe Restaurants, Inc., which sought an order declaring that any disclosure of financial records to Mr. Pertuis would be subject to a confidentiality agreement. The court entered a protective order and Mr. Pertuis received the information he requested.

The case changed into a minority shareholder oppression claim filed by Pertuis on September 6, 2012, and was tried in that context after the parties were realigned by agreement. Mr. Pertuis sought damages for minority shareholder oppression and an order requiring the defendants to purchase the value of his shares in each corporation.

A non-jury trial was held May 28 and 29, 2013. In lieu of closing arguments the court directed the parties to submit their proposed findings of fact and conclusions of law

by June 7, 2013. Defendants filed their motion for directed verdict on May 31, 2013, because the court did not entertain post-trial motions on the record. Defendants also filed their proposed findings of fact and conclusions of law as directed on June 7, 2013.

On June 18, 2013, the court notified counsel for the parties of its decision. The court adopted the submission filed by Mr. Pertuis' counsel *ex parte*. The court found an amalgamation of companies, found there was oppression of Mr. Pertuis, awarded Mr. Pertuis a 7.2% interest in Front Roe, and awarded Mr. Pertuis $99,116 in distributions that were purportedly unpaid. The court entered the order July 3, 2013. On July 19, 2013, defendants filed their joint motion to alter or amend the judgment. On September 9, 2013, the trial court entered an order correcting mathematical errors in the original order but otherwise adhering to the prior judgment. This joint appeal follows.

FACTS

This is an action in equity. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). This Court reviews factual findings and legal conclusions in an equitable action *de novo*. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). The following testimony and evidence is relevant to the issues on appeal.

Kyle Pertuis (Plaintiff)

Mr. Pertuis has lived in Greenville, South Carolina, for 8 years. (Tr.p.10, ll.1-4). In the spring 2000, Mr. and Mrs. Pertuis were living in Arkansas. (Tr.p.10, ll.14-15). Mr. and Mrs. Hammond approached Mr. Pertuis about a business opportunity in the Carolinas. (Tr.p.10, ll.17-25). They owned "Larkins on the Lake," a restaurant on Lake Lure in North Carolina, through Lake Point. (Tr.p.11, ll.6-10; p. 7-9; p. 18, ll.6-7). The

Hammonds wanted Mr. Pertuis to be the "general manager" to help with the day to day operations of the restaurant. (Tr.p.11, l. 21 - p. 12, l. 4). Mr. Hammond had an extensive background in operations and Mrs. Hammond had some experience from a marketing standpoint. (Tr.p.48, ll.13-18). One of the deciding factors for Mr. Pertuis to take the job was a "vesting schedule" so that he could move into a position for growth and eventual ownership. (Tr.p.13, ll.14-19; p. 66, ll.14-25). The Hammonds wanted to increase his interest over time to give him the incentive to stay there longer. (Tr.p.67, ll.3-6).

The terms of the employment included a "base plus bonus [compensation] package." (Tr.p.13, ll 20-23; p. 65, ll.5-10). The initial conversation was a vesting schedule that would accrue over five years to a maximum of ten percent ownership. (Tr.p.13, l. 24 - p. 14, l. 1; p. 65, ll.11-12, 21-24). Mr. Pertuis did not recall signing any vesting schedules. (Tr.p.66, ll.5-13; p. 67, ll.12-13).

Mr. and Mrs. Pertuis moved from Arkansas to take over his new position in June 2000. (Tr.p.12, ll.5-12). The Hammonds helped them with relocation assistance. (Tr.p.13, l. 23). The financial performance of the restaurant improved during his tenure. (Tr.p.12, l. 24-p. 13, l. 6). The Hammonds were pleased with his performance. (Tr.p.13, ll.7-9).

In 2001, the Hammonds formed a new corporation, Beachfront Foods, to acquire another restaurant, "Malarkie's." (Tr.p.14, l. 19 - p. 15, l. 6). At that point Mr. Pertuis's role had expanded into a "director of operations" over both entities. (Tr.p.15, ll.7-11). The name "Malarkie's" was derived from the initials of the first names of the participants, Mark and Larkin Hammond and Kyle Pertuis (M, L & K). (Tr.p.16, ll.1-7). They upgraded the restaurant, reopened and did fairly well.(Tr.p.16, ll.8-13). The parties'

understood that Mr. Pertuis would have a vesting schedule with Beachfront that would be concurrent with the vesting schedule for Lake Point and would reach 10 percent in the same five-year period. (Tr.p.16, ll.14-24; p.67, ll.7-17; p. 67, l. 18 - p. 68, l. 3; p. 76, ll.15-21). Despite not having a writing setting forth the vesting schedule, eventually Mr. Pertuis reached the vesting level for Lake Point and for Beachfront. (Tr.p.65, ll.13-15; p. 78, ll.5-24). Both are North Carolina corporations. (Tr.p.16, l. 25 - p. 17, l. 1).

In 2004, Mr. Hammond had been in Greenville, South Carolina, regarding a location that was on the market. (Tr.p.20, ll.9-12). Mr. and Mrs. Hammond came to South Carolina again in 2005 to "check it out a couple of times" and then Mr. Pertuis came down with them "a time or two, before it was a done deal." (Tr.p.20, ll.15-17). Mr. Pertuis was unfamiliar with the terms of the purchase, although the seller "raised the price at the last minute." (Tr.p.20, ll.19-25). The Hammonds then started a new corporation, "Front Roe," through which they took over the location. (Tr.p.21, ll.1-8).

Mr. Pertuis was assigned to manage Front Roe.(Tr.p.22, ll.2-9). The Hammonds asked him about his expectations for compensation and his comment "the best I can remember to them was I want ownership in this one up to the 10 percent. Similar to the last two." (Tr.p.22, ll.2-9). Because the restaurant was larger they agreed that Mr. Pertuis would move to Greenville. (Tr.p.22, ll.18-22; p. 23, ll.14-17). Mr. Pertuis stated, "the conversation around the ownership was, you know, I'd like to acquire 10 percent in this as well." (Tr.p.22, ll.24-25). They memorialized the agreement with a letter. (Tr.p.23, ll.1-5). The Hammonds indicated they were looking at "creative ways" for Mr. Pertuis to obtain an ownership interest in Front Roe. (Tr.p.73, ll.7-15; Def. 4).

The vesting schedule for Front Roe was different from Lake Point or Beachfront. (Tr.p.76, ll.22-23). The agreement required the business to achieve a certain profit margin. (Tr.p.76, l. 24 - p. 77, l. 7). They created a document that contained the vesting schedule based on profitability. (Tr.p.77, l. 8 - p. 78, l. 4; p. 78, l. 25 - p. 79, l. 21). Mr. Pertuis' ownership interest would increase as the business met certain profit margins. (Tr.p.79, ll.22-24). Mr. Pertuis agreed to this arrangement. (Tr.p.79, l. 25 - p. 80, l. 1).

In 2007, the Hammonds sold Malarkie's and acquired a new restaurant, "Larkins Carolina Grill," in Columbus, North Carolina. (Tr.p.17, ll.5-16). The restaurant initially lost money from startup costs but has since performed better. (Tr.p.19, ll.9-23).

By 2007, Mr. Pertuis was managing all three locations. (Tr.p.23, l. 18 - p. 24, l. 3). He traveled to all three locations four to six days a week. (Tr.p.24, ll.12-17). He was in contact with Mr. and Mrs. Hammond every day during this period. (Tr.p.24, l. 18 - p. 25, l. 2). Each restaurant had a manager and Mr. Pertuis was the point person for them. (Tr.p.48, ll.19-23). The Hammonds gave him the title of "managing partner" of all locations during this period. (Tr.p.48, l. 24 - p. 49, l. 5).

Larkins on the Lake was in rental property and in 2007 the property's owner let the Hammonds know that she wanted to sell the real estate. (Tr.p.18, ll.6-15; p. 73, l. 16 - p. 74, l. 1). The Hammonds ultimately purchased the property through a new corporation, not one in which Mr. Pertuis was a shareholder. (Tr.p.18, ll.18-23). Mr. Pertuis knew nothing about the terms, only that the Hammonds were buying it. (Tr.p.18, l. 24 - p. 19, l. 2). Mr. Pertuis stated that the Hammonds did tell him they were going to buy the land and he responded, "okay, you're going to buy it" but voiced no other concerns. (Tr.p.19, ll.3-

8). He did not recall asking to participate in the transaction stating "it was just kind of one of those things that [Mr. Hammond] had moved forward with." (Tr.p.74, ll.12-16). He doubted he told Mr. Hammond he wanted "a piece of that pie." (Tr.p.74, ll.17-20). The Hammonds paid $1.7 million for the land and had to personally guarantee all of the loans. (Tr.p.74, l. 21 - p. 75, l. 5). Pertius stated "I don't deal with real estate." (Tr.p.75, l. 22).

From 2005 through 2009 the restaurants did very well and Mr. Pertuis was working towards an ownership interest. (Tr.p.25, ll.3-22). He agreed the tax returns for 2005 and 2006 did not list him as an owner of Front Roe. (Tr.p.95, l. 23 - p. 96, l. 4). The first time he realized he had achieved an interest in Front Roe was in 2007, when the K-1 business tax return listed him as a 1% owner. (Tr.p.25, l. 23 - p. 26, l. 1; p. 96, ll.5-10). There was never any other kind of written agreement or confirmation of ownership. (Tr.p.26, ll.2-7). In 2008, Mr. Pertuis received a similar K-1 form. (Tr.p.26, ll.8-10). His interest was listed at 1% for 2009 as well.(Tr.p.96, ll.11-15; Def. Exh. 31A-31H).

The tax document generated in 2009 listed Mr. Pertuis as receiving "eight percent of net shareholder distributions." (Tr.p.97, ll.5-14). He agreed that at the time he owned 10% in both Lake Point and Beachfront and at least 1% of Front Roe. (Tr.p.97, l. 20 - p, 98, l. 1). He disagreed, however, that the figures for shareholder distributions reflected what he received. (Tr.p.98, l. 10 - p. 100, l. 10). He agreed that the amounts reflected distributions of 10% for Lake Point and Beachfront and 1% for Front Roe. (Tr.p.100, ll.3-10; p. 101, ll.16-22). He never received any distributions. (Tr.p.102, ll.6-7).

Mr. Pertuis identified the tax returns for Beachfront (Def. Exh. 30) and Lake Point. (Def. Exh. 20). (Tr.p.102, ll.15-22). The K-1 forms reflected that Mr. Pertuis was a

10% owner of each business from 2005. (Tr.p.103, ll.2-6).

Front Roe never achieved the profit margin necessary to get Mr. Pertuis to 10% ownership. (Tr.p.80, l. 2 - p. 81, l. 7; p. 103, ll.10-25). Mr. Pertuis agreed that if he had thought Front Roe had done so he would have said something to Mr. Hammond in 2008. (Tr.p.81, l. 9 - p. 82, l. 4). Mr. Pertuis maintained he did not understand how he would achieve a 10% ownership in Front Roe, although he never told Mr. Hammond that he did not understand the arrangement. (Tr.p.82, l. 22 - p. 84, l. 18).

By 2008, Mr. Pertuis was bothered by the fact that he did not have a clear understanding about what it was going to take for him to vest in an increased ownership in Front Roe. (Tr.p.26, l. 20 - p. 27, l. 3). Mr. Pertuis did not communicate to the Hammonds any concerns about ownership, even during their annual meetings to discuss future business plans. (Tr.p.27, ll.4-15). Mr. Pertuis had questions about formalizing their agreement with the vesting schedule for Front Roe. (Tr.p.29, ll.7-18; p. 31, ll.3-7; Pl. Exh. 1). In the summer 2008, Mr. Hammond sent Mr. Pertuis an email that set forth "some of the options with, like, keep current arrangement with 10 percent of Front Roe this year. You will own approximately $250,000 in net street equity on the businesses. You will also receive shareholder distributions of approximately 30,000 in 2008 from this ownership." (Tr.p.30, ll.17-23; p. 80, ll.7-18; Def. Exh. 6). Mr. Hammond did not tell Mr. Pertuis how much ownership he would have in Front Roe. (Tr.p.30, l. 24 - p. 31, l. 2).

Mr. Pertuis sent an email to Mr. Hammond requesting clarification as to matters related to shareholder documents and asking "about the things that weren't included in the original ones of Lake Point and Beachfront and just other things as we started going

forward." (Tr.p.31, ll.14-22; Pl. Ex. 2). Mr. Pertuis asked about the stock valuation formula and how much he would have to pay to reach 33% interest in the company, but could not recall if there was a response. (Tr.p.32, ll.4-17).

By the beginning of January 2009 the parties began to discuss in earnest what they needed to do regarding an employment agreement or a shareholder agreement. (Tr.p.84, l. 19 - p. 85, l. 3). The parties met at Sanibel Island, Florida, in February 2009. (Tr.p.32, ll.18-21; p. 85, ll.17-22). Immediately prior to the meeting Mr. Hammond sent Mr. Pertuis an email on February 20, 2009, in which Mr. Hammond thanked Mr. Pertuis for working on a partnership agreement, which was the document that had not been finished and formalized. (Tr.p.32, ll.14-21; Pl. Exh. 3).

In the email, Mr. Hammond mentioned forming an "umbrella corporation" or choosing "another means to equalize" Mr. Pertuis' ownership interest across the three companies. (Tr.p.33, ll.3-13). Mr. Hammond also suggested developing a lease between Lake Point and Largo Properties (the company the Hammonds formed to purchase the real estate under Lake Point) to ensure Lake Point's ability to operate at the location long term. (Tr.p.34, ll.3-12). The email also suggested dispersing "shareholder distributions on an annual basis according to completed K-1 forms" because the disbursements "weren't being done that way" for some unknown reason. (Tr.p.34, ll.16-24; p. 85, l. 14 - p. 86, 18; Def. Exh. 9). Mr. Hammond, however, said they needed to get the tax returns done before finalizing the method for Mr. Pertuis to obtain 33%, and they always sought an extension from April. (Tr.p.89, l. 17 - p. 90, l. 10; p. 91, ll.15-24). At no time did Mr. Pertuis tell Mr. Hammond that they did not have to wait for the returns. (Tr.p.90, 21 - p. 91, l. 14).

The email also stated, "clean up all 'due to/from shareholder' accounts and define treatment of Beachfront sale of Malarkie's and opening of Carolina Grill as it relates to [Mr. Pertuis'] payouts and investment requirements." (Tr. p.35, ll.2-7; p. 89, ll.12-16). This entry concerned accounts on the books of loans "to and from" but Mr. Pertuis did not understand them, including entries showing loans to and from him. (Tr.p.35, ll.9-15).

The email stated that Mr. Pertuis was "to provide initial draft of employment agreement buy-sale/shareholder agreement" to Mr. and Mrs. Hammond, including "language addressing item 5 consistent with our agreement and discussion from yesterday's meeting. Anticipate draft documents to be available by April 30th." (Tr.p.35, l. 23 - p. 36, l. 3). In 2008, Mr. Pertuis asked a friend in Texas who is a corporate lawyer to prepare a Master Relationship Agreement, which he did. (Tr.p.36, l. 4 - p. 37, l. 6; Pl. Exh. 4; Def. Exh. 10). Mr. Pertuis presented the document to Mr. Hammond in December 2008 and there was one redrafted with some language about "whatever point 5 was." (Tr.p.37, ll.7-19). Mr. Pertuis obtained this document so that he could get the agreement "formalized" and "stop worrying about it." (Tr. p.37, l. 21 - p.38, l. 3).

At the end of an email following the February 2009 meeting, Mr. Hammond stated, "if I missed any item from our discussion, please let me know so that I can be sure it's addressed." (Tr.p.86, l. 23 - p. 87, l. 1). Mr. Pertuis did not recall if there was anything missing or that he sent a followup to this saying "there's something else in play that we talked about that's not here." (Tr.p.87, ll.1-5).

In April 2009, Mr. Hammond sent an email to Mr. Pertuis. (Tr.p.87, ll.11-24; Def. Exh. 11). Although they had discussion about whether they should "wrap all three entities

into one," Mr. Pertuis agreed this would make it difficult for him to offer ownership opportunities to people he had hired into each entity. (Tr.p. 87, l. 25-p. 89, l. 11).

Mr. Pertuis identified a document he received from Mr. Hammond on June 27, 2009 in response to a request by Mr. Pertuis about restructuring his compensation package. (Tr.p.38, ll.5-17; p. 42, ll.1-2; Pl. Exh. 5). The document stated Mr. Pertuis had a current annual salary of $55,000 with a bonus of $50,000. (Tr.p.39, ll.1-4). His shareholder distribution was "8 percent of net SD." (Tr.p.39, ll.5-7). The document also had three options that combined different salaries, bonuses and distribution percentages, and included a one-time transfer of a $12,000 boat. (Tr.p.39, l. 9 - p. 40, l. 13).

Mr. Pertuis agreed that the boat was originally used to transport customers to and from the property on Lake Lure. (Tr.p.104, l. 22 - p. 105, l. 9). The insurer for the company suggested they remove the boat from the company name and Mr. Pertuis stated, "if I was going to have it in my name, I was going to own it." (Tr.p.105, ll.10-19). Mr. Pertuis thereafter insured the boat in his name. (Tr.p.105, ll.20-22; Def. Exh. 15). The address on the policy, however, was "Larkins on the Lake." (Tr.p.106, ll.4-6). Lake Point paid the premium. (Tr.p.106, ll.7-21). He agreed that he did not list $12,000 income on his 2008 tax returns for the boat. (Tr.p.106, l. 22 - p. 107, l. 2).

The proposal stated "if we go with Option A, we'll extend the original timeline on the River [Front Roe] into 2009 if the final numbers from 2008 fall short of what you need under the original agreement to get you to the 10 percent ownership across the board." (Tr.p.40, ll.17-21; p. 92, ll.12-21). This would have extended the agreement into 2009 for Mr. Pertuis to obtain 10% "across the board." (Tr.p.93, ll.3-18; p. 104, ll.4-12).

Mr. Pertuis already owned 10% of Lake Point and Beachfront. (Tr.p.92, ll.19-24). He did not, however, own 10% in Front Roe. (Tr.p.92, l. 25 - p. 93, l. 2; p. 104, ll.13-15).

Mr. Pertuis stated he had no idea what performance level he had to reach to increase his ownership in Front Roe or the River, asserting it was "somewhat arbitrary" with the Hammonds making the decision. (Tr.p.40, l. 22 - p. 41, l. 4). The document also stated "I'm sure you realize that every dollar we spend is 90 cents we don't make and 10 cents you don't make." (Tr.p.41, ll.5-9). The document mentioned that the Hammonds were working with a lawyer to finalize the documents that would address all issues, and Mr. Pertuis sat in on one meeting with the lawyers. (Tr.p.41, ll.20-25; p. 94, l. 3 - p. 95, l. 14; p. 108, ll.20-25). Mr. Pertuis did not think Mr. Hammond hampered the lawyers from producing the documents. (Tr.p.94, ll.21-24).

Mr. Pertuis identified his response to the June 27, 2009 document. (Tr.p.42, l. 18 - p. 43, l. 4; Pl. Exh. 6). Mr. Pertuis counter-proposed a salary of $67,000, an $80,000 bonus, and a shareholder distribution at 10 percent along with the $12,000 boat. (Tr.p.43, ll.6-13; p. 44, ll.4-13; p. 125, l. 19 - p. 1216, l. 11). The document stated, "if I did not achieve 10 percent ownership in 2008, we will extend current program through 2009 in order to equalize current ownership at 10 percent across the board. Distributions going forward after the close of '09 will be based on 10 percent ownership." (Tr.p.43, l. 23 - p. 44, l. 3). Mr. Pertuis also requested a time line for completing the documents. (Tr.p.44, ll.17-24). The response was sometime in July 2009. (Tr.p.44, l. 25 - p. 45, l. 2).

Mr. Hammond subsequently responded to his counterproposal. (Tr.p.45, ll.12-19; Pl. Exh. 7). The response stated "thanks, Kyle. We're looking forward to the next 10

years. I'll get those details to [the lawyer] to incorporate into the employment agreement and ask him about the timeline as well." (Tr.p.45, ll.22-25).

Thereafter Mr. Pertuis' annual salary was $67,000 and Mr. Hammond conveyed the boat to him. (Tr.p.46, ll.4-13). Mr. Hammond did not give him a stock certificate for 10% of Front Roe. (Tr.p.46, ll.14-16). During the rest of the summer and into the fall 2009 Mr. Pertuis continued to press for the documentation of his ownership interest. (Tr.p.46, l. 19 - p. 47, l. 1). The Hammonds always responded that the documents were coming. (Tr.p.47, ll.2-4). Mr. Pertuis had several meetings with Mr. Hammond to discuss the documents and things came to a head just before Mr. Pertuis left. (Tr.p.47, ll.5-20).

Mr. Pertuis said the restaurants were running well during this time, although "there are always issues with this business," adding there were "a couple of issues that I think maybe just were blown out of proportion or whatever." (Tr.p.47, l. 21 - p. 48, l. 9).

In October 2009, Mr. Pertuis confronted Mr. Hammond with his frustration over no documentation. (Tr.p.49, ll.6-9). Mr. Pertuis wrote an email on October 6, 2009, enumerating the issues he was experiencing at the time. (Tr.p.107, l. 22 - p. 108, l. 2). Mr. Pertuis mentioned that he had not received his 1% distribution. (Tr.p.109, l. 18 - p. 110, l. 5). He said nothing, however, about being treated unfairly. (Tr.p.108, ll.3-17). Mr. Pertuis told the Hammonds he "needed some time to clear my head." (Tr.p.49, ll.12-19; p. 107, ll.9-18; Def. Exh. 16). Mr. Hammond told him to call the lawyer and the documents should be done, and Mr. Pertuis did so. (Tr.p.49, l. 21 - p. 50, l. 2). The lawyer working on the documents was out sick. (Tr.p.50, ll.4-7; p. 109, ll.7-11).

Mr. Pertuis then took 10 days off to consider his situation with the Hammonds

and the business. (Tr.p.50, ll.8-10). Mr. Pertuis exchanged emails with Mr. Hammond during this time and Mr. Hammond suggested they meet. (Tr.p.50, ll.11-24). They met in Columbus, North Carolina, so Mr. Hammond could address the situation. (Tr.p.50, l.25-p.51, l.2; p.110, ll.10-17). Mr. Hammond answered the questions Mr. Pertuis had sent him but he could not recall the details of the conversation. (Tr.p.51, ll.4-8; p.110, l.17-p. 111, l.4). Mr. Pertuis continued his time off to consider the situation. (Tr.p.51, ll.9-11).

Mr. Hammond eventually emailed Mr. Pertuis and told him that if he was going to continue with the companies, he needed to come to their home to talk about it; if he was not, then he needed to stay in Greenville. (Tr.p.51, ll.21-24). Mr. Pertuis began to drive toward the Hammond's home on the appointed date, but he was late. (Tr.p.52, ll.2-5; p. 111, l. 6-10). Mr. Hammond called him and was angry and said "no, we're coming down there; meet me at the River" at a certain time. (Tr.p.52, ll.5-8; p. 111, l. 12). This was the location for the meeting "if there was going to be termination." (Tr.p.52, ll.9-11).

Mr. Hammond and Mr. Pertuis met in one of the banquet rooms. (Tr.p.52, ll.13-14). Mr. Hammond said "we're going to have an understanding that this is a mutual agreement" that Mr. Pertuis was "going to be moving on." (Tr.p.52, ll.16-22; p. 114, ll.12-24). Mr. Pertuis responded "okay." (Tr.p.52, ll.23-24; p. 114, l. 24). He asked Mr. Hammond to allow him to tell the staff and he then told them simply that he was moving on. (Tr.p.53, ll.2-10). He went downstairs and told the general manager that he was moving on and the person shook his head and said "I already know. [Mrs. Hammond] told me." (Tr.p.53, ll.10-14). Because Mrs. Hammond was not at the meeting this exchange told Mr. Pertuis that she was telling people that Mr. Pertuis was leaving before

he met with Mr. Hammond. (Tr.p.53, ll.14-17). Mr. Pertuis agreed that he testified in his deposition that he had already made up his mind to resign before he received the call from Mr. Hammond during the drive to Lake Lure. (Tr.p.112, l. 16 - p. 114, l. 10).

Mr. Hammond told Mr. Pertuis that the Hammonds had decided to buy Mr. Pertuis' shares. (Tr.p.53, ll.18-23). Mr. Hammond said he would get with his accountant and present Mr. Pertuis with a price. (Tr.p.53, l. 24 - p. 54, l. 2). Mr. Hammond eventually presented an offer of $12,000 if Mr. Pertuis would return the boat, meaning the net offer was zero. (Tr.p.54, ll.5-23; p. 117, l. 9 - p. 118, l. 1; Def. Exh. 18).

On December 2, 2009, Mr. Hammond sent Mr. Pertuis an email stating they were rescinding the offer to purchase Mr. Pertuis' stock interest. (Tr.p.55, ll.19-20). The email added that if Mr. Pertuis chose to return the boat for proper storage before the lake was drawn down they would consider further discussions. (Tr.p.55, ll.20-23). Mr. Pertuis took this to mean the offer was "off the table." (Tr.p.55, ll.24-25; Pl. Exh. 8). Mr. Pertuis responded that he needed information to obtain a third party evaluation. (Tr.p.56, ll.7-12). In the email, Mr. Pertuis stated:

> I have every intention to resolve things with you both on fair and amenable terms. That's all I have ever requested. My decision to move on from Larkins was based on changes I needed to make to positively impact my life. I represented this brand with the utmost integrity and professionalism. The nine and a half years have given me a tremendous number of experiences, opportunities and growth, and I'm truly appreciative. I'm looking forward to every new opportunity and what is best for me and my family and wish for you and everyone representing Larkin's brand the same. I continue to promote and support your business and the people that represent you on a daily basis and do not appreciate your taking this direction.

(Tr.p.56, l. 16 - p. 57, l. 4; p. 120, l. 17 - p. 121, l. 1; Def. Exh. 22). Mr. Pertuis said

nothing about the Hammonds mistreating him. (Tr.p.121, ll.2-4).

Mr. Pertuis received no documents during the time he took off. (Tr.p.57, ll.5-13). He also received no further offers to purchase his stock. (Tr.p.57, ll.14-16). He sold the boat about a year and a half before trial. (Tr.p.57, ll.19-23).

Mr. Pertuis hired Charles Alford to perform a third-party evaluation of the company. (Tr.p.58, ll.9-15). Mr. Alford asked for financial documents and records. (Tr.p.58, ll.16-22; p. 59, ll.12-17). Although Mr. Pertuis received some documents from the accountant, he never received anything for Mr. Alford's use. (Tr.p.59, ll.18-25). When the Hammonds presented him with a Confidentiality Agreement he refused to sign because he felt it accused him of theft and it listed him as only a 1% owner in Front Roe. (Tr.p.62, ll.1-20; p. 123, l. 13 - p. 124, l. 5). His response stated that he wanted the documents "unrestricted in any way." (Tr.p.124, ll.21-24; Def. Exh. 27). Once the court entered a protective order he received the information he sought. (Tr.p.125, ll.5-12).

After Mr. Pertuis left the company on October 12, 2009, he did not do anything for about six months. (Tr.p.60, ll.4-8). He posted his resume on "Monster.com" soliciting work as "a restaurant consultant." (Tr.p.118, l. 11 - p. 119, l. 5). Anyone wanting to retain his services likely would have included a competitor of Larkins. (Tr.p.119, ll.6-9). During this time Mr. Pertuis was requesting financial information from the Hammonds. (Tr.p.121, l. 5 - p. 122, l. 12; Def. Exh. 23). In March 2010, he took a position as a management consultant working for a company out of Chicago, Illinois. (Tr.p.60, ll.14-21). That job lasted a little over one year. (Tr.p.60, ll.22-23). After that position ended Mr. Pertuis started his own business working with small business owners, executives and

athletes as an executive coach. (Tr.p.61, ll.16-21). When asked if he had had anything to do with the restaurant business since his departure from his employment with the Hammonds, he stated, "other than eating in restaurants, no." (Tr.p.61, ll.22-25).

Appellants objected to this line of questioning on grounds of relevance. (Tr.p.61, ll.1-3). Mr. Pertuis' counsel stated the evidence was relevant to "wrongful termination and the difference between what he was making and what he should have been making." (Tr.p.61, ll.4-6). Appellants responded "they've never alleged wrongful termination in the pleadings" and counsel responded "as a part of the breach of fiduciary duty...." (Tr.p.61, ll.7-10). The court simply stated, "well, go ahead. Go ahead." (Tr.p.61, l. 11). Mr. Pertuis agreed there was nothing in his pleadings about wrongful termination. (Tr.p.115, ll.3-22; Def. Exh. 41). He also admitted that he stated in an email in January 2010 that he "resigned" before the documents were finalized. (Tr.p.122, l. 13 - p. 123, l. 1).

Mr. Pertuis stated that during the period 2005 through 2008, the Hammonds were treating the businesses as a partnership. (Tr.p.27, ll.16-18). He agreed there were exchanges of funds and personnel between the businesses. (Tr.p.27, l. 22 - p. 28, l. 1). Mr. Pertuis felt like he was included in the business planning meetings "for a reason." (Tr.p.28, ll.18-20). By the late summer or early fall 2009 Mr. Pertuis had been with the Hammonds 9 ½ years. (Tr.p.48, ll.10-12). He believed he was entitled to a 10% interest in the companies, and stated Mr. Hammond placed an 8% evaluation on it, although he never received any documentation to support that "understanding." (Tr.p.63, ll.6-17).

Throughout their association, Mr. Pertuis had regular communication with Mr. Hammond regarding either an annual assessment or where he stood as far as how the

business was doing or where he stood on compensation. (Tr.p.68, l. 10 - p. 69, l. 17; p. 70, ll.15-17; p. 76, ll.2-10; Def. Ex. 1, 2, 3, 5). When Mr. Pertuis started he was receiving a salary and a bonus that would be entirely taxable as income. (Tr.p.69, l. 22 - p. 70, l. 22). He did not recall there ever being a bonus to which he was entitled but did not get. (Tr.p.70, l. 23 - p. 71, l. 3). Mr. Hammond then advised Mr. Pertuis that going forward, the bonuses would be paid to him through shareholder distributions as a way of saving him money. (Tr.p.69, l. 24 - p. 70, l. 3; p. 71, l. 4 - p. 72, l. 6). Mr. Pertuis never interacted with the accountant even though there was nothing that prohibited him from asking the accountant any questions. (Tr.p.72, l. 7 - p. 73, l. 6).

Mr. Pertuis agreed that there was nothing in his complaint to assert that the Hammonds had defrauded him or misrepresented anything to him about the percentage of ownership. (Tr.p.115, l. 18 - p. 116, l. 13). Prior to November 2011, Mr. Pertuis did not allege any misconduct or minority oppression. (Tr.p.116, l. 14 - p. 117, l. 8).

Mr. Pertuis stated that although the K-1 forms listed amounts for "distributions," there was never a separate check "specific as a distribution" but the amounts were included in bonuses. (Tr.p.126, l.16-p.127, l.10). There was no way to determine whether he received a bonus or a distribution. (Tr.p.127, ll.7-13). Since he left Mr. Pertuis has not received any distributions. (Tr.p.395, ll.14-24). He also never received any notice of a shareholder meeting. (Tr.p.396, ll.1-11). He has received a K-1 showing his interests at 10% in Beachfront and Lake Point and 1% in Front Roe. (Tr.p.396, ll.11-17).

Appellants offered into evidence 16 U.S.C. § 6037, which requires that when a shareholder believes that his interest is something other than what has been reported by

the corporation on a K-1 form, the individual has a responsibility to notify the IRS that he or she believes the individual is due a different percentage and to file a return accordingly. (Tr.p.189, ll.3-9; Def. Ex. 42). The parties stipulated that Mr. Pertuis made no notification pursuant to § 6037 at any time since 2007. (Tr.p.189, ll.9-11; p. 189, l. 23 - p. 190, l. 21; p. 191, ll.1-4; Court's Exh. 1).

Mark Hammond

Mr. Hammond began to work in restaurants while in high school so that he could pay for flight school and pursue a career as a pilot. (Tr.p.203, ll.11-15). Circumstances changed and there were no jobs flying aircraft and at that time the restaurant business was looking to move him into management. (Tr.p.204, ll.15-20). He stayed in the restaurant business and has been in that business ever since. (Tr.p.204, ll.20-23).

Mr. Hammond worked for about 10 to 11 years in the restaurant operations division of PepsiCo in California and along the west coast. (Tr.p.205, ll.1-8). He eventually was moved to the Human Resources Department in the training facility in Southern California. (Tr.p.205, ll.8-13). He was in that position for about 4 years. (Tr.p.205, ll.14-15). He then moved to a marketing focus and eventually moved to Arkansas in that capacity. (Tr.p.205, l. 16 - p. 206, l. 12). He spent about 15 of the 20 years in training and developing management. (Tr.p.14-20).

The Hammonds loved the restaurant business and looked for opportunities to purchase a going concern. (Tr.p.206, ll.23-25). They did not have a lot of capital so they looked for someone who could "seller finance." (Tr.p.206, l. 25 - p. 207, l. 2). They also wanted to move to this part of the country to be closer to Mrs. Hammond's father, who

lived in Kentucky and whose health was diminishing. (Tr.p.207, ll.2-5). They found the opportunity in North Carolina, met with the seller, reviewed the books with their accountant, and purchased the business. (Tr.p.207, ll.5-9).

The business was called "Jimmy's Original." (Tr.p.207, ll.10-11). They ran it under that name for a few months but eventually chose the name "Larkins on the Lake." (Tr.p.207, ll.13-16). This is now "Lake Point Restaurant." (Tr.p.207, ll.20-21). The Hammonds were originally the only shareholders. (Tr.p.207, l. 22 - p. 208, l. 1). They financed the purchase and personally guaranteed the money. (Tr.p.208, ll.2-4). They also sold everything they could, including two boats and two cars they owned in Arkansas, for the down payment. (Tr.p.208, ll.5-7). The seller carried most of the financing, and the Hammonds obtained a small bank loan as a line of credit. (Tr.p.208, ll.7-9).

After going through the first year the Hammonds decided they needed to focus more on the business management of the operation since neither of them had much experience in running a full-service business with a bar. (Tr.p.208, ll.14-22). The Hammonds found Mr. Pertuis' resume on the internet. (Tr.p.208, l. 23 - p. 209, l. 4). In the summer 2000, or a little more than a year after the purchase, Mr. Pertuis came on board. (Tr.p.208, ll.10-12). The Hammonds hired him as their general manager for Larkins on the Lake. (Tr.p.209, ll.5-8). They agreed to relocate him and his wife. (Tr.p.209, ll.8-10). Although stock ownership may have been discussed there were no promises or arrangements made at that time. (Tr.p.209, ll.11-16). His compensation included a salary and a bonus based on profit targets. (Tr.p.214, l. 18 - p. 217, l. 21).

At some point the Hammonds made the option of ownership available to Mr.

Pertuis. (Tr.p.209, ll.17-18). They were very impressed with his dedication to the business and they wanted to do something that was mutually beneficial. (Tr.p.209, ll.21-24). They wanted to keep Mr. Pertuis aboard and give him an incentive to stay the next several years. (Tr.p.209, l. 24 - p. 210, ll.1). They wanted him to share in the business he was helping to grow and develop and be a shareholder. (Tr.p.210, ll.1-3).

The Hammonds gave Mr. Pertuis an opportunity to earn through a vesting schedule up to 10% ownership in Lake Point "purely based on sticking around, staying dedicated and staying on board as an employee in that capacity." (Tr.p.210, ll.6-9). It was important to have continuity and consistency in management. (Tr.p.210, ll.11-16). Mr. Hammond did not know if they ever reduced the agreement to writing but they "continued to grant him his ownership shares as we stipulated and agreed to culminating in his ownership of 10% of the corporation." (Tr.p.210, ll.17-24; p.210, l.25-p.211, l.3).

A few years after Mr. Pertuis came on board the Hammonds had the opportunity to acquire another restaurant in town. (Tr.p.211, ll.6-8). It was in a "different trade area" and would not compete with the existing restaurant while giving them the opportunity to grow the businesses within the same community. (Tr.p.211, ll.8-11). They met with the owners, looked at the facility, looked at the trade area and completed the formation of a new corporation to run that business. (Tr.p.211, ll.12-15). They secured a loan from a local bank, purchased the business (Beachfront) with some seller financing, and started to operate. (Tr.p.211, ll.15-16; p. 222, ll.2-7).

The Hammonds made Mr. Pertuis the same ownership offer that they made him for Lake Point. (Tr.p.211, ll.17-20). They would grant him shares of corporate stock

based on a vesting schedule over time. (Tr.p.211, ll.20-21). Again, they wanted to have some consistency in management and to have Mr. Pertuis focused on growing the business' profitability "for the long haul." (Tr.p.211, ll.21-24). The longer he stayed the more ownership he gained in Beachfront similarly to the Lake Point arrangement. (Tr.p.211, l. 24 - p. 212, l. 1; p. 285, l. 22 - p. 286, l. 7). By 2005 Mr. Pertuis was vested 10% in both Beachfront and Lake Point. (Tr.p.293, ll.15-25).

Some friends of the Hammonds who lived in Greenville also had a home at Lake Lure. (Tr.p.224, ll.15-16). They would invite the Hammonds to come to Greenville, and they were acquainted with Rene Rock, the owner of the restaurant that eventually became "Larsons on the River." (Tr.p.224, ll.16-24). Mr. Rock was interested in selling the restaurant but had not decided on a price. (Tr.p.224, l. 23 - p. 225, l. 1). They communicated over the next six to nine months and those conversations culminated in the Hammonds buying the restaurant in April or May 2005. (Tr.p.225, ll.2-6).

The seller did not have the resources to carry financing so the Hammonds had to come up with all of the money to buy the restaurant. (Tr.p.227, ll.19-24). The Hammonds were able to assume the owner's loan as part of the purchase price. (Tr.p.227, l. 25 - 228, l. 2). Mr. Hammond then secured financing from another bank for part, and the rest came from the Hammonds' savings. (Tr.p.228, ll.2-4). The loans were secured by mortgages on the Hammonds' home. (Tr.p.228, ll.5-15). The financial risk at Front Roe was significantly higher than the other two businesses. (Tr.p.228, ll.16-18). The Hammonds paid $1.205 million for the restaurant. (Tr.p.325, ll.10-14).

Front Roe is under a lease with the Peace Center. (Tr.p.265, ll.17-19). They

negotiated a new lease for 18 years - an initial 3-year term and three five-year options. (Tr.p.265, l. 21 - p. 266, l. 3). At the time of trial they had 9 ½ years left. (Tr.p.266, ll.4-6). In recent years the Peace Center has renovated its facility, increased the rent, and opened a competing restaurant. (Tr.p.266, l. 7 - p. 273, l. 6; Def. Exh. 38, 39, 40). The Peace Center has so far refused to extend the lease. (Tr.p.333, ll.12-23).

Mr. Pertuis was going to manage the operations of the new restaurant and the Hammonds proposed a new bonus structure and ownership track based on profitability. (Tr.p.225, l. 22 - 226, l. 19). The ownership track of the other two restaurants was spread out over five years. (Tr.p.226, ll.20-22). They decided to tie ownership vesting in the new restaurant to profitability so that Mr. Pertuis could attain ownership in one or two years because "the quicker he attained it, the better we all...would benefit." (Tr.p.226, l. 23 - p. 227, l. 7). The Hammonds decided to give Mr. Pertuis a 1% interest in the restaurant (Front Roe) after the year that it first turned a profit, and the next hurdle was once the restaurant obtained $500,000 in operating profit – at that point Mr. Pertuis would be granted an additional 9% to bring his ownership to 10%. (Tr.p.227, ll.10-18; p. 235, ll.23-25; p. 251, ll.21-24; p. 253, ll.9-20; p. 284, l. 24 - p. 285, l. 1; p. 287, l. 21 - p. 288, l. 5; p. 332, ll.9-13). Although they reduced this agreement to a writing, Mr. Hammond was unable to locate the document. (Tr.p.228, l. 25 - p. 229, l. 6; p. 284, ll.1-10). Mr. Pertuis never stated that he did not understand what he needed to do in order to obtain a 10% interest in Front Roe. (Tr.p.229, ll.7-14).

Mr. Pertuis moved from North Carolina to Greenville and the Hammonds paid for a car in his name. (Tr.p.232, ll.6-13). They covered his expenses and the company loaned

him $10,000 as a down payment on a home. (Tr.p.232, ll.13-21). The loan was repaid through offsets from bonuses Mr. Pertuis was due. (Tr.p.232, l. 23 - p. 233, l. 5). Mr. Pertuis agreed to the arrangement. (Tr.p.233, ll.10-14). They also increased his base salary from $45,000 to $55,000. (Tr.p.247, ll.18-19).

Mr. Hammond helped develop Mr. Pertuis professionally by regular personal coaching about the business. (Tr.p.191, ll.20-24; p. 212, l. 2 - p. 214, l. 17; Def. Exh. 1). He paid for Mr. Pertuis to have executive coaching, attend workshops, and leadership seminars. (Tr.p.191, l. 25- p. 192, l. 8). It was the Hammonds' intent to help Mr. Pertuis "become the best manager for our business as possible." (Tr.p.192, ll.8-10). Mr. Pertuis was the "director of operations" for the restaurants. (Tr.p.225, ll.21-22). At no time did Mr. Pertuis raise a question that he did not understand what he needed to do at Front Roe in order to earn a 10 percent interest. (Tr.p.203, l. 21 - p. 204, l. 6; p. 254, l. 20 - p. 255, l. 1; p. 296, ll.15-16; p. 299, ll.14-18).

Both of the North Carolina restaurants were seasonal, making profits only from Memorial Day to Labor day. (Tr.p.222, ll.12-20; p. 256, l. 23 - p. 257, l. 1). Sometimes the restaurants needed cash infusions to make payroll and continue operation during the off-season. (Tr.p.222, ll.8-23). Instead of making a capital call from the shareholders, and to avoid diluting Mr. Pertuis' interest, the Hammonds would loan the company money. (Tr.p.223, ll.3-14). Mr. Pertuis knew money was being loaned but voiced no objection. (Tr.p.223, ll.15-22). Later on the Hammonds would transfer funds from the Greenville restaurant (which was less seasonal), again to avoid a capital call or requiring the Hammonds from having to infuse more cash. (Tr.p.224, ll.1-8). Mr. Pertuis never made

any capital contribution or loan to any of the three companies. (Tr.p.228, ll.. 19-24).

In 2005, Front Roe had not performed at a level where Mr. Pertuis had vested any interest. (Tr.p.230, ll.22-25). After 2006 the restaurant finally turned from a negative to a positive in operating income. (Tr.p.231, ll.1-4). At that point Mr. Pertuis was granted a 1% interest. (Tr.p.231, ll.5-7; p. 296, ll.10-11). Front Roe never achieved net profit of $500,000, however. (Tr.p.251, l.25-p.252, l.3).

The vesting threshold for Front Roe never changed. (Tr.p.284, ll.15-18). The court asked Mr. Hammond "you are saying there is no intermediary stopping point, is that right?" to which Mr. Hammond replied, "that was - - no, there wasn't. That was part of what the original agreement was." (Tr.p.252, ll.4-7).

Mr. Hammond regularly gave Mr. Pertuis feedback and information on how he could grow the businesses, help make them profitable, and attain ownership. (Tr.p.218, l. 17 - p. 220, l. 9; p. 229, l. 15 - p. 230, l. 13; Def. Ex. 2, 3, 4, 5, 6). This included advising him that because Mr. Pertuis was a shareholder, instead of writing a "bonus" check the money would be characterized as "shareholder distribution." (Tr.p.220, ll.10 - p. 221, l. 1). They would have a target for a bonus as much as his shareholder distributions would allow and they would write a check for that bonus. (Tr.p.231, l. 24 - p. 232, l. 1). Then if Mr. Pertuis had more bonus than his shareholder distributions would allow, they would run it through payroll.(Tr.p.232, ll.2-4). Treating the bonus in this manner helped Mr. Pertuis with tax treatment. (Tr.p.250, ll.15-20). Any time Mr. Pertuis was entitled to a distribution he received it. (Tr.p.306, ll.20-25).

By 2007, the lease on the property upon which Lake Point sat was coming to an

end. (Tr.p.241, ll.15-19). The Hammonds had tried to acquire the property and by 2007, the owner agreed to sell it to them. (Tr.p.241, ll.19-21; p. 294, l. 6). The Hammonds felt it was imperative to acquire the property to continue the enterprise beyond the existing lease. (Tr.p.242, ll.1-3; ll.10-12). Mr. Hammond met with the seller (their landlord at the time) and paid for an appraisal of the property. (Tr.p.242, ll.5-8). He met with the seller's attorney and accountant and then agreed to a price. (Tr.p.242, ll.8-10). The seller gave them a 30-year fixed mortgage. (Tr.p.242, ll.12-16). Lake Point now pays rent to the new real estate holding company the Hammonds formed, Largo Properties, LLC. (Tr.p.242, l. 17 - p. 243, l. 10; p. 244, ll.1-11). Because of the drop in the real estate market since 2007, however, the Hammonds owe more on the property that it was worth. (Tr.p.243, ll.11-17). They personally guaranteed repayment of the loan. (Tr.p.244, ll.12-14).

Mr. Hammond had discussions with Mr. Pertuis for "probably a couple of years" about acquiring the property upon which Lake Point was located. (Tr.p.243, ll.18-20). At no point did Mr. Pertuis ask to particpate in the acquisition. (Tr.p.243, ll.21-23). Mr. Hammond did not offer the opportunity to Mr. Pertuis because it required capital of nearly $200,000 that the Hammonds put up and this was for the benefit of all the shareholders. (Tr.p.294, ll.7-22).

In 2008 Mr. Pertuis and Mr. Hammond had a conversation regarding Mr. Pertuis' future. ((Tr.p.233, l. 17 - p. 234, l. 234, l. 1). Mr. Hammond wrote a memorandum regarding some of the questions Mr. Pertuis had. (Tr.p.233, l. 24 - p. 234, l. 7; Def. Exh. 6). The memo sets forth options for Mr. Pertuis going forward, including the "hope" that he would become a 10% owner in Front Roe. (Tr.p.234, ll.11-16). This was based on a

trend in Greenville in 2007 that indicated the restaurant would reach the necessary threshold in 2008. (Tr.p.234, l. 17 - p. 235, l. 3; p. 236, l. 13 - p. 237, l. 1).

In January 2009, Mr. Pertuis sent Mr. Hammond an email with a list of questions about Mr. Pertuis' future. (Tr.p.237, l. 13 - p. 238, l. 18; Def. Exh. 8). In February 2009 Mr. Hammond sent an email telling Mr. Pertuis that they would get a new partnership agreement drafted to reflect their current and future status. (Tr.p.238, l. 19 - p. 239, l. 10; Def. Exh. 9). The intent was to form an umbrella corporation, develop a lease between Lake Point and Largo Properties, re-evaluate Mr. Pertuis' life insurance, look at "key man" life insurance, address what would happen if the Hammonds died, have regular shareholder disbursements, clean up balance sheet accounts, create an opportunity for Mr. Pertuis to own one-third of the company through a company loan and a revised vesting schedule. (Tr.p.239, l. 22 - p. 240, l. 12; p. 240, l. 23 - p. 241, l. 3; p. 244, l 15 - p. 245, l. 25; p. 312, l. 25 - p. 313, l. 14; Def. Exh. 11). Mr. Pertuis was to provide a draft of an employment or buy/sell agreement including language to address his concerns. (Tr.p.240, ll.15-17). They anticipated the document would be drafted by April 30, 2009. (Tr.p.240, ll.17-18). Mr. Pertuis presented a draft agreement. (Tr.p.240, ll.19-22; Def. Exh. 10).

Mr. Hammond spoke with the CPA and attorney about the pros and cons of bringing all the companies under one umbrella and realized it was not in the shareholders' best interest or in the interest of any of the companies to consolidate them into one. (Tr.p.241, ll.7-10). There were different leases and tax elements and would have been to no one's benefit. (Tr.p.241, ll.11-14).

In June 2009, Mr. Hammond sent Mr. Pertuis an email setting forth the review of

his compensation. (Tr.p.246, ll.18-19; Def. Exh. 12). The email set forth some options for Mr. Pertuis to choose regarding his future compensation. (Tr.p.246, l. 21 - p. 247, l. 12). This included payment to Mr. Pertuis of 8% of "net shareholder distributions." (Tr.p.247, ll.20-25). At the time Mr. Pertuis owned 10% of Lake Point, 10% of Beachfront and 1% of Front Roe. (Tr.p.248, ll.1-8). Mr. Hammond looked at the distributions to Mr. Pertuis from 2007 amounted to an aggregate of 8% of all of the shareholder distributions. (Tr.p.248, l.9-p.249, l.2). That 8% aggregate was based in part on the 1% interest in Front Roe. (Tr.p.249, ll.4-6; p. 307, l. 15 - p. 308, l. 18). Mr. Hammond got the information from QuickBooks because the 2008 taxes had not been completed. (Tr.p.249, l.7-p.250, l.14; p.250, l.21-p.251, l.16). The 8% figure an aggregate and does not represent Mr. Pertuis' ownership as more than 1% in Front Roe. (Tr.p.252, ll.9-18). Mr. Pertuis had access to all of the information in the QuickBooks program. (Tr.p.252, ll.19-25).

The email also said "if we go with option A in that second column, we will extend the original timeline on the River into 2009 if the numbers for 2008 fall short of what you need under the original agreement to get you to 10 percent ownership across the board." (Tr.p.253, ll.1-8; Def. Exh. 12). Mr. Pertuis responded by saying "if I did not achieve 10 percent ownership in 2008, we will extend the current program for 2009 in order to equalize current ownership at 10 percent across the board." (Tr.p.254, ll.13-19; Def. Exh. 13). It was clear to them both that they were extending the initial program through 2009. (Tr.p.255, ll.2-7; p. 296, ll.19-22; p. 311, ll.13-19).

Mr. Pertuis had had some discussions in the summer 2009 about his compensation package, about his interest in wanting more ownership in the business up to even being an

equal partner where each owned a third of each of the businesses. (Tr.p.193, ll.13-18). Paramount to that would be getting some kind of shareholder agreement in place. (Tr.p.193, ll.18-19). The summer months are busy for Larkin's on the River because of various activities, including weddings and a concert series. (Tr.p.255, l. 24 - p. 19). Toward the end of the summer Mr. Hammond met with their corporate counsel to get documents drafted to that effect so that would "spell out all the terms relating to being a shareholder" and be in place prior to issuing any additional shares. (Tr.p.193, ll.20-25). Corporate counsel was drafting those documents toward the end of the summer and the beginning of the fall 2009. (Tr.p.194, ll.3-5; p. 257, ll.2-16; p. 259, ll.17-23). Mr. Hammond suggested that Mr. Pertuis contact counsel about the status of the documents, which Mr. Pertuis did, but the lawyer was out sick. (Tr.p.260, ll.2-14).

In late September or early October 2009, Mr. Hammond knew that Mr. Pertuis had been concerned about a variety of things with both his business, professional life, and personal life. (Tr.p.192, ll.15-18; p. 193, ll.4-10). Mr. Pertuis requested some time off "just to kind of clear his head and think about what was important to him and make some decisions about his future, both, again, professionally and personally." (Tr.p.192, ll.18-22). The Hammonds granted him a week off and took over operation of the business for that week "and gave him time to think." (Tr.p.192, l. 24 - p. 193, l. 1). This was a difficult time to do this because typically they started closing down things at the lake and the Hammonds would go to their home in Florida for a little while – this meant putting that off a little bit. (Tr.p.194, ll.10-14).

Mr. Hammond stayed in touch with Mr. Pertuis during the week off. (Tr.p.194,

ll.15-17). He offered to meet with Mr. Pertuis which Mr. Pertuis felt was helpful. (Tr.p.194, ll.18-19; p. 259, ll.7-16; Def. Exh. 16). They met about mid-week sot that Mr. Hammond had an opportunity to answer any questions that he may have as Mr. Pertuis was deciding what he wanted to do with his future. (Tr.p.194, ll.19-23). Mr. Pertuis wanted to know what he could do to own more ownership, to help grow the company, and to expand the value of the businesses to all shareholders. (Tr.p.195, ll.1-5). Mr. Hammond told him:

> [T]he same thing that we had been talking about all along. We needed to get through the first hurdle, which is getting the shareholder agreements in place. He needs to obtain his next hurdle of profitability in the newest enterprise, which was Front Roe Restaurants by obtaining a half million dollars in operating profit. One he was able to obtain that, we would look at, not only ways for him to increase his ownership, but also ways to grow the company whether it be through opening another restaurant, which had been our growth path in the past or simply improving the revenue and profits of the existing enterprise.

(Tr.p.195, ll.6-18). At the end of the meeting Mr. Pertuis did not indicate to Mr. Hammond the direction in which he was leaning. (Tr.p.195, ll.19-24). All Mr. Hammond wanted Mr. Pertuis to do was "to make a decision that was going to work for him." (Tr.p.196, ll.3-12). They agreed that if Mr. Pertuis chose to stay with the business he would meet with the Hammonds at Lake Lure so they could "really solidify the plans for the future." (Tr.p.196, ll.19-25; p. 289, ll.7-11). If he was not going to stay, however, they would meet him at Larkins on the River in Greenville and they would part ways. (Tr.p.196, l. 25 - p. 197, l. 3).

The following Sunday the Hammonds were in Greenville for the Fall Festival. (Tr.p.196, ll.16-19). Larkins had a booth at the festival. (Tr.p.197, ll.4-8). They ran into

Mr. Pertuis and his family. (Tr.p.197, ll.9-11). Mr. Pertuis told the Hammonds he had decided to stay and would see them the next morning at their home at 9 a.m. (Tr.p.197, ll.12-16; p. 290, l. 20 - p. 291, l. 1; p. 328, ll.14-21). The next day Mr. Pertuis was late and around 9:20 a.m. Mr. Hammond called him. (Tr.p.197, ll.20-23; p. 291, ll.4-14). Mr. Pertuis stated he had changed his mind and would meet them in Greenville instead, meaning that Mr. Pertuis intended to resign. (Tr.p.197, ll.23-24; p. 328, l.25-p.329, l. 19)

Mr. Hammond was disappointed but was not angry. (Tr.p.197, l. 25 - p. 198, l. 1). The Hammonds drove to Greenville and met Mr. Pertuis at Larkins on the River. (Tr.p.198, ll.3-5). Mr. Hammond did not want Mr. Pertuis to resign because they had invested a lot of time and resources in Mr. Pertuis' business development and Mr. Pertuis running the business allowed the Hammonds more free time. (Tr.p.198, ll.6-18). Mr. Pertuis wanted to say goodbye to the staff and Mr. Hammond agreed. (Tr.p.291, l. 25 - p. 292, l. 1). Mr. Hammond was not surprised that Mrs. Hammond had already told the staff that Mr. Pertuis was leaving because "if he was going to stay, he would have come up to the lake where we had plans to meet all day.... His decision to meet in Greenville [meant] that he was resigning." (Tr.p.292, ll.2-12; p. 292, l. 22 - p. 293, l. 10; p. 329, ll.20-24).

The Hammonds did not replace Mr. Pertuis but Mr. Hammond began to coach the existing management team to be better decision-makers. (Tr.p.198, l. 21 - p. 199, l. 9). After Mr. Pertuis left the revenue at Front Roe was in a steady increase the same as almost any restaurant in Greenville. (Tr.p.199, ll.10-18).

Mr. Hammond denied that he fired Mr. Pertuis. (Tr.p.191, ll.18-19; p. 289, l. 7). If he was going to fire Mr. Pertuis he would not have given him a week off or met with him

in the middle of the week. (Tr.p.194, 6-8; p.195, l.25-p. 196, l.2).

Once Mr. Pertuis resigned, Mr. Hammond asked for his keys and for the return of the boat's title. (Tr.p.199, ll.19-23). The Hammonds offered to work with Mr. Pertuis a little bit and told him they would put together a price to buy his shares of his stock so that he had some money to live on as he moved forward. (Tr.p.199, l.24-p.200, l.4). They paid Mr. Pertuis through the end of that month. (Tr.p.200, ll.5-10).

Mr. Hammond contacted the CPA to alert him that the Hammonds would be buying back Mr. Pertuis' stock and requested help in arriving at a value. (Tr.p.260, l. 20 - p. 261, l. 4; Def. Exh. 17). Mr. Hammond looked at the most recent records that were completed, which were the 2007 tax returns. (Tr.p.200, ll.19-20). He also looked at what the Quickbooks showed for 2008 in terms of cash flow, book value, and intrinsic value. (Tr.p.200, ll.20-22). Mr. Hammond then came up with a "rough number" and talked with the accountant who "kind of concurred." (Tr.p.200, ll.22-24). They applied "the normal minority shareholder interest discounts" and came up with a value of about $12,000 to $15,000. (Tr.p.200, l. 24 - p. 201, l. 1; p. 326, l. 10 - p. 327, l. 10). Mr. Pertuis wanted to confirm his own analysis so Mr. Hammond gave him copies of documents "he would already have, which would be the profit/loss statements, budget versus actual financial information. That sort of thing." (Tr.p.201, ll.2-8).

Mr. Hammond had heard from Mr. Pertuis and others in Greenville that Mr. Pertuis "had been interested in pursuing a career as a hospitality consultant or a consultant to the restaurant industry." (Tr.p.201, ll.9-19; p. 261, ll.8-23; Def. Exh. 23). When Mr. Pertuis requested copies of the QuickBooks files and other things Mr.

Hammond felt were proprietary, he had concerns and told Mr. Pertuis he did not feel comfortable releasing more data than Mr. Hammond thought was necessary. (Tr.p.201, l. 23 - p. 202, l. 6). Mr. Hammond was willing to provide the information if Mr. Pertuis would enter into a confidentiality agreement. (Tr.p.202, ll.7-9). He presented a draft agreement to Mr. Pertuis and would have removed any recitations that were unnecessary to the document. (Tr.p.202, ll.10-24).

Mr. Pertuis was unwilling to enter into a confidentiality agreement so Mr. Hammond talked with their attorney. (Tr.p.202, l. 25 - p. 203, l. 3). They filed a motion to have the court weigh the company's interest to protect proprietary information against Mr. Pertuis' right to have information. (Tr.p.203, ll.3-10). The information was ultimately forwarded to Mr. Pertuis' lawyer. (Tr.p.262, l.6-p.265, l. 9; Def. Exh. 23,32,33A,33B).

The only indication Mr. Pertuis had given that he was being treated unfairly was when he complained that the amount that Mr. Hammond offered to buy his shares was not high enough. (Tr.p.203, ll.14-20). He had never said that he believed that Mr. Hammond or the company had done anything illegal. (Tr.p.204, ll.2-6).

Mr. Hammond discussed the boat transfer. (Def. Exh. 15). The Hammonds had bought the boat for themselves. (Tr.p.257, ll.21-25). A year or two later they wanted to buy a different boat. (Tr.p.257, l. 25 - p. 258, l. 1). They gave the first boat to the restaurant to use for business and pleasure and kept the boat at the restaurant. (Tr.p.258, ll.1-6). The insurance cost for corporate ownership was about 10 times what private ownership would be. (Tr.p.258, ll.7-13). The Hammonds approached the general manager, Louis Bentley, but he was apprehensive about transferring the title to him.

(Tr.p.258, ll.13-16). Mr. Hammond then talked with Mr. Pertuis, who agreed to title it in his name. (Tr.p.258, ll.17-18). The boat would be for the use of the restaurant as well as Mr. Pertuis, and the Hammond would pay all expenses, insurance, annual permits, maintenance, etc. (Tr.p.258, ll.19-23). Lake Point restaurants paid the insurance. (Tr.p.258, l. 24 - p. 259, l. 4; Def. Exh. 15). The boat was included as part of Mr. Pertuis' compensation package. (Tr.p.309, ll.4-9; p. 314, ll.2-7).

Mr. Hammond stated that they took over a new location, gutted the building, and put in a restaurant they call "Grill Marks." (Tr.p.318, l. 16 - p. 319, l. 12). The corporations loaned money to the new entity. (Tr.p.319, ll.13-25; p. 321, ll.17-21). They did not offer Mr. Pertuis the opportunity to participate in the new venture because he was not part of the organization other than being a shareholder. (Tr.p.320, ll.9-14).

The shareholders met at least once a year, although they met more often than that. (Tr.p.322, ll.16-17). There was no notices of shareholder meetings. (Tr.p.322, l. 18- p. 323, l. 3). There was no agenda for the meetings sent out. (Tr.p.323, ll.4-6). Mr. Pertuis was never afforded the chance to vote on the directors. (Tr.p.323, ll.7-11). They also do not have formal minutes. (Tr.p.324, l. 7 - 325, l. 9).

Mr. Hammond stated the three corporations have common officers and directors. (Tr.p.334, ll.5-9). They are in different locations and do not share the same phone numbers. (Tr.p.334, ll.10-15). The three corporations do not share the same employees. (Tr.p.334, ll.16-20). Each one has its own management team and staff. (Tr.p.334, ll.23-25). The shareholder interests are not the same in all three, and they are not all incorporated in the same state. (Tr.p.334, ll.1-5). Front Roe files taxes in South Carolina,

while Lake Point and Beachfront file in North Carolina. (Tr.p.335, ll.6-13). The corporations all have separate loan obligations to third parties. (Tr.p.335, l. 24 - p. 336, l. 1). They each have separate contracts with third parties. (Tr.p.336, ll.2-4). They have separate accounting records, bank records, and credit cards. (Tr.p.336, ll.5-11).

ARGUMENTS

I. The Trial Court Erred in Finding an Amalgamation of the Companies but Then Ordering an Award to the Plaintiff Based upon a Separate Treatment of Each Company

The trial court found that the Hammonds and Mr. Pertuis operated the three corporate defendants "as a *de facto* partnership of the corporate entities." (Order, p. 3). The court stated it was applying "the standards articulated in *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012)."[1] (Order p. 3). This Court should reverse that ruling.

In *Magnolia*, this Court discussed the concept of "amalgamation of corporate interests" in a construction defect case involving Magnolia North, a condominium complex in Horry County. Work began in 1998 and as of March 2000, Heritage Communities, Inc. (HCI) had sold 41 or more units. HCI was the parent corporation of both HMNI (the seller) and BuildStar (the general contractor supervising all construction). Prior to the construction, HCI and BuildStar developed numerous other properties in Horry County, South Carolina.

On January 29, 2001, HCI filed for bankruptcy protection. Twenty-one buildings, each with 12, 13, or 15 units, had been completed by the time HCI turned over control of the property owners association (POA) to the unit owners on September 9, 2002. Some of the development's roads, as well as four buildings and four pools, were incomplete. Another developer completed the construction of the four buildings, and the POA

---

[1] On June 26, 2014, the Supreme Court granted a writ of certiorari to review *Magnolia*.

completed the construction of the roads and pools.

The POA sued HCI, HMNI and BuildStar in one action. A jury found for the POA and the entities appealed. They contended the trial court erred in ruling that their entities were amalgamated because the concept of amalgamation did not apply to the facts of the case. This Court disagreed, stating:

> In *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App.1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company. In addition to sharing owners, the three companies shared a location. Furthermore, the management company was the entity called to remedy problems. Finally, the company's letterhead identified the management company as, "A Development, Construction, Sales, and Property Management Company." This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."
>
> Here, the trial court concluded that the facts of the instant case closely paralleled the facts in *Kincaid.* The trial court further concluded that the piercing of the corporate veil analysis did not apply to this case. The trial court stated: "The evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation[s] and their activities."
>
> The evidence supports the trial court's ruling. Gwyn Hardister, chief operating officer and president of HCI, testified HCI was the parent corporation of HMNI and BuildStar. The other officers of HCI were Roger Van Wie and Jack Green. Van Wie also oversaw BuildStar, the general contractor supervising the construction at Magnolia North. Separate corporations were created for each HCI development for the purpose of operating as "cost centers," thereby containing each development's expenses and oversight as it applied to property management and construction cost allocation. All of these corporations shared officers, directors, office space, and a phone number with HCI. HMNI, the corporation HCI created to operate as a cost center for Magnolia North,

> created the POA; its officers were also officers for HCI. HCI officers controlled the POA until September 9, 2002, when the unit owners were given control of the POA.
>
> Hardister testified it could be assumed that the employees of BuildStar were also the employees of HCI. At the first annual meeting of the POA, Van Wie acknowledged construction problems and represented that the problems would be corrected. Moreover, the warranty manual distributed to the unit owners upon purchase was entitled: "Heritage Communities, Inc. Limited Warranty Manual," and it identified HCI as the corporation extending the warranty.
>
> Therefore, as in *Kincaid*, this case involves several indicia of an amalgamation of interests between HCI, HMNI, and BuildStar. The corporations shared a location, telephone number, board members, officers, and employees. In its warranty, HCI held itself out to the homeowners as the corporation responsible for construction defects. In light of these indicia, the trial court's ruling that Appellants' entities were amalgamated is supported by the law and the evidence.

397 S.C. at 358-359, 725 S.E.2d at 118 (pinpoint cites and citations omitted).[2] Thus, this Court had before it several companies that shared the same location, employees, telephone number, and represented to the public that any one of them did the functions of the other. The companies were intrinsically immersed in the business of each other, and were operating in a joint venture on various projects. HCI created HMNI to operate the condominium's cost center, and HMNI created the development's POA (which was controlled by HCI). All construction was controlled by BuildStar for the HCI projects. The interaction among these entities was critical to the operation of the entire enterprise.

In this case there were three distinct entities in three locations, and Mr. Pertuis had

---

[2] The *Magnolia North* Court cited to *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), which involved claims against the same entities; this Court reached the same conclusion based upon the same facts. The Supreme Court granted a writ of certiorari to review *Pope* on June 26, 2014, the same date as the writ in *Magnolia North*.

a separate agreement regarding his compensation and ownership track for each company. Two of the corporations were organized under North Carolina law while one was in South Carolina. Each corporation was created at different times, each was distinct in its operation and location, and none of them relied upon any of the others to operate. There was never any confusion about the separate identity of each individual entity, as was the case in *Kincaid, Magnolia North* and *Pope*.

The trial court then turned around and awarded Mr. Pertuis an amount for his separate interest in each company. That is, the court blended the companies into one "*de facto*" entity it found had its "locus" in Greenville, South Carolina, but then viewed them as distinct companies for valuation and division. Mr. Pertuis cannot have it both ways – either they are an amalgamated entity that should be evaluated as one entity (thus pulling in the negative value of Beachfront[3] to reduce the overall value) in which Mr. Pertuis owns something less than 10% of the whole, or they are indeed separate entities with separate values and ownership interests and governed by separate state laws.

The Court should reverse the finding of amalgamation of interests since the evidence does not support that conclusion. The Court should also reverse the conflicted manner in which the trial court treated the entities for valuation and ownership of the corporate defendants, first as an amalgamated "*de facto*" partnership and then as separately identifiable companies. The Court should either make its own findings on these

---

[3] There is no dispute that Beachfront had negative value at the time of trial. Dr. Alford testified that Beachfront had "negative equity." (Tr. p. 149, ll.23-24; p. 151, ll.15-21). Louis Manios valued Beachfront at a negative <-$620,000>. (Tr. p.357, l.25-p. 35, l.12). The trial court found Beachfront had "no value," (Order p. 7) but the only evidence is a negative value.

issues (finding there is no amalgamation) or should remand the matter for proceedings consistent with this Court's rulings.

II. The Trial Court Erred in Finding the "*Locus*" of the Amalgamated Business Was Greenville, South Carolina

In holding the three corporations were one amalgamated "*de facto*" partnership, the trial court held the "locus" of this business was in Greenville, South Carolina. This Court should reverse that determination.

The only evidence in this case is that Beachfront and Lake Point are separately organized under the laws of North Carolina where they are physically located. Mr. Pertuis moved to North Carolina to run those businesses until he moved to Greenville to run Front Roe. The parties regularly met either at Lake Lure in North Carolina or in Sanibel Island, Florida. Most of the dealings involving the two North Carolina companies occurred outside of South Carolina.

When a trial court makes a factual finding that is without evidentiary support, that court commits an abuse of discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85–86 (2008) (an abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support). *See also Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008) (reversing master's finding of breach of contract where finding had no evidentiary support). The trial court's finding that the parties owned one "amalgamated" company located in Greenville lacks any support in the evidence.

This Court should reverse this factual determination.

III. The Trial Court Erred in Awarding Mr. Pertuis a 7.2% Interest in Front Roe

The court rejected Mr. Pertuis' claim to a 10% interest in Front Roe, finding that Front Roe never attained the required profit threshold for the 10% ownership interest. (Order, p. 4-5). Yet the court then determined it would "equitably treat this disputed ownership as if there was a *graduated* vesting schedule in place, so that Plaintiff had achieved 72% of the goal of 10% shareholding in [Front Roe], 7.2% ownership of [Front Roe]." (Order, p. 5; emphasis in order). This Court should reverse.

First Mr. Pertuis never sought an interest in Front Roe based upon a graduated vesting schedule. He sought a 10% interest in the company, which the trial court rejected.

Second, the trial court noted that "the parties had employed a *graduated* employee stock vesting schedule for Plaintiff's stock acquisition in [Beachfront] and [Lake Point]" as support for its determination. (Order p. 5 n. 1). That fact does not support the court's imposition of a graduated vesting schedule with regard to Front Roe. Rather, that fact supports just the opposite because it demonstrates that the parties knew how to employ a graduated basis for ownership in Beachfront and Lake Point, but chose not to do so with the separate company, Front Roe. Mr. Pertuis did not testify it was his expectancy that the parties use a graduated schedule, and in fact testified he understood the vesting schedule for Front Roe was different that the other two businesses. (Tr. pp. 76-80).

Mr. Pertuis agreed to this different arrangement for Front Roe. (Tr.p.79, l. 25 - p. 80, l. 1). Mr. Pertuis also agreed that Front Roe never achieved the profit margin necessary to get Mr. Pertuis to 10% ownership. (Tr.p.80, l. 2 - p. 81, l. 7; p. 103, ll.10-25). Mr. Pertuis agreed that if he had thought Front Roe had achieved the profit needed

for him to earn the 10% interest he would have said something to Mr. Hammond in 2008. (Tr.p.81, l. 9 - p. 82, l. 4). He was listed as a 1% owner on the tax documents that he received each year but voiced no objection. (Tr.p.25, l. 23 - p. 26, l. 10; p. 96, ll.5-15; Def. Exh. 31A-31H). He acknowledged in 2009 that he did not own 10% of Front Roe, demonstrating he knew he had not met the goals for the vesting schedule. (Tr.p.92, l. 25 - p. 93, l. 2; p. 104, ll.13-15). There is *no* evidence that the Hammonds and Mr. Pertuis contemplated a vesting schedule for Front Roe as graduated based upon profit.

Third, as a basis for this ruling, the trial court stated "equity regards and treats as done that which in good conscience ought to done," citing to *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938). (Order, p. 5). *Wilkie*, however, does not support the application of that rule here.

In *Wilkie*, the master ruled that the terms of a life insurance policy regarding the beneficiary designation controlled over a claim that the insured did all she could do to change the beneficiary. The master noted the equitable maxim but added, "this doctrine applies in those cases only where the party seeking to invoke it has established a clear obligation based upon a valuable consideration that another do some act which he has failed to perform." 187 S.C. at 393-394, 197 S.E. at 381. The circuit court reversed under the view that the decedent had substantially complied with the policy requirements, applying the equitable maxims that "equity regards and treats that as done which ought to be done" and "equity regards substance rather than form." The circuit court therefore ordered the proceeds paid to other parties it found the decedent intended to designate. The Supreme Court reversed, finding the maxim was misapplied because the evidence

demonstrated the insured did not do all that she could have done to comply with the insurance agreement. The Court approved the master's order.

The point is that although *Wilkie* does discuss this maxim, the Court did not apply it since there was no "clear obligation based upon valuable consideration to do some act which [the defendant] has failed to perform." The maxim is generally applied in cases involving constructive trusts imposed due to fraud. It is not applied to rewrite contracts.

Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). Maxims should not supplant settled law that courts should not blue pencil or alter an agreement or refuse to enforce it according to its terms, no matter the wisdom, folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Lee v. University of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014). *See also Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)("It is not the function of the court to rewrite contracts for parties.").

In this case, the *only* evidence is that Mr. Pertuis was a 1% owner of Front Roe, but could become a 10% owner if the business reached annual profits of $500,000. Mr. Pertuis admitted that Front Roe never met that threshold and he therefore never met the goal. There was no evidence or testimony that the parties intended a graduated vesting scale so that Mr. Pertuis' interest would grow along with the margin of profit - this was a theory first proposed by the trial court's order under the equitable maxim the court misapplied from the *Wilkie* case. It is inappropriate for a court to alter and rewrite the parties' undisputed agreement. This Court should reverse.

IV. The Trial Court Erred in Assigning a "Zero" Value to Beachfront

The trial court stated that Dr. Alford valued Lake Point at $507,000 and "established that [Beachfront] had no value." (Order p. 7). The court then valued Mr. Pertuis combined 10% interest in these entities at $507,000. (Order on Reh'g, pp. 1-2). The Court thus awarded Mr. Pertuis $50,700. This was error.

There is no dispute that Beachfront had *negative* value at the time of trial. Dr. Alford testified that Beachfront had "negative equity" that he assessed at <-$410,271>. (Tr. p. 149, ll.23-24; p. 151, ll.15-21; Pl. Ex. 9). Louis Manios valued Beachfront at a negative <-$620,000>. (Tr. p.357, l.25-p. 35, l.12). The trial court, however, found Beachfront had "no value," (Order p. 7) but the only evidence is a negative value.

This finding, therefore, lacks support in the record. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008) (reversing master's finding of breach of contract where finding had no evidentiary support). The trial court should have assessed a negative value for "owner equity" in Beachfront and offset that amount against an award of 10% for Lake Point and 1% value for Front Roe.

This Court should remand the matter with instructions to the trial court to assess a negative value for Beachfront and offset that value against the final amount awarded to Mr. Pertuis for his interests in Lake Point and Front Roe.

V. The Trial Court Erred in Finding Oppression of Mr. Pertuis

The trial court held that the Hammonds, as majority shareholders, engaged in oppression of Mr. Pertuis, the minority shareholder to the extent to justify requiring the

Hammonds to buy out Mr. Pertuis under both South Carolina and North Carolina law. (Order, pp. 5-6). The trial court cited to the South Carolina case of *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001) and the North Carolina case of *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983). The Court should reverse that ruling.

In *Kiriakides*, the Supreme Court established how a court should determine whether majority shareholders have acted oppressively within the meaning of Section 33-14-300 of the Code (governing corporate dissolution). *Kiriakides* involved Atlas Food Systems, a family owned close corporation, where the oldest brother, Alex, was the majority shareholder owning 57.68% of the shares. His siblings John and Louise owned 37.7% and 3% of the corporation. John and Louise sued Alex and the corporation seeking, among other things, judicial dissolution for oppression.

In establishing the proper considerations for finding oppression, the Supreme Court observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." *Id.* at 602, 541 S.E.2d at 266. The Court also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." *Id.* at 603, 541 S.E.2d at 266. Although the Court declined to set out specific factors in *Kiriakides*, the Court observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders."

Id. at 605 n. 28, 541 S.E.2d at 267 n. 28.

The Court found the facts of the case "present[ed] a classic situation of minority 'freeze out'" and noted several factors including Alex paying Louise less than was owed to her based on her ownership; Alex's conduct in transferring 21% of a wholly owned subsidiary to his children instead of to a partnership which included John and Louise; Alex and his family receiving substantial benefits from ownership of the company through employment while Louise and John had no such expectations of benefit; Atlas having no intention of declaring dividends in the near future; Atlas's extremely low buyout options for John and Louise, offering them $4,000,000 in 1998 when John had been told by an accountant in 1995 that his interest alone was worth $10,000,000; and there being no market otherwise for John and Louise's stock. *Id.* at 605–06, 541 S.E.2d at 268(discussed in *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012)).

The concern and focus in shareholder oppression cases is that the minority faces a trapped investment and an indefinite exclusion from participation in business returns. *Ballard*, citing *Kiriakides* at 604, 541 S.E.2d at 267. A court-mandated buyout may be appropriate under those circumstances. *Ballard.* The evidence in this case does not demonstrate that Mr. Pertuis has been or is in imminent danger of being excluded from returns, despite his self-imposed exclusion from management in the companies. He is being offered payment for the value of his ownership. The evidence in this case does not justify the extreme remedy of judicial buyout under a finding of oppression of a minority shareholder in this case.

The trial court focused on several things it found were indicia of oppression, but

each of those findings either lack support in the record or do not rise to the level described in *Kiriakides* and *Ballard*. The court found two "classic examples of misappropriation of corporate opportunities by the majority shareholders and are oppressive to the minority shareholder." (Order p. 6). The court stated Mr. Pertuis "was excluded from a real estate opportunity in connection with [Larkins on the River]." (Order, p. 6). This finding has no support in the record. Mr. Pertuis admitted that he knew about the transaction in advance, that he did not object to the purchase, and that he voiced no interest in participating in the purchase. (Tr. pp. 18-19, 74-75). The record does not support a finding that Mr. Pertuis was "excluded" from the purchase.

Next, the court found the Hammonds opened "Grill Marks" using funds from Front Roe "without offering to allow [Mr. Pertuis] to participate in the new venture, while using funds from a corporation of which [Mr. Pertuis] was a shareholder." (Order p. 6). The only evidence was that Pertius had voluntarily left the business by that time.

The court found the Hammonds continued to frustrate Mr. Pertuis "by changing the threshold for [Mr. Pertuis] to become a 10% shareholder in [Front Roe] and by failing to formally document the agreement memorialized in the email exchange of 2009." (Order p. 6). Again, this finding lacks support in the record, and even so would not be sufficient to meet the standard set forth in *Kiriakides*. Despite his late-in-the-day protestations, there was never any doubt about what had to happen for Mr. Pertuis to attain a 10% interest in Front Roe – the company had to achieve net profits of $500,000, which it did not do before he left. The only change that was discussed in 2009 may have given Mr. Pertuis a different pathway to ownership, and the evidence is that the

corporations' lawyers had the documents drafted, but Mr. Pertuis left before he got them from the lawyers. This was not evidence, however, that Mr. Pertuis was "trapped" in any way or being "excluded from participating" in the business.

The court found "[p]ost-termination examples of oppressive conduct by [the Hammonds] included resisting [Mr. Pertuis'] request for financial records, demanding return of the boat conveyed to [Mr. Pertuis] as compensation, and using corporate funds to contest [Mr. Pertuis'] shareholder rights." (Order p. 6). Each of these "post-termination" findings, however, are not supported by the record or do not support a finding of oppression under *Kiriakides* and *Ballard.*

With regard to the records request, Mr. Pertuis sought proprietary information at a time that he was looking to set up a business that might have assisted competitors, and the Hammonds merely asked him to execute a confidentiality agreement before turning the information over to him. That was a reasonable request and is not evidence of exclusion.

Regarding the finding that the Hammonds used corporate funds to contest Mr. Pertuis' shareholder rights, there is *no* evidence in the record to support this statement. The court expressed concern that the same lawyer was representing the Hammonds and the corporate entities, but there was never a forceful request that the companies go to the added expense of hiring separate counsel or that current counsel step aside due to any alleged conflict. There is no evidence that the companies spent more on that arrangement than it would have to have spent in defending themselves with separate lawyers. This is not evidence of exclusion from participation or oppression as contemplated by *Kiriakides.*

None of these things, even if true, could support a finding of "oppression" under

Kiriakides because by that time Mr. Pertuis had already voluntarily left the business. That is, this "post-termination" activity could not have excluded Mr. Pertuis from participating in businesses that he voluntarily left in 2009.

In applying Section 33-14-300 (2)(ii) (2006), courts must exercise caution in finding conduct to be oppressive. *Ballard*, 399 S.C. at 600, 733 S.E.2d at 113 (Pleicones, AJ, dissenting, joined by Toal, CJ) (citing *Kiriakides*, 343 S.C. at 597–98, 541 S.E.2d at 263 (quoting official comment that "[t]he court should be cautious in the application of these grounds so as to limit them to genuine abuse....")). The trial court in this case, however, threw caution to the wind and based the finding of oppression on "findings" that either lack support in the record or fail to meet the rigorous standards of *Kiriakides*.

The trial court also mentioned the North Carolina case of *Meiselman* in the order. (Order p. 6). The *Kiriakides* Court discussed *Meiselman* in great detail, explaining how North Carolina jurisprudence in this area is vastly different from that in South Carolina.

In *Meiselman*, a minority shareholder in a family-owned close corporation was "frozen out" of the family corporation. The minority shareholder brought an action requesting a buyout of his interests under N.C.G.S. § 55–125.1(a)(4), which permits a North Carolina court to liquidate assets when it is "reasonably necessary for the protection of the rights or interests of the complaining shareholders."

In holding the minority shareholder was entitled to relief, the *Meiselman* court noted that the trial court had focused on the conduct of the majority shareholder, using standards of "oppression," "overreaching," "unfair advantage," and the like. 307 S.E.2d at 567. The Court found this was error because North Carolina's statute required the trial

court to focus on the plaintiff's "rights and interests" and his "reasonable expectations" in the corporate defendants, and determine whether those rights or interests were in need of protection. *Id.* The focus in *Meiselman* under North Carolina law was upon the interests of the minority shareholder, as opposed to the conduct of the majority. The *Kiriakides* Court noted that unlike the North Carolina statute, section 33-14-300 does not place the focus upon the "rights or interests" of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, *i.e.*, whether they "have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder."

The *Kiriakides* Court noted that although several jurisdictions have adopted "reasonable expectations" as a guide to the meaning of "oppression," the Court found adoption of the "reasonable expectations" standard was inconsistent with Section 33-14-300, which places an emphasis not upon the minority's expectations but, rather, on the actions of the majority. The Court declined to adopt such an expansive approach to oppressive conduct in the absence of a legislative mandate. The Court found, consistent with the Legislature's comment to Section 33-18-400, that the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case. The Court noted, "If the legislature wishes to afford such expansive rights to minority shareholders, it may amend the statute to include language similar to the statutes in North Carolina, California, and New York." 343 S.C. at 602 n. 24, 541 S.E.2d at 266 n. 24. The Court held that given the language of South Carolina's statute, a "reasonable expectations" approach is simply inconsistent with our statute.

Hence, North Carolina has a different standard for determining whether a minority shareholder has suffered oppression. The trial court should have applied *that* law to Mr. Pertuis claims of exclusion from the two North Carolina companies; the application of South Carolina's law in this area was error.

For all of these reasons this Court should reverse the trial court's erroneous finding of oppression of Mr. Pertuis under *Kiriakides* or application of the North Carolina standard under *Meiselman* despite finding the amalgamated "de facto" partnership has its "locus" in Greenville, South Carolina. The Court should find that the record in this case does not justify a conclusion of oppression, or should remand the matter for a new trial with a correct application of the standards set forth in *Kiriakides* and *Ballard.*

VI. The Trial Court Erred in Ordering Payment to Plaintiff of $99,117 for Unpaid "Shareholder Distributions"

The court ordered that "[Mr. Pertuis] shall receive the sum of $99,117 for distributions which he did not receive." (Order, p. 9). The Court should reverse.

The trial court noted that the testimony described amounts paid to Mr. Pertuis but found their description to involve "murkiness" or "bonuses disguised as distributions." (Order pp. 7-8). The court stated that it "share[d] Dr. Alford's reservations about the reliability of Defendants' accounting," yet then "determined to rely on the corporate Defendants' tax returns as a more credible source for the amounts of distributions which were not distributed to [Mr. Pertuis] by the corporate Defendants." (Order p. 6). Of course, both the accounting and the corporate tax returns were prepared by the same

person, and there was no finding that Mr. Pertuis did not receive the amounts listed on the K-1 forms or a finding that justifies the amount the court ordered to be paid.

The court also found and concluded "that the shaky accounting applied by [the Hammonds] to the distribution/bonus compensation was an additional form of oppression and wrongdoing by [the Hammonds]." (Order p. 8). This finding lacks support in the record – the only evidence is that Mr. Pertuis received the amounts in the form of bonuses characterized as distributions for tax advantages. This is not evidence sufficient to support "exclusion" or oppression as set forth in *Kiriakides* or *Ballard*, discussed above.

Most importantly, however, Mr. Pertuis did not seek this relief in his pleadings, nor did he testify that he was entitled to be paid any amount for "unpaid distributions." The trial court exceeded its authority in awarding Mr. Pertuis any amount, much less $99,117, under this theory of recovery. *See Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997) (finding arbitration panel exceeded its powers by awarding respondent the value of her shareholder's equity; because the pleadings represented the arbitration agreement in this case, absent an amendment of the pleadings or implied consent to consider relief not requested in the pleadings, the panel could only consider the issues contained within the pleadings and could only award the parties the relief they requested within the pleadings). The Court in *Pittman* cited to *Parker Peanut Co. v. Felder*, in which the Supreme Court stated:

> It is a generally recognized principle of equity jurisprudence that where [a] court of equity obtains jurisdiction of a controversy on any ground it will, to avoid a multiplicity of suits, administer complete relief by the adjustment of all equities connected with the subject of the suit, which may be authorized by the pleadings and proofs, and may thus

> establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.
>
> But the incidental or auxiliary relief granted must be within the limits of the issues made by the pleadings and be of the same general nature.
>
> A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs, and be in accordance with the theory of the action upon which the pleadings are framed and the case was tried. In case the plaintiff proceeds on a definite, clear and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith.

207 S.C. 63, 68-69, 34 S.E.2d 488, 490 (1945) (Citations omitted).

This Court should reverse this award and find that Mr. Pertuis did not seek this relief by pleading, nor does the record support the trial court's award of $99,117 for unpaid distributions to which Mr. Pertuis was entitled.

CONCLUSION

For the reasons stated the Court should reverse the trial court's order and remand the matter for proceedings consistent with this Court's opinion.

Respectfully submitted,

July 28, 2014

John S. Nichols, SC Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Attorney for Appellants/Respondents
Mark Hammond and Larkin Hammond

Curtis Stodghill, SC Bar # 6458
STODGHILL LAW FIRM
P.O. Box 2431
Greenville, SC 29602
(864) 271-0966
curt@stodghill-law.com

Attorney for Appellants/Respondents
Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc.