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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
Appellate Case No. 2013–002257

Kyle Pertuis, ... Respondent,

v.

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

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, the five Appellants file this Petition for Rehearing with respect to this Court's decision in *Pertuis v. Front Roe Restaurants, Inc.*, 2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016). Appellants suggest the Court overlooked or misapprehended the following points in affirming the trial court's decision.

I. The Court Overlooked That the Issues Were, in Fact, Raised To, and Ruled upon By the Trial Court.

At oral argument, this Court expressed, *sua sponte*, its concern that the record did not indicate various arguments were raised to or ruled upon by the trial court. Because the Court had these concerns, Appellants sought leave pursuant to Rule 212(b), SCACR, to provide the Court with the material that demonstrated the issues had been raised and ruled upon below. In its decision, however, the Court denied this motion and declared this denial rendered "some of the briefed arguments unpreserved." The Court noted that "counsel for [Respondent] Pertuis stated at oral argument that he believed the issues were properly preserved on appeal—*i.e.*, they had been raised to and ruled upon by the trial court," but added "the record presented to this court fails to support such," ostensibly without the proffered material in the motion to supplement. The Court cited to *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012), for the proposition that "[Our appellate courts] are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us."

In relying on *Lewis*, the Court overlooked or misapprehended the majority's discussion in *Lewis*. There, the Supreme Court affirmed due to the "two issue rule"

because the Record demonstrated without doubt that while the trial court had ruled for the respondent on several alternative grounds, the appellant had appealed only one of them. Justice Hearn wrote:

> While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds *when it clearly is unpreserved. Here, we do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties nor the court of appeals raised it.* Therefore, the two-issue rule precludes our consideration of Lewis's arguments.

Id. at 330, 730 S.E.2d at 285 (emphasis added). The key to *Lewis* is that there was no doubt the two issue rule applied – an alternative basis upholding the judgment was not appealed. But by withholding leave to supplement *this* record, and then declaring this ruling renders the issues unpreserved under *Lewis*, the Court misapplies that decision. As Chief Justice Toal explained in her dissent in *Lewis*:

> I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.

Id. at 333, 730 S.E.2d at 287 (Toal, CJ, dissenting).

In this case, however, there is *no doubt* that the issues *were* raised. And Respondent was not "silent" on the point. Unlike the respondent in *Lewis*, the Respondent in this case candidly admitted at oral argument that the issues *were* raised and ruled upon below.

Leave of court indicates the necessity of the court granting permission, but a court

should not withhold that permission without good reason. In the initial record on appeal Appellant included the trial court's ruling on the post-verdict motions. (R. 13-15). Even *that* order notes that the motions were made and that "Defendants renewed their Motion for a Directed Verdict in writing on May 31, 2013, which Motion has not yet been resolved." (R. p. 15). That order resolved those motions in their entirety. (R. p.15).

The Court also overlooked the fact that this case was tried nonjury. Rule 52, SCRCP, governs "Findings by the Court," and provides:

> **(b) Amendment.** Upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial. *When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.*

Rule 52(b), SCRCP (Emphasis added). Again, there is no doubt Appellants filed a motion for the trial court to amend its findings and reconsider its ruling as demonstrated by its order denying the same.

The Court repeatedly states "[t]here is no indication in the record presented to this court" that various arguments were made, which is a reference to the original Record on Appeal. These statements overlook Respondent's candid concession that these issues were preserved. This Court's statements also overlook the contents of the supplemental record, which demonstrates *without doubt* that the arguments were made to the trial court, which ruled upon them all.

Imposing error preservation requirements on an appellant "is meant to enable the

lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In finding the record presented to this Court does not demonstrate proper preservation, the Court overlooked that the lower court did, in fact, have the opportunity to rule on these arguments. The Court misapprehended the stated intent of error preservation rules expressed in *I'On* as well as the policies underlying the primary purpose of the judiciary, which is to see that issues are decided on the merits rather than technicalities. *Mictronics, Inc. v. South Carolina Dep't of Rev.*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). While rules governing preservation serve a valuable purpose where there is no doubt that an issue was not raised to or ruled upon by the trial court, those purposes are not served by an overly zealous application, especially where there is no doubt (and no dispute) that the issues were raised and ruled upon below.

The Court should grant this Petition for Rehearing and reconsider its decision denying Appellants' request (which Respondents did not oppose) that the Court permit Appellants to supplement the Record. The post-verdict motions demonstrate Appellants' arguments were, in fact, preserved. Appellants request that the Court withdraw its opinion and issue a new opinion addressing the issues without any discussion of preservation.

II. The Case is About Amalgamation Only, Not "*De Facto*" Partnership as an Alternate Theory

In holding the trial court did not find the entities "amalgamated" under the standards articulated in *Magnolia North Property Owners' Ass'n, Inc. v. Heritage*

Communities, Inc., but instead found something different, that is, a "*de facto*" partnership, the Court overlooked or misapprehended several things.

First, Appellants incorporate their first argument, above, that the Court reconsider its conclusion that their arguments are not preserved for appeal.

Second, the trial court itself explicitly 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)." (Tr. p. 6). The trial court did this because it viewed the separate corporate entities as having lost their separate identities, a concept that is at the heart of amalgamation. Although the trial court used the phrase "*de facto* partnership of the corporate entities," the trial court expressly applied *Magnolia*, an amalgamation case. While this Court stated "the order itself never specifically found the separate entities were amalgamated," that statement overlooks or misapprehends that this is *precisely* what the trial court was doing, and why the trial court expressly stated it was applying *Magnolia* – to find otherwise renders the trial court's statement and cite to *Magnolia* meaningless and out of place.

Furthermore, everyone understood this case as involving an amalgamation argument and ruling: The trial judge (R. p. 6), the Respondent (Respondent's Brief, pp. 12-15), and of course the Appellants. Respondent never argued that the trial court's use of *Magnolia* was some sort of mis-label and not controlling; in fact, Respondent specifically advocated that this case involved amalgamation and only amalgamation. Respondent's entire argument on this point under the heading "Amalgamation," after reciting testimony, is as follows:

The Lower Court applied the holding of [*Magnolia*] to amalgamate the corporate entities for purposes of resolving the intra-corporate shareholder dispute presented in this case. The Record shows that the corporate entities have identical ownership, the corporate entities have been operated as a unified business operation. Judicial amalgamation, for the purpose of adjudicating the common issues of this case, offers judicial economy in the resolution of identical claims arising from identical factual scenarios.

Pertuis, therefore, argues that *Magnolia*, *supra*, and its antecedent cases, should apply to this case, first for judicial economy, but also to afford parties in parallel, intra-corporate shareholder disputes an opportunity to litigate, in a single case, their differences. A single venue for the resolution of amalgamated corporate issues offers fair play and economy to the disputants.

Indeed Pertuis argues that *Magnolia* should apply to open the same door to single-venue, intra-corporate litigation disputes as *Magnolia* offers to parties tortiously damaged by multiple entities which have been fractured to avoid common liability. Pertuis respectfully submits that it is a logical extension of the *ratio decidendi* of *Magnolia*, to apply *Magnolia* to this case. Pertuis cites to the following from *Magnolia* to support his assertion that he should be allowed to litigate his claims in a single action:

> The evidence revealed an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.
>
> *Magnolia*, *supra*, citing *Mid-South Mgment. Co. v. Sherwood Dev. Corp.*, [374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007)].

The record of this case reflects a blurring of the legal distinction between the members of Larkins Restaurant Group sufficient to subject the members to Pertuis' claims, in one action in South Carolina.

Based on the foregoing, Pertuis respectfully submits that the application of *Magnolia*, *supra*, to amalgamate the members of Larkins Restaurant Group, for purposes of adjudicating these identical intra-corporate shareholder disputes in a single action, is correct.

(Resp. Br. pp. 12-13). There is *no* contention that the case involved anything but

amalgamation under *Magnolia*.

The Court deems abandoned Appellants' argument that Respondent cannot argue amalgamation on the one hand and then seek separate valuation. This holding overlooks or misapprehends the overall arguments *both* parties made here. Appellants contended each entity was separate and should have been treated separately, while Respondent argued the three separate entities lost their separate character and were properly blended into an amalgamated entity. If Appellants are correct, then the entities should be valued separately – no authority is needed for that principle. If Respondent is correct – that the entities became one – then they should be valued as one (using the correct values). *See* Black's Law Dictionary 92 (9th ed. 2009) ("amalgamation" means "the act of combining or uniting; consolidation"). That is the nature of amalgamation, and this is not a legal argument requiring authority. It is math.

The Court also notes Appellants' own expert valued the entities separately. This statement overlooks that such separate valuation is logical since Appellants contended the entities retained their own separate identity, were not amalgamated, and should have been treated separately in determining Respondent's interest, if any, in each.

Accordingly, Appellants respectfully request that the Court grant this Petition for Rehearing, withdraw its opinion, and enter a new opinion reversing the trial court's inconsistent rulings regarding amalgamation of the entities yet assigning the various entities separate treatment when identifying Respondent's purported interest in each.

III. There is No Evidence to Support a Finding of an Amalgamated Business Located in Greenville, South Carolina

The Court found Appellants' argument here does not explain prejudice from a finding that the "locus" of the business was in Greenville, and that there was evidence to support this finding.

First, Appellants incorporate their first argument, above, that the Court reconsider its conclusion that their arguments are not preserved for appeal.

Second, the Court overlooks that had Appellants not challenged this finding (that the amalgamated business is located in Greenville), this Court may have found it to be an unchallenged alternative ruling and deemed amalgamation to be the "law of the case."

Third, the only evidence in the record was that two of the entities were located in North Carolina and were not part of any amalgamated or *de facto* partnership with its "locus" in Greenville, South Carolina. This argument is connected with Appellants' principal argument that the trial court erred in applying the principles of *Magnolia* in finding an amalgamation of entities. If they were not amalgamated, they were not all located in Greenville, and there is no evidence to support otherwise.

As for the finding that there was, in fact, an amalgamation of the three entities, the Court overlooked or misapprehended what the trial court did. The trial court expressly found amalgamation of the three entities under *Magnolia*, thus blending them into one business entity. The trial court then, however, ruled Respondent should own a different percentage of Front Roe (7.2%) as opposed to Lake Point (10%) and Beachfront (10%). These two rulings are not consistent and, as argued above, cannot be reconciled. The

court should have viewed each entity separately, according to its unique attributes, and made a separate determination of ownership and value as to each.

Accordingly, Appellants respectfully request that the Court grant this Petition for Rehearing, withdraw its opinion, and enter a new opinion reversing the trial court's ruling that the entities became amalgamated and that blended entity had its locus in Greenville, South Carolina.

IV. The Trial Court's Award of 7.2% Interest to Respondent in Front Roe is Unsupported by the Record

In ruling upon this issue, this Court overlooked or misapprehended several points.

First, Appellants incorporate their first argument, above, that the Court reconsider its conclusion that their arguments are not preserved for appeal.

Second, in disagreeing with Appellants' argument that the trial court did, in fact, reject Respondent's claim to a 10% ownership, this Court overlooked the trial court's specific finding that the business never obtained the required threshold for Respondent to attain a 10% ownership. (R. pp. 7-8). Instead, the trial court announced it was going to award Respondent a 7.2% interest representing 72% of the threshold required to vest as a matter of equity, and that 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). (R.p.8). This Court overlooked that Respondent *did not* seek this graduated award but claimed only entitlement to the full 10%.

Third, the Court overlooked that the evidence established the parties had an agreement that Front Roe would extend the deadline for Respondent to have the opportunity to earn the additional interest in Front Roe. That email exchange demonstrates that Respondent acknowledged he had not yet met the requirements to earn more than his current 1% ownership in Front Roe.

Fourth, this Court stated it did not believe the trial court intended to analogize this case to *Wilkie*. This statement overlooks or misapprehends that the trial court stated that was precisely what it was doing, and that Respondent himself contended at length the trial court "employed" this maxim from *Wilkie* to reach the result. (Resp. Br. pp. 18-19). Respondent in fact stated "In *Wilkie*, the Lower Court found an apt precedent for authority to remedy Mark Hammond's breach of the email agreement which had promised that Pertuis would enjoy 10% ownership in Larkins on the River Restaurant." (Resp. Br. p. 19).

The Court noted Appellants argued the maxim from *Wilkie* that "equity regards and treats as done that which in good conscience ought to be done" is "generally applied in cases involving constructive trusts imposed due to fraud" but Appellants cited no law in support of this proposition. The Court overlooked that this maxim underlies settled law in South Carolina that "constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done." *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E.2d 343 (1949); *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E.2d 168 (943); *Greene v. Brown*, 199 S.C. 218, 19 S.E.2d 114 (1942); *Bank of Williston v. Alderman*, 106 S.C.

386, 91 S.E. 296 (1917); *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990). That is where this maxim finds the most common usage, *i.e.*, is "generally applied" as Appellants pointed out. That is also how Respondent contended the doctrine should be applied in this case, *i.e.*, to correct "constructive fraud." (Resp. Br. p. 19).

The Court noted that the *Wilkie* Court added that the "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." In applying this rule the Court stated Appellants "*arguably*, owed a duty to [Respondent] to document his greater ownership in [Front Roe] based upon his continued management of the various entities." (Emphasis added). In so ruling, the Court overlooked that Respondent *never* based his claim of ownership on that theory; rather, he contended he was entitled to the full 10% pursuant to the parties' express agreement, and the trial court found Front Roe never attained the necessary threshold to support that award. The Court misapprehends that saying something "arguably" exists is not the same as saying an obligation is "clear," as required by *Wilkie*.

The Court should grant this Petition, withdraw its decision and enter a new opinion reversing the trial court's application of *Wilkie* to justify awarding relief Respondent did not seek and which is not supported by the record.

V. The Finding of "Zero" Value for Beachfront is Not Supported by the Record

In affirming the trial court's finding that Beachfront had "no value," the Court overlooked that the preponderance of the evidence did not support this finding. Dr. Alford testified that Beachfront had "negative equity" that he assessed at <-$410,271>. (R. p. 173, ll.23-24; p. 175, ll.15-21; p.459). Louis Manios valued Beachfront at a negative <-$620,000>. (R. p.381, l.25-p.382, l.12).

The Court stated the trial court found Mr. Manios "conceded some matters and was not credible in others." The Court overlooked that the trial court found specifically that "Mr. Manios' testimony as to the dismal future presented for [Front Roe] was not credible and did not take into account the growth and vibrancy of the downtown area of Greenville and the value of the name 'Larkins' as a brand." (R. p. 10). That is, the trial court's finding regarding credibility was limited to a discussion of Mr. Manios' testimony regarding *Front Roe*, and was not related to any valuation of Beach Front.

The Court also overlooks that the *only* evidence in the record is that Beachfront had a negative value, not a "zero" value. This is important because if the Court is to affirm the finding that the three entities were joined (either as an amalgamation as the trial court found and the parties argued, or as a "*de facto* partnership" as this Court views as a separate description of the business), then the negative portion must offset any finding of positive value of other aspects of the blended entity's overall value.

This Court should grant this Petition, withdraw its opinion, rehear this case, and issue a new opinion reversing the trial court's application of a "zero" value to Beach Front.

VI. The Evidence Does Not Support a Finding of Oppression

The Court rejected Appellants' argument that the trial court erred in finding oppression of Respondent as a "minority shareholder" under *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012) and *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983). In doing so, the Court overlooked or misapprehended several points.

First, Appellants incorporate their first argument, above, that the Court reconsider its conclusion that their arguments are not preserved for appeal.

Second, although both this Court and the trial court outlined a number of things as purportedly demonstrating suppression, Appellants outlined in their brief why these findings were either not supported by the Record or did not meet the tests set forth in *Kiriakides*, *Ballard* and *Meiselman*. (App. Br. pp. 43-50).

The Court misapprehends both the appropriate tests for suppression of a minority shareholder in a close corporation and the evidence in the record. Furthermore, the Court overlooks that it found the parties engaged in a "*de facto*" partnership, not a corporation of any kind, such that Respondent would have been a *partner* and not a minority shareholder in the separate corporations or in one amalgamated business. *Kiriakides*, *Ballard* and their progeny apply to freeze-out of minority shareholders, not partners in a partnership, *de facto* or otherwise. *See also Mason v. Mason*, 412 S.C. 28, 53, 770 S.E.2d 405, 418 (Ct. App. 2015) (applying these principles in a case involving a dissolution of a statutory close corporation, and noting "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").

Appellants understand that this Court disagrees with their view of the record and how and when the *Kiriakides/Ballard* and *Meiselman* tests are applied. They ask for this Court to revisit this issue and reverse its holding, but they also desire to preserve these arguments for review by the Supreme Court.

VII. The Record Does Not Support the Award to Respondent of $99,117 for Unpaid "Shareholder Distributions"

The Court affirmed the trial court's award of $99,117 to Respondent for allegedly unpaid "shareholder distributions." Appellants assert that the Court overlooked or misapprehended several points.

First, Appellants incorporate their first argument, above, that the Court reconsider its conclusion that their arguments are not preserved for appeal.

Second, the Court overlooked or misapprehended Appellants' contention that Respondent failed to specifically plead for this separate relief. Instead, Respondent relied upon his general prayer for relief, and tied this claim to the earlier erroneous finding by the trial court that he owned 7.2% of Front Roe. (Resp. Br. pp. 28-30).

Third, the Court inappropriately found the issue tried by consent under Rule 15, SCRCP. In doing so, the Court overlooked that the trial court did not find that the issue was tried by consent, the Respondent did not argue the issue was tried by consent, and the evidence upon which Respondent claimed entitlement to this amount was relevant to other disputed issues in the case, that is, whether Respondent had achieved the necessary threshold to have the agreed upon 10% interest in Front Roe, and what the value of that

interest would be. *Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App.1994). Furthermore, the Court overlooked that Respondent made no motion to amend the pleadings to conform to the evidence, nor did he contend on appeal that the issue was tried by consent.

The Court should grant this Petition, withdraw the opinion, and issue a new opinion reversing the trial court's rulings.

CONCLUSION

Appellants request that the Court reverse its denial of their Motion to Supplement the Record, grant this Petition for Rehearing, withdraw the previous opinion, and issue a new opinion reversing the trial court's rulings.

Respectfully submitted,

March 10, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Robert C. Wilson, Jr., Esquire
201 Whitsett St.
Greenville, SC 29601

March 10, 2016

Sam Ryals
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

March 10, 2016

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Kyle Pertuis v. Front Roe Restaurants, Inc.
Case Tracking No.: 2013-002257

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the *Petition for Rehearing* in reference to this case. I have also enclosed a proof of service of this document upon counsel for Respondent and a check in the amount of $25.00 for filing this motion. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Sam Ryals
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/srr
Enclosures
cc: Curtis W. Stodghill, Esquire
Robert C. Wilson, Jr., Esquire