

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016)  
Case No. 2010-CP-23-1646  
Appellate Case No. 2013-002257

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SC Court of Appeals

Kyle Pertuis, ..... Respondent,

v.

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

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PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 221 and 240, SCACR, Petitioners Front Roe Restaurants, Inc., Beachfront Foods, Inc., Lake Point Restaurants, Inc., Mark Hammond and Larkin Hammond file this Petition for Writ of Certiorari to review *Pertuis v. Front Roe Restaurants, Inc.*, 2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016).

### CERTIFICATE OF COUNSEL

Counsel for the Petitioners certify that the petition for rehearing was made on March 10, 2016 (App. p. 13) and denied by the Court of Appeals on March 31, 2016. (App. p. 30).

### QUESTIONS PRESENTED

- I. Did the Court of Appeals err in summarily denying Petitioners' request to supplement the Record on Appeal?
- II. Did the Court of Appeals err in holding the issues Petitioners argued were not preserved for appeal?
- III. Did the Court of Appeals err in finding a "*de facto*" partnership in this case, particularly where the arguments and rulings dealt with "amalgamation," not "*de facto*" partnership?
- IV. Did the Court of Appeals err in affirming the trial court's finding of an amalgamated business located in Greenville, South Carolina?
- V. Did the Court of Appeals err in affirming the trial court's award of a 7.2% interest in Front Roe Restaurants, Inc., to Respondent?
- VI. Did the Court of Appeals err in affirming the trial court's finding of a "zero" value for Beachfront Foods, Inc.?
- VII. Did the Court of Appeals err in affirming the trial court's finding of oppression of Respondent as a "minority shareholder"?
- VIII. Did the Court of Appeals err in affirming the trial court's award to Respondent of \$99,117 for alleged unpaid "shareholder distributions"?

## STATEMENT OF THE CASE

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

The case changed into a minority shareholder oppression claim Mr. Pertuis filed on September 6, 2012, and was tried in that context after the parties were realigned by agreement. Mr. Pertuis sought damages for alleged minority shareholder oppression and an order requiring the Respondents 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. Petitioners filed their motion for directed verdict on May 31, 2013, because the court did not entertain motions on the record. Petitioners also filed their proposed findings of fact and conclusions of law as directed on June 7, 2013.

On June 18, 2013, the trial court notified counsel for the parties of its decision adopting Mr. Pertuis' submission. 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 \$99,116.00 in distributions that were purportedly unpaid. The court entered the order July 3, 2013. On July 19, 2013, Petitioners filed a 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.

Petitioners pursued a joint appeal. The Court of Appeals held oral argument on

October 14, 2015. At argument the panel questioned whether Petitioners had raised the issues to the trial court and gotten rulings thereon. During responsive argument Mr. Pertuis' counsel conceded that the Petitioners had raised all issues and the trial court had ruled upon those issues. Mr. Pertuis also made no argument to the contrary in his brief.

The next day, October 15, 2015, Petitioners moved the Court of Appeals for leave to file a supplemental record on appeal demonstrating that the issues had been raised and ruled upon below. There had been no question regarding error preservation during briefing. Mr. Pertuis did not file any opposition to the motion.

On February 24, 2016, the Court of Appeals issued its opinion. *Pertuis v. Front Roe Restaurants, Inc.*, 2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016). The Court first declined the motion to supplement the record on appeal. The Court added that even if it considered the arguments preserved it would affirm. However, the Court then found each argument not preserved based upon the record it had before it (*i.e.*, without the supplemental material).

On March 10, 2016, Petitioners sought reconsideration. Mr. Pertuis filed no return in opposition. On March 31, 2016, the Court of Appeals denied rehearing. This Petition follows.

## ARGUMENTS

### I. The Court of Appeals Should Have Permitted Petitioners to Supplement the Record on Appeal and Should Not Have Ruled Petitioners Issues Were Not Preserved for Appellate Review

At oral argument, the Court of Appeals 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, Petitioners 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 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 misapprehended the majority’s discussion in *Lewis*. The Supreme Court affirmed due to the “two issue rule” because the Record demonstrated without doubt that the trial court had ruled for respondent on several alternative grounds and 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). There was no doubt the two issue rule applied in *Lewis* – an alternative basis upholding the judgment was not appealed. By withholding leave to supplement the record, and then declaring this ruling renders the issues unpreserved under *Lewis*, the Court of Appeals misapplied that decision. As then 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 there is *no doubt* that the issues *were* raised. Further, Respondent was *not* “silent” on the point like the respondent in *Lewis*; instead, Respondent admitted at oral argument that the issues *were* raised and ruled upon.

Leave of court indicates permission, but a court should not withhold that permission without good reason. In the initial record on appeal Petitioners included the trial court's ruling on the post-verdict motions. (R. pp. 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 of Appeals also overlooked the fact that this case was tried nonjury. Rule

52, SCRPC, 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), SCRPC (Emphasis added). Again, there is no doubt that Petitioners 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 of Appeals repeatedly stated “[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 overlooked that Respondent did not remain silent about error preservation but expressly conceded that these issues were preserved. These statements also overlooked the contents of the supplemental record, which at minimum creates doubt about whether the arguments were made to the trial court and that the trial court ruled upon them all. And the order disposing of the post-judgment motions removes all doubt.

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). The lower court *had* the opportunity to rule on Respondent’s arguments. The Court of Appeals misapprehended *I’On*’s stated intent of error preservation rules 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. *Micronics, Inc. v. South Carolina Department of Revenue*, 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 (in fact, incorrect) application, especially where there is no doubt (and no dispute) that the issues were raised and ruled upon below.

Accordingly, Petitioners request that the Court grant this Petition for Writ of Certiorari and reverse the Court of Appeals' decision to deny Petitioners' request (which Respondents did not oppose) to supplement the Record with the post-verdict motions that demonstrate these arguments were, in fact, preserved. Petitioners also request that the Court consider the materials when reviewing whether the issues argued on appeal were, in fact, raised to and ruled upon by the trial court.

**II. The Court of Appeals Erred in Finding a “*De Facto*” Partnership in this Case, Particularly Where the Arguments and Rulings Dealt with “Amalgamation,” Not “*De Facto*” Partnership**

The Court of Appeals held the trial court did not find the entities “amalgamated” under the standards enunciated in *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.* Instead, the Court of Appeals found something different, that is, that a “*de facto*” partnership existed. The Court of Appeals overlooked or misapprehended several things in reaching this conclusion.

First, the trial court itself 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).” (R. p. 6). The trial court did this because it viewed the separate corporate entities involved in this case as having lost their separate identities, a concept that is at the heart of amalgamation of under *Magnolia*. Although the trial court used the phrase “*de facto* partnership of the corporate entities,” the court expressly applied *Magnolia*, an amalgamation case. While the Court of Appeals stated “the order itself never specifically found the separate entities were amalgamated,” that statement overlooked that this was *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 cite to *Magnolia* meaningless and absurd.

Furthermore, everyone understood this case involved an amalgamation argument and ruling: the trial judge (R. p. 6), the Respondent (App. pp. 101-104), and of course the Petitioners. Respondent never argued that the trial court’s use of *Magnolia* was merely a 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” and 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 Mgmt. 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.

(App. pp. 101-102). There is *no* contention that the case involved anything but amalgamation of corporate entities under *Magnolia*.

The Court of Appeals also held that Petitioners' argument that Respondent cannot argue amalgamation on the one hand and then seek separate valuation is conclusory and deemed that argument abandoned. This holding ignored the overall arguments *both* parties made here. Petitioners 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 Petitioners 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 amalgamated entity – then they should be valued as one entity (using the correct values for each). That is the nature of amalgamation.

The Court of Appeals also noted Petitioners' own expert valued the entities separately. This statement overlooked that such separate valuation was logical since Petitioners contended each entity retained its own separate identity, the entities were not amalgamated, and the entities should have been treated separately in determining Respondent's interest, if any, in each.

Accordingly, Petitioners respectfully request that the Court grant this Petition and reverse the Court of Appeals' affirmance of 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. The Court of Appeals Erred in Affirming the Trial Court's Finding of an Amalgamated Business Located in Greenville, South Carolina**

The Court of Appeals found Petitioners' 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, the Court overlooked that had Petitioners not challenged this finding (that the amalgamated business is located in Greenville), the Court of Appeals may have found it to have been an unchallenged alternative ruling.

Second, the only evidence in the record was that two of the entities were located in

North Carolina, and were not part of any amalgamated company or *de facto* partnership with its "locus" in Greenville, South Carolina. The three entities filed separate tax returns and had separate loan obligations to third parties, separate contracts with third parties, separate accounting records, separate bank records and separate credit cards. (R. p. 357, l. 24 - p. 360, l. 11). Respondent was paid separately by each entity. (R. p. 279; Def. Exh. 14, p. 546).

This argument is connected with Petitioners' argument that the trial court erred in applying the principles of *Magnolia* in finding an amalgamation of entities. If the entities were not amalgamated, they were not all located in Greenville, and there is no evidence to support otherwise.

Accordingly, Petitioners request that the Court grant this Petition and reverse the trial court's ruling that the entities became amalgamated and that the blended entity had its locus in Greenville, South Carolina.

#### **IV. The Court of Appeals Erred in Affirming the Trial Court's Award of a 7.2% Interest in Front Roe Restaurants, Inc., to Respondent**

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

First, in disagreeing with Petitioners' argument that the trial court did, in fact, reject Respondent's claim to a 10% ownership, the Court of Appeals ignored 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 Responding 7.2% as a matter of equity representing 72% of the threshold required to vest.

As a basis for this ruling, the trial court stated “equity regards and treats as done that which in good conscience ought to be done,” citing to *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938). (R. p. 8). The Court of Appeals overlooked that Respondent did not seek this graduated award but claimed *only* entitlement to the full 10%.

Second, the Court of Appeals stated it did not believe the trial court intended to analogize this case to *Wilkie*. This statement ignored that the trial court stated that this was precisely what it was doing. (R. pp. 7-8). This statement also ignored that Respondent himself contended the trial court “employed” this maxim from *Wilkie* to reach the result. (App. pp. 107-108). In fact, Respondent stated in his brief: “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.” (App. p. 108).

The Court of Appeals noted Petitioners 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 rejected this argument, stating Petitioners cited no law in support of this proposition. In so holding, the Court overlooked that this principle 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 (1943); *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 equitable maxim finds the most common usage, *i.e.*, is “generally applied.” That is also how Respondent contended the doctrine should be applied in this case, *i.e.*, to correct “constructive fraud.” (App. p. 108).

The Court of Appeals also 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 Petitioners “*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 ignored that Respondent never based his claim of ownership on that theory; rather, he contended he was entitled to 10% pursuant to the parties’ express agreement, and the trial court found Front Roe never attained the necessary threshold. Further, saying something “arguably” exists is not the same as saying an obligation is “clear,” as set forth in *Wilkie*.

Next, the evidence demonstrated that from 2007 forward, Respondent received a K-1 Form from Front Roe indicating he was a 1% owner. Respondent 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).

Finally, the Court of Appeals noted further an email exchange as evidence of an attempt to frustrate Respondent’s effort to achieve a 10% interest in Front Roe by “changing the threshold.” *Pertuis v. Front Roe Restaurants*, slip at 9 n. 4. That exchange, however, demonstrates Respondent’s understanding and agreement regarding the vesting schedule. The Record reveals that in June 2009, Mr. Hammond sent Respondent an email setting forth the

review of his compensation. (R. p. 270, ll.18-19; pp. 540-542). The email set forth some options for Respondent to choose regarding his future compensation. (R. p. 270, l. 21 - p. 271, l. 12). This included payment to Respondent of 8% of "net shareholder distributions." (R. p. 271, ll.20-25). At the time Respondent owned 10% of Lake Point, 10% of Beachfront and 1% of Front Roe. (R. p. 272, ll.1-8). Mr. Hammond looked at the distributions to Respondent from 2007 amounted to an aggregate of 8% of all of the shareholder distributions. (R. p. 272, l.9- p. 273, l.2). That 8% aggregate was based in part on the 1% interest in Front Roe. (R. p. 273, ll.4-6; p. 331, l. 15 - p. 332, l. 18). Mr. Hammond got the information from QuickBooks because the 2008 taxes had not been completed. (R. p. 273, l.7-p. 274, l.14; p. 274, l.21- p. 275, l.16). The 8% figure an aggregate and does not represent Respondent's ownership as more than 1% in Front Roe. (R. p. 276, ll.9-18). Respondent had access to all of the information in the QuickBooks program. (R. p. 276, 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." (R. p. 277, ll.1-8; pp. 540-542). Respondent 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." (R. p. 278, ll.13-19; p. 543). It was clear to both parties that they were extending the initial program through 2009. (R. p. 279, ll.2-7; p. 320, ll.19-22; p. 335, ll.13-19). Respondent resigned before the threshold was achieved.

The Court should grant this Petition and reverse 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 Court of Appeals Erred in Affirming the Trial Court's Finding of a "Zero" Value for Beachfront Foods, Inc.**

In affirming the trial court's finding that Beachfront had "no value," the Court of Appeals ignored that the preponderance of the evidence did not support this finding. Rather, the only evidence was that Beachfront had a negative value: 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 of Appeals stated the trial court found Mr. Manios "conceded some matters and was not credible in others." The Court misstated the trial court's ruling here. 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) (emphasis added). 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 Beachfront.

The Court of Appeals also ignored 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 the Court of Appeals described 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 and reverse the trial court's application of a "zero" value to Beachfront.

**VI. The Court of Appeals Erred in Affirming the Trial Court's Finding of Oppression of Respondent as a "Minority Shareholder"**

The Court of Appeals rejected Petitioners' 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 of Appeals overlooked or misapprehended several points.

Although both the Court of Appeals and the trial court outlined a number of things both courts stated sufficiently demonstrated suppression of a minority shareholder in a close corporation, Petitioners 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. pp. 78-85). Petitioners reference those arguments here.

The Court of Appeals misapprehended both the appropriate tests for suppression of a minority shareholder in a close corporation and the evidence in the Record. Furthermore, the Court overlooked its own finding, that is, that 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 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”). *Cf.* S.C. Code Ann. § 33-41-910 (2006), *et seq.* (setting forth rules for dissolution of a partnership).

This Court should grant this Petition and reverse the Court of Appeals and the trial court on both courts application of the tests set forth in *Kiriakides, Ballard* and *Meiselman*.

**VII. The Court of Appeals Erred in Affirming the Trial Court’s Award to Respondent of \$99,117 for Alleged Unpaid “Shareholder Distributions”**

The Court of Appeals affirmed the trial court’s award of \$99,117 to Respondent for allegedly unpaid “shareholder distributions” from the business. The Court of Appeals ignored the fact 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 trial court’s earlier erroneous finding that Respondent owned 7.2% of Front Roe. (App. pp. 117-119).

Second, the only evidence in the case was that throughout their association, Respondent 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. (R. p. 92, l. 10 - p. 93, l. 17; p. 94, ll.15-17; p. 100, ll.2-10; p. 502; p. 505; p. 507; p. 509). When Respondent started he was receiving a salary and a bonus that would be entirely taxable as income. (R. p. 93, l. 22 - p. 94, l. 22). He did not recall there ever being a bonus to which he was entitled but did not get. (R. p. 94, l. 23 - p. 95, l. 3). Mr. Hammond then advised Respondent that going forward, the bonuses would be paid to him through

shareholder distributions as a way of saving him money. (R. p. 93, l. 24 - p. 94, l. 3; p. 95, l. 4 - p. 96, l. 6). Respondent never interacted with the accountant even though there was nothing that prohibited him from asking the accountant any questions. (R. p. 96, l. 7 - p. 97, l. 6). The evidence revealed this treatment was to Respondent's benefit from a tax standpoint. (R. p. 274, ll.15-20).

Third, the Court of Appeals inappropriately found the issue tried by consent under Rule 15, SCRC. In doing so, the Court ignored 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. *See Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App.1994) (Court will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record-introduced as relevant to some other issue which would support the amendment; the opposing party may not be conscious of the relevance of the evidence to issues not raised by the pleadings if the relevance is not otherwise made clear); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000) (implied consent to amendment of pleadings will not be found if all of the parties did not recognize it as an issue at trial). Additionally, Respondent made no motion to amend to conform to the evidence, nor did he contend on appeal that the issue was tried by consent.

The Court should grant this Petition and reverse the trial court's rulings regarding purported shareholder distributions.

## CONCLUSION

The Court of Appeals should have permitted the supplemental record absent good reason to withhold such permission. The Court should have also found the issues Petitioners argued were preserved for appellate review, as all the parties agreed they were.

The Court of Appeals erroneously held that the parties entered into a *de facto* partnership rather than addressing the theory advanced by the parties and addressed by the trial court – amalgamation. Further, the record does not support finding either a *de facto* partnership or an amalgamated entity, especially not one that is located in Greenville.

The Court of Appeals also should not have affirmed the trial court's award of 7.2% of Front Roe Restaurants to Respondent, or the finding of "zero" value rather than a negative value for Beachfront Foods. The Court should have reversed the application of the "minority shareholder oppression" rules to this case. The trial court applied inconsistent theory to this case, and compounded its error by using inconsistent math.

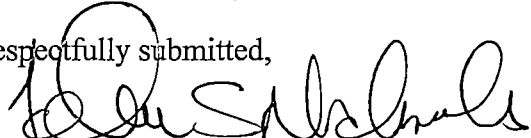
Finally, the Court of Appeals erred in affirming the finding that Respondent is entitled to payment for "shareholder distributions" – Respondent did not seek this relief in his pleadings, the issue was not tried by consent, and such a finding is inconsistent with the Court of Appeals' view that the parties had entered into a *de facto* partnership.

This Court should grant this Petition and reverse both the Court of Appeals and the circuit court's rulings in this case.

/Signature page attached

April 11, 2016

Respectfully submitted,



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