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.

REPLY BRIEF OF APPELLANTS

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I. Respondent's Factual Assertions are not Supported by the Record

In his brief, Respondent Pertuis makes numerous factual assertions that are not supported by the preponderance of the evidence in the record. The Court should not be persuaded by these claims.

For instance, in the Statement of the Case, Mr. Pertuis states, "[i]n response to the complaint seeking a protective order, Pertuis counterclaimed, alleging common-law and statutory claims for his oppression as a minority shareholder and seeking a court-ordered buyout of his sharholder position." (Resp. Br. p. 4). In fact, the minority shareholder claim did not appear until five days before the case was scheduled to be arbitrated in November 2012. That was over two years after the case had been filed and one and one-half years after Mr. Pertuis had all of the financial information.

Mr. Pertuis states the trial court awarded him a 7.2% interest in Front Roe "based on his oppression as a minority shareholder," indicating Mr. Pertuis had claimed a 7.2% interest all along. (Resp. Br. p. 5). In fact, the figure of 7.2% was never claimed nor did it appear in the testimony – rather, the figure appeared for the first time in the proposed order Mr. Pertuis sent to the trial court.

Mr. Pertuis mentions that "[p]articipation in the acquisition [of the property under Larkins on the Lake] was not offered to Pertuis or to BF by Mark Hammond." (Resp. Br. p. 7). Mr. Pertuis admitted, however, that he knew about the transaction but never asked to participate. Mr. Pertuis testified 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. (R.p.43, 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." (R.p.98, ll.12-16). He doubted he told Mr. Hammond he wanted "a piece of that pie." (R.p.98, ll.17-20). Pertius stated "I don't deal with real estate." (R.p.99, l. 22).

Mr. Pertuis states that Mr. Hammond "cannot find a copy of the vesting agreement." (Resp. Br. P. 8). In fact, Mr. Pertuis could not find the document either. Both Mr. Pertuis and Mr. Hammond acknowledged the document existed, but neither could locate it. (R.p.101, l. 8 - p. 102, l. 4; p. 102, l. 25 - p. 103, l. 21; p.252, l. 25 - p. 253, l. 6; p. 308, ll.1-10).

Mr. Pertuis notes that while Mr. Hammond granted Mr. Pertuis a 1% interest in Front Roe, Mr. Hammond denied that Mr. Pertuis had qualified for the vesting of his full 10% interest in Front Roe. (Respondent's Brief, p. 8). Of course, from 2007 forward, Mr. Pertuis received a K-1 form from Front Roe indicating he was a 1% owner. Furthermore, Mr. Pertuis never filed a corrected return with the IRS in which he asserted he owned any more than 1% in Front Roe. (R.p.213, ll.3-11; p. 213, l. 23 - p. 214, l. 21; p. 214, ll.1-4; p.420, ll.11-17; p.974).

Mr. Pertuis contends there "were no shareholder meetings, no meetings of Boards of Directors, no minutes of meetings." (Resp. Br. p. 8). In fact, Mr. Pertuis admitted they had regular meetings and the Hammonds even flew Mr. Pertuis to Florida for a meeting. And while there were no formal corporate minutes, there were memoranda generated at those meetings on the status and a developed action plan.

Mr. Pertuis asseerts Mr. Hammond "conceded that Pertuis' bonus checks were

being disguised as shareholder distributions." (Resp. Br. p. 10). He described this as "murky mingling of Pertuis' bonus payments and distributions payments" which he claims "amounts to more of the 'oppressive acts' required by the *Kiriakides* case." (Rep. Br. P. 26). Of course, the evidence reveals this treatment was to Mr. Pertuis' benefit from a tax standpoint. (R.p.274, ll.15-20).

Interestingly, despite his insistence at trial that he did not resign but was fired, Mr. Pertuis admits in his brief that he "resigned from his position as General Managing Partner of Larkins Restaurant Group." (Resp. Br. p. 10).

Mr. Pertuis claims "the corporations share personnel." (Resp. Br. p. 11). The testimony reveals, however, that Mr. Pertuis was the only common employee. The three corporations do not share the same employees. (R.p.358, ll.16-20). Each one has its own management team and staff. (R.p.358, ll.23-25). On occasion an employee from one location might need to cover another location, but this was the exception, not the rule.

Mr. Pertuis asserts that Larkins on the River had gone from gross revenues of $1,000,000 in 2005 to $3,500,000 in 2009. (Resp. Br. p. 17). This statement fails to account for the fact that 2005 was not a full year of operation. Furthermore, the vesting schedule was based upon net profits, not gross revenue.

In his argument in support of the *Kiriakides* criteria, Mr. Pertuis contends Mr. Hammond failed to tender the acquisition of the Lake Lure property to the corporation and opened the new Greenville business without offering the opportunity to the existing restaurant, and that minority shareholders were not permitted to participate in future salary, distributions and profits. (Resp. Br. P. 22). Again, Mr. Pertuis was aware of these

transactions but never asked to participation. That participation would have required substantial financial contribution, which Mr. Pertuis knew he did not have (nor could obtain through financing). Furthermore, Mr. Hammond never offered stock to a shareholder who was not an employee – shares were offered as an incentive for key employees.

Mr. Pertuis points to a loan Larkins on the River made to the new business, Grill Marks, contending this was "misappropriation of the new restaurant opportunity" and amounted to a "material breach of Hammond's fiduciary duty to Larkins on the River Restaurant, in which Pertuis was a shareholder." (Resp. Br. P. 24). These loans, however, were a good business decision for Front Roe – the money was loaned at a good interest rate and the business saw a profit from the loan.

Mr. Pertuis contends he "never received his pro-rata shareholder distributions." (Resp. Br. p. 26). However, Mr. Pertuis never claimed these funds as damages.

These are but a few examples of inaccurate statements regarding the evidence at trial. The Court should not accept these factual assertions on their face, but should rely upon the testimony and evidence presented at trial.

II. Respondent Cannot Have it Both Ways Regarding Amalgamation

Mr. Pertuis contends "that amalgamation for consolidating shareholder claims in litigation does not dictate amalgamation for evaluation." (Resp. Br. p. 14). The Court should not accept this submission.

Mr. Pertuis cannot have it both ways. *See Ketterman v. South Carolina Farm*

Bureau Mut. Ins. Co., 302 S.C. 276, 278 n. 1, 395 S.E.2d 187, 189 n. 1 (Ct. App. 1990) ("you cannot have your cake and eat it" means "you cannot 'have it both ways': once cake is eaten, it can no longer be 'had' or retained in one's possession."). Either the companies are amalgamated into one entity, which mandates an amalgamation of their values, or they are separate entities and are not amalgamated.

The Court should reverse the trial court's finding of an amalgamation of companies but then ordering an award to Mr. Pertuis based upon separate treatment of each company's value.

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,

December 3, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants and Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

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December 8, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent/Appellant with a copy of the *Final Brief of Appellants and Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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December 8, 2014

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