

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC SUPREME COURT

Edward W. Miller, Circuit Court Judge

2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016)
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, ... Petitioners.

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kyle Pertuis, Respondent,

v.

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

Appellate Case No. 2013-002257

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2016-UP-091
Heard October 14, 2015 – Filed February 24, 2016

AFFIRMED

John S. Nichols, of Bluestein Nichols Thompson &
Delgado, of Columbia, and Curtis Warren Stodghill, of
Stodghill Law Firm, of Greenville, for Appellants.

Robert C. Wilson, Jr., of Greenville, for Respondent.

PER CURIAM: In this minority shareholder oppression case, Appellants, Front
Roe Restaurants, Inc. (FRR), Beachfront Foods, Inc. (BFI), Lake Point
Restaurants, Inc. (LPR), Mark Hammond (Hammond) and Larkin Hammond

(Mark and Larkin Hammond, collectively, the Hammonds) appeal from an order making an award of monies to Kyle Pertuis (Pertuis) for his interests in the corporations and for unpaid distributions from the corporate entities, contending the trial court erred in (1) finding an amalgamation of the three corporate entities, but basing an award on their separate values; (2) finding the locus of the amalgamated business was Greenville, South Carolina; (3) awarding respondent a 7.2 % interest in FRR; (4) assigning a "zero" value to BFI instead of a negative value; (5) finding Pertuis was oppressed by Appellants; and (6) ordering payment of \$99,117 to Pertuis for unpaid shareholder distributions. We affirm.

From the outset, we note the sole argument of the Appellants contained in the record on appeal presented to the trial court is that from their directed verdict motion following the presentation of Pertuis' case. Only after this court raised concern at oral argument that many of the arguments made by the Appellants in their brief did not appear in the record before us, and, therefore, may not be preserved for our review, did the Appellants' counsel move to supplement the record with over 100 additional pages. We decline to accept this late filing, which would render some of the briefed arguments unpreserved.¹ However, even if we considered those arguments preserved, we would nonetheless affirm.

Because an action for stockholder oppression is one in equity, this court may find facts according to our own view of the preponderance of the evidence. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). "However, this broad scope does not relieve the appellant[s] of [their] burden to show that the trial court erred in its findings." *Id.* "Furthermore, we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Id.*

1. In its order, the trial court found the evidence showed there was a dearth of respect for corporate governance among the three corporate entities, blurring the distinction between them. It concluded, applying the standards articulated in

¹ Although 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—the record presented to this court fails to support such. "[Our appellate courts] are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Hammonds and Pertuis operated the three corporate entities as a *de facto* partnership of the three corporate entities. On appeal, the Appellants contend the trial court erred in finding an amalgamation of the companies but then ordering an award to Pertuis based upon a separate treatment of each company, arguing the facts supporting amalgamation in *Magnolia* are not present here. They argue the trial court blended the companies into one *de facto* entity, but awarded Pertuis an amount for his separate interest in each company, but 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 [BFI] to reduce the overall value) in which [] 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."

First, we question whether this issue is preserved on appeal. "[I]t is a litigant's duty to bring to the [trial] court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). To be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 301–02, 641 S.E.2d at 907 (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "A point not specifically raised to and ruled upon by the trial court will not be considered on appeal." *Sanderson v. Sanderson*, 391 S.C. 249, 255, 705 S.E.2d 65, 67 (Ct. App. 2010). Appellant has the burden of providing this court with an adequate record for review. *Harkins v. Greenville Cty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). There is no indication in the record presented to this court the Appellants ever argued to the trial court, as they do on appeal, that the trial court erred in finding amalgamation of the corporate entities, but then ordering an award to Pertuis based upon a separate treatment of each company.

However, even assuming the matter was specifically raised in the Appellants' motion to alter or amend, we find no merit to the argument. Though the trial court

did cite the *Magnolia*² case in its order, which involved amalgamation, the order itself never specifically found the separate entities were amalgamated. Rather, it found Hammond and Pertuis "operated the three corporate [Appellants] as a *de facto* partnership of the corporate entities." Further, the preponderance of evidence supports this finding by the trial court.³ Thus, even if the facts of this case do not fit the mold of the *Magnolia* case in regard to amalgamation, we discern no reversible error in the trial court's ultimate conclusion that the three corporate entities were operated as a *de facto* partnership. See *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (noting our appellate courts recognize an overriding rule which says: "whatever doesn't make any difference, doesn't matter"). Although they attack the finding of the trial court as not fitting within the parameters of amalgamation in *Magnolia*, the Appellants do not argue why the trial court's finding that the separate entities were operated as a *de facto* partnership would be erroneous. In regard to the Appellants' argument that the trial court erred in inconsistently considering the entities as one, but then considering their separate valuations, the Appellants fail to cite any support for their assertion that such is improper. Rather, they simply summarily argue that Pertuis should not be allowed to "have it both ways." See *State v. Crocker*, 366 S.C. 394, 399 n.1, 621 S.E.2d 890, 893 n.1 (Ct. App. 2005) (holding "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review," and noting failure to provide such argument and citation renders an issue abandoned). Further, there is substantial evidence to support the valuation of the entities separately, instead of as a whole, based on Dr. Alford's testimony. Additionally, we note the Appellants' own expert valued the entities separately.

² 397 S.C. at 358-59, 725 S.E.2d at 118 (discussing whether the trial court erred in determining the appellants' entities were amalgamated so as to blur the legal distinction between the corporations for purposes of liability).

³ In particular, there is evidence Pertuis was given the title "Managing Partner." An e-mail from Hammond referred to the parties' partnership. Pertuis referred to them as partners in an e-mail, and in response, Hammond thanked Pertuis for working on their "partnership agreement." In another e-mail, Pertuis discussed the anticipated completion of the "partnership and employment agreements." In his final days of employment, Pertuis discussed his concern of feeling "boxed in" in regard to where he was going with "this partnership" and stated he felt that the "partnership" was only on the surface.

2. In its order finding the Hammonds and Pertuis operated the three corporate entities as a *de facto* partnership, the trial court further stated, "From [Pertuis'] title, 'Managing General Partner,' from the joint and unified internet web site for the three corporate [Appellants], and from the parties' email, the Court further finds that the *locus* of the partnership is Greenville, SC." The Appellants assert error in the trial court's finding the locus of the amalgamated business was in Greenville, South Carolina, maintaining the trial court's factual ruling in this regard is without evidentiary support.

As with the "amalgamation" issue, there is nothing to indicate this issue was ever raised to the trial court, thus it is questionable whether this issue is properly before us on appeal. See *Sanderson*, 391 at 255, 705 S.E.2d at 67 ("A point not specifically raised to and ruled upon by the trial court will not be considered on appeal."). Further, it is not clear from the Appellants' brief how this finding of the "locus" of the operation prejudices the Appellants. See *McCall*, 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter."). On the merits, we note the only law cited in support of the Appellants' argument on this issue is that a trial court errs in making findings of fact which have no evidentiary support. However, there is evidence to support the trial court's finding in this regard. In particular, as noted by Pertuis, there is evidence that the three entities shared personnel, Pertuis served as the General Managing Partner of each, he relocated to Greenville from where he managed all three, and he travelled to the various locations four to six days a week from Greenville. Accordingly, we find no error.

3. The Appellants argue the trial court erred in awarding Pertuis a 7.2 % interest in FRR. They contend the trial court rejected Pertuis' claim to a 10% interest in FRR, finding he never attained the required profit threshold to achieve such an interest, but then awarded him 7.2 % based upon equitably treating his ownership on a graduated vesting schedule, erroneously relying on *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938) for the proposition that "[e]quity regards and treats as done that which in good conscience ought to be done." While it is clear the parties contested Pertuis' percentage ownership of FRR, as with the previous two issues, it is not clear the Appellants raised these particular arguments to the trial court. Accordingly, we likewise question whether these arguments are properly preserved. See *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."); see also *Harkins*, 340 S.C. at

616, 533 S.E.2d at 891 (holding an appellant has the burden of providing this court with an adequate record for review). However, even assuming the arguments were raised to the trial court, we would find no error.

First, we disagree with the Appellants' assertion that "[t]he [trial] court rejected [] Pertuis' claim to a 10% interest in [FRR], finding that [FRR] never attained the required profit threshold for the 10% ownership interest." Rather, the trial court recounted the evidence Pertuis presented in support of his claim of a 10% interest and recognized Hammond's contradictory testimony that Pertuis had not achieved 10% interest pursuant to the "missing" vesting schedule. The trial court specifically noted "the strength of [Pertuis'] argument for 10% ownership from the exchange of emails," and further laid blame for the "missing" vesting schedule on the Hammonds, but ultimately determined it was appropriate to award Pertuis a 7.2% interest in FRR under equitable principles. Thus, the trial court did not reject Pertuis' 10% claim by finding he had never attained such. Rather, it found "strength" in Pertuis' claim for 10% ownership in FRR. It appears the trial court did not give credence to Hammond's testimony that Pertuis had not reached the level necessary under the missing vesting agreement, but did not consider it proper to award Pertuis the full 10% since Pertuis acknowledged his 10% acquisition in the company was tied to profits and Pertuis could not, himself, testify to the specific provisions in the missing vesting schedule.

As to the Appellants' argument concerning application of *Wilkie*, we do not believe the trial court intended to analogize this case to the specific facts in *Wilkie*. Rather, it simply cited *Wilkie* for the equitable maxim. Further, though the Appellants argue such maxim is "generally applied in cases involving constructive trusts imposed due to fraud," they cite no law in support of this proposition. Additionally, the facts of this case do not suffer the same deficiency as those in *Wilkie*, which prevented application of the maxim. The *Wilkie* case noted, in order to apply the maxim, the party seeking to invoke it must establish "a clear obligation based upon a valuable consideration that another do some act which he has failed to perform." 187 S.C. at 393-94, 197 S.E. at 380. In *Wilkie*, there was no such obligation. Here, the Hammonds, arguably, owed a duty to Pertuis to document his greater ownership in FRR based upon his continued management of the various entities.

4. The Appellants contend the trial court erred in assigning a "zero" value to BFI because the undisputed evidence shows it had a negative value. They argue Pertuis' expert, Dr. Alford, testified BFI had a negative equity of \$410,271, and

their expert, Mr. Manios, valued it at negative \$620,000. Thus, they maintain the trial court's finding lacks evidentiary support.

It is clear the parties disputed the values of the individual entities and presented evidence on the same to the trial court for consideration. Thus, this issue is preserved for our review. On the merits, however, we find the preponderance of evidence supports the trial court's determination that BFI had no value. Dr. Alford placed a fair value of \$0—or no value—on BFI. In evaluating BFI, Dr. Alford noted the business was not making money and had negative equity. However, he observed the financial records showed loans to the business from shareholders, but no accrual of interest from those loans. He testified, if there was no payment of interest, they would be construed as capital investments by the shareholders instead of loans. If this was the case, it would increase the valuation of BFI from \$0 to \$46,000. This testimony is also supported by Dr. Alford's report, which lists negative owners' equity of \$410,271 in BFI, places a figure of \$456,052 on loans from shareholders, and concludes "[e]xcluding loans to and from shareholders, [BFI] would have a small positive adjusted net asset value." His report also indicates, "[u]pon sale of each entity, amounts due from shareholders would be collected and amounts due to shareholders would be distributed prior to distributions of net proceeds of the sale," and "[t]he resulting transactions would yield net proceeds of . . . \$0 for 100% equity ownership of [BFI]." The trial court specifically accepted the testimony of Dr. Alford in establishing the values of the separate entities, including that "BFI had no value." In so doing, it found Dr. Alford "presented an entirely believable and competent analysis for the [trial] [c]ourt's use, based on his credentials and based on his demonstrated application of methodology." On the other hand, in regard to the testimony of Dr. Manios, the trial court observed he conceded some matters and was not credible in others. This court is "not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Ballard*, 339 S.C. at 593, 733 S.E.2d at 109. Therefore, there is evidentiary support for the trial court's finding in this regard.

5. On appeal, the Appellants contend the trial court erred in finding oppression of Pertuis. They argue the evidence in this case does not demonstrate that Pertuis was in imminent danger of being excluded from returns, his exclusion from management in the companies was self-imposed, and he was offered payment for the value of his ownership. Therefore, they assert the evidence does not justify the extreme remedy of judicial buyout under a finding of minority stockholder oppression. The Appellants maintain the indicia of oppression focused on by the court either lacked support in the record or did not rise to the level described in

Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) and *Ballard*. They note the trial court mentioned the North Carolina case of *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983), and they make the additional argument that North Carolina follows a different standard and the trial court should have applied North Carolina law regarding minority shareholder oppression to the two North Carolina companies, and the application of South Carolina law in this regard was error.

First, we note the issue of whether the trial court erred in finding the Hammonds engaged in oppression of Pertuis as a minority shareholder was clearly raised to and ruled upon by the trial court and is therefore proper for consideration on appeal. On the merits, we find no error. Applying the case law on minority shareholder oppression, in particular *Kiriakides* and *Ballard*, to the facts of this case, we find the preponderance of the evidence supports the court-ordered buyout for minority oppression. In particular, there is evidence of the following oppressive conduct: (a) Hammond failed to provide formal documentation of Pertuis' ownership interest in FRR despite repeated requests by Pertuis and in spite of the fact that the parties began operating under the terms of Pertuis' counterproposal, which had been accepted by the Hammonds and included acknowledgment of Pertuis' increased interest in the entity. (b) The majority failed to offer Pertuis the opportunity to participate in the ownership of real estate leased to LPR. While Pertuis was informed of the acquisition and voiced no objection at the time, it is nonetheless undisputed that the majority did not specifically afford him the opportunity. Further, even assuming their failure to specifically offer Pertuis the opportunity is, alone, insufficient to conclude they misappropriated this corporate opportunity, there is also evidence the majority failed to offer Pertuis the opportunity to participate in the new "Grill Marks" restaurant. Though the Appellants argue Pertuis' employment had ended by that time, we fail to see how this fact precludes him from participation, as he still held an ownership interest in the entities at that time. (c) The majority helped finance the "Grill Marks" restaurant by borrowing \$275,000 from FRR and LPR, thus they used corporate assets to aid them in their unilateral acquisition. (d) Because Pertuis is no longer employed by the entities, he no longer derives a salary, bonus, and other benefits he was receiving from the entities. While the Appellants contend Pertuis voluntarily left the business, Pertuis' testimony shows he parted ways only after he tried in vain to have his agreement with the majority formally documented so as to clarify his position and ensure he was receiving his appropriate ownership interest.

Further, there is evidence to support the trial court's finding that the majority continued to frustrate Pertuis' efforts to achieve a 10% interest in FRR "by changing the threshold."⁴ (e) The majority shareholders continued to receive substantial benefits from the corporations, using the corporate assets to help finance another venture. (f) There were sufficient funds in LPR and FRR to afford a buyout, as evidenced by the fact that LPR loaned approximately \$75,000 and FRR loaned approximately \$200,000 toward acquisition of the new "Grill Marks" restaurant. (g) There is a total estrangement between the majority shareholders, who are in total control of the company, and the minority shareholder. (h) The majority offered the minority shareholder an extremely low buyout offer, in spite of testimony showing substantial value in two of the entities. Hammond effectively offered Pertuis nothing for his interest in the entities when he offered to pay him only the value of the boat for his shares on the condition that Pertuis would return the boat. (i) There is no public trading in stock of these closely-held entities. (j) Pertuis was excluded from management, as evidenced by the fact that he was no longer employed with the companies and had not received any notice of a shareholder's meeting since that time. (k) The majority either refused to declare dividends or withheld Pertuis' dividends after his employment ended, as evidenced by his testimony he had not received any distributions since parting ways with the Hammonds. (l) The majority withheld information from the minority. Pertuis was not kept informed or allowed to participate in the businesses in any way after his termination from employment. Hammond acknowledged shareholders' meetings were held at least once a year for the three corporate entities, but there were no notices of shareholders' meetings, no agendas sent out, and nothing to show Pertuis was ever afforded a chance to participate in the election of board members or

⁴ The record shows Hammond accepted Pertuis' counterproposal in his e-mail of June 30, 2009, which provided if Pertuis did not achieve a 10% ownership interest in 2008, the parties would "extend [the] current program through 2009 in order to equalize current ownership at 10% across the board," and "[d]istributions going forward after the close of 2009 [would] be based on 10% ownership." This is some evidence that they anticipated treating his ownership of FRR as ten percent at that time and, at least certainly going forward, Pertuis was to acquire a ten percent interest in FRR by the close of 2009. Hammond agreed to, and the parties began implementing certain changes to operate under the counterproposal, yet Pertuis was unsuccessful in obtaining formal documentation of his ownership from the Hammonds, and at the time of this action, the Hammonds maintained Pertuis had only acquired a one percent interest in FRR.

directors. (m) The majority used the corporate assets for their personal benefit and at the expense of the corporations, failing to enforce the rights of the corporations, as Hammond acknowledged they failed to pay interest on their loans from the corporations. (n) The Hammonds resisted Pertuis' request for financial records. (o) The Hammonds used corporate funds to contest Pertuis' shareholder rights, using the same counsel as the corporations to represent them in this action. (p) The Hammonds commingled the bonus and distribution compensation due Pertuis. As in *Ballard* and *Kiriakides*, we find Pertuis "similarly faces prospects of exclusion from the business, a slim chance of seeing a return any time soon, and no market in which to otherwise unload his investment." *Ballard*, 399 S.C. at 595, 733 S.E.2d at 110.

It is questionable whether the Appellants' argument that the trial court was required to apply North Carolina law to Pertuis' claims relating to exclusion from the North Carolina companies is preserved for review, as there is no indication in the record on appeal that this specific argument was ever raised to the trial court. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding the Court of Appeals should not address an issue which was not explicitly ruled on by the trial court or brought to the trial court's attention in a motion to alter or amend); *see also Harkins*, 340 S.C. at 616, 533 S.E.2d at 891 (holding an appellant has the burden of providing this court with an adequate record for review). Nonetheless, we note the trial court not only considered South Carolina law, but additionally stated it had "also considered legal authority from North Carolina, submitted by [the Appellants], which provides additional support for the foregoing analysis: *Meiselman*." Thus, the trial court clearly considered *Meiselman*, and the Appellants fail to argue on appeal how the trial court erroneously applied South Carolina law instead of North Carolina law to the North Carolina companies. Finally, the Appellants fail to cite any authority to support their conclusory assertion that the trial court was required to apply North Carolina law to the entities incorporated in North Carolina and that it would be error to apply South Carolina law to the same. *See Crocker*, 366 S.C. at 399 n.1, 621 S.E.2d at 893 n.1 (holding "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review," and noting failure to provide such argument and citation renders an issue abandoned).

6. The Appellants challenge the award of \$99,117 to Pertuis for unpaid shareholder distributions. First, they argue Pertuis did not seek this relief in his pleadings nor specifically testify he was entitled to any amount for unpaid distributions, and the trial court, therefore, exceeded its authority in awarding the same. They additionally maintain, while the court relied on the corporate tax

returns in making its determination on this matter, there was no finding Pertuis did not receive the amounts listed on the K-1 forms or a finding that justifies the amount ordered to be paid to Pertuis. Thus, they argue the record does not support the award of \$99,117 for unpaid distributions.

In regard to the Appellants' argument that the trial court exceeded its authority, it is again questionable whether this argument is preserved for our review. *See Timmerman*, 331 S.C. at 460, 502 S.E.2d at 922 (holding, when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal); *see also Harkins*, 340 S.C. at 616, 533 S.E.2d at 891 (holding appellant has the burden of providing this court with an adequate record for review). Nonetheless, we find no error. In his complaint, Pertuis complained about the impropriety surrounding the distributions, alleging the Appellants "grant[ed] dividends and distributions to the Majority without granting the same benefits to [him]." Further, Pertuis alleged he had suffered damages and asked the court to "fashion relief for [him]" and, in addition to his request for an ordered buyout of his shares, "pray[ed] for such other and further relief as this Court may deem just and proper." Therefore, the award of unpaid shareholder distributions is generally encompassed within the pleadings. At any rate, we would find the issue was tried by consent. *See* Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("In order to be tried by implied consent, the issue must have been discussed extensively at trial."). The record clearly reflects the issue concerning shareholder distributions was extensively discussed at trial and was tried before the court without objection.

In regard to the amount awarded, as with the Appellants' argument that the trial court exceeded its authority, the record before us does not reflect this argument was raised to the trial court and, therefore, it may not be preserved for appellate review. Nonetheless, the trial court specifically stated it relied on "the corporate [Appellants'] tax returns" in determining the amounts of distributions not paid to Pertuis,⁵ and we find some evidence in the record to support such an award.⁶

⁵ The testimony is clear that the bonuses due Pertuis were disguised as distributions. Dr. Alford's testimony reveals, if a shareholder distribution was

AFFIRMED.

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

made to one shareholder (Pertuis), then the other shareholders (the Hammonds) would have also received a distribution proportionate to their share. Pertuis would have then been entitled to the amount of that distribution *as a shareholder*, and any bonus he would have been entitled to would have to be on top of that amount. Thus, amounts he received for bonuses disguised as shareholder distributions meant he was not receiving his proportionate share of distributions to which he would have been entitled.

⁶ Specifically, the trial court found Pertuis was entitled to a 7.2% shareholder interest in FRR, and the trial court received in evidence the tax records for FRR. A review of these tax returns for FRR from 2008 through 2012 shows the cumulative ordinary business income, or profit, for those years totals \$1,376,481. This figure, multiplied by 7.2%, comes to \$99,106.63, which is very close to the award made by the trial court.

78914

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

Edward W. Miller, Circuit Court Judge

MAR 10 2016

SC Court of Appeals

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. *Micronics, 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 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.

(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 be 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 (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 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

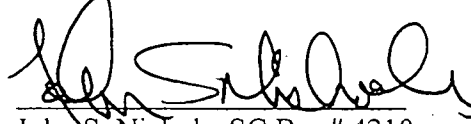
interest would be. *Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App. 1994). Furthermore, the Court overlooked that Respondent made no motion to amend the pleadings to conform to the evidence, nor did he contend on appeal that the issue was tried by consent.

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;



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*Front Roe Restaurants, Inc., Beachfront
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The South Carolina Court of Appeals

Kyle Pertuis, Respondent,

v.

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

Appellate Case No. 2013-002257

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

A.C.J.

H. B. Wee

J.

Paul C. Thomas

J.

Columbia, South Carolina

cc:

Robert C. Wilson, Jr., Esquire

Curtis Warren Stodghill, Esquire

FILED

March 31, 2016

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John S. Nichols, Esquire
The Honorable Edward W. Miller

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.

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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. (R.p.34, ll.1-4). In the spring 2000, Mr. and Mrs. Pertuis were living in Arkansas. (R.p.34, ll.14-15). Mr. and Mrs. Hammond approached Mr. Pertuis about a business opportunity in the Carolinas. (R.p.34, ll.17-25). They owned "Larkins on the Lake," a restaurant on Lake Lure in North Carolina, through Lake Point. (R.p.35, ll.6-10; p.42, ll.6-7). The

Hammonds wanted Mr. Pertuis to be the "general manager" to help with the day to day operations of the restaurant. (R.p.35, l. 21 - p.36, l. 4). Mr. Hammond had an extensive background in operations and Mrs. Hammond had some experience from a marketing standpoint. (R.p.72, 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. (R.p.37, ll.14-19; p.90, ll.14-25). The Hammonds wanted to increase his interest over time to give him the incentive to stay there longer. (R.p.91, ll.3-6).

The terms of the employment included a "base plus bonus [compensation] package." (R.p.37, ll 20-23; p.89, ll.5-10). The initial conversation was a vesting schedule that would accrue over five years to a maximum of ten percent ownership. (R.p.37, l. 24 - p.38, l. 1; p.89, ll.11-12, 21-24). Mr. Pertuis did not recall signing any vesting schedules. (R.p.90, ll.5-13; p.91, ll.12-13).

Mr. and Mrs. Pertuis moved from Arkansas to take over his new position in June 2000. (R.p.36, ll.5-12). The Hammonds helped them with relocation assistance. (R.p.37, l. 23). The financial performance of the restaurant improved during his tenure. (R.p.36, l. 24-p.37, l. 6). The Hammonds were pleased with his performance. (R.p.37, ll.7-9).

In 2001, the Hammonds formed a new corporation, Beachfront Foods, to acquire another restaurant, "Malarkie's." (R.p.38, l. 19 - p.39, l. 6). At that point Mr. Pertuis's role had expanded into a "director of operations" over both entities. (R.p.39, 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). (R.p.40, ll.1-7). They upgraded the restaurant, reopened and did fairly well.(R.p.40, 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. (R.p.40, ll.14-24; p.91, ll.7-17; p. 91, l. 18 - p. 92, l. 3; p.100, 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. (R.p.89, ll.13-15; p.102, ll.5-24). Both are North Carolina corporations. (R.p.40, l. 25 - p.41, l. 1).

In 2004, Mr. Hammond had been in Greenville, South Carolina, regarding a location that was on the market. (R.p.44, 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." (R.p.44, ll.15-17). Mr. Pertuis was unfamiliar with the terms of the purchase, although the seller "raised the price at the last minute." (R.p.44, ll.19-25). The Hammonds then started a new corporation, "Front Roe," through which they took over the location. (R.p.45, ll.1-8).

Mr. Pertuis was assigned to manage Front Roe.(R.p.46, 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." (R.p.46, ll.2-9). Because the restaurant was larger they agreed that Mr. Pertuis would move to Greenville. (R.p.46, ll.18-22; p.47, 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." (R.p.46, ll.24-25). They memorialized the agreement with a letter. (R.p.47, ll.1-5). The Hammonds indicated they were looking at "creative ways" for Mr. Pertuis to obtain an ownership interest in Front Roe. (R.p.97, ll.7-15; p.508).

The vesting schedule for Front Roe was different from Lake Point or Beachfront. (R.p.100, ll.22-23). The agreement required the business to achieve a certain profit margin. (R.p.100, l. 24 - p. 101, l. 7). They created a document that contained the vesting schedule based on profitability. (R.p.101, l. 8 - p.102, l. 4; p.102, l. 25 - p.103, l. 21). Mr. Pertuis' ownership interest would increase as the business met certain profit margins. (R.p.103, ll.22-24). Mr. Pertuis agreed to this arrangement. (R.p.103, l. 25 - p.104, l. 1).

In 2007, the Hammonds sold Malarkie's and acquired a new restaurant, "Larkins Carolina Grill," in Columbus, North Carolina. (R.p.41, ll.5-16). The restaurant initially lost money from startup costs but has since performed better. (R.p.43, ll.9-23).

By 2007, Mr. Pertuis was managing all three locations. (R.p.47, l. 18 - p.48, l. 3). He traveled to all three locations four to six days a week. (R.p.48, ll.12-17). He was in contact with Mr. and Mrs. Hammond every day during this period. (R.p.48, l. 18 - p.49, l. 2). Each restaurant had a manager and Mr. Pertuis was the point person for them. (R.p.72, ll.19-23). The Hammonds gave him the title of "managing partner" of all locations during this period. (R.p.72, l. 24 - p.73, 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. (R.p.42, ll.6-15; p.97, l. 16 - p.98, l. 1). The Hammonds ultimately purchased the property through a new corporation, not one in which Mr. Pertuis was a shareholder. (R.p.42, ll.18-23). Mr. Pertuis knew nothing about the terms, only that the Hammonds were buying it. (R.p.42, l. 24 - p.43, 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. (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). The Hammonds paid \$1.7 million for the land and had to personally guarantee all of the loans. (R.p.98, l. 21 - p.99, l. 5). Pertuis stated "I don't deal with real estate." (R.p.99, l. 22).

From 2005 through 2009 the restaurants did very well and Mr. Pertuis was working towards an ownership interest. (R.p.49, ll.3-22). He agreed the tax returns for 2005 and 2006 did not list him as an owner of Front Roe. (R.p.119, l. 23 - p.120, 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. (R.p.49, l. 23 - p.50, l. 1; p.120, ll.5-10). There was never any other kind of written agreement or confirmation of ownership. (R.p.50, ll.2-7). In 2008, Mr. Pertuis received a similar K-1 form. (R.p.50, ll.8-10). His interest was listed at 1% for 2009 as well.(R.p.120, ll.11-15; p.812).

The tax document generated in 2009 listed Mr. Pertuis as receiving "eight percent of net shareholder distributions." (R.p.121, 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. (R.p.121, l. 20 - p.122, l. 1). He disagreed, however, that the figures for shareholder distributions reflected what he received. (R.p.122, l. 10 - p.124, l. 10). He agreed that the amounts reflected distributions of 10% for Lake Point and Beachfront and 1% for Front Roe. (R.p.124, ll.3-10; p. 125, ll.16-22). He never received any distributions. (R.p.126, ll.6-7).

Mr. Pertuis identified the tax returns for Beachfront (R.p.705) and Lake Point. (R.p.587). (R.p.126, ll.15-22). The K-1 forms reflected that Mr. Pertuis was a 10% owner

of each business from 2005. (R.p.127, ll.2-6).

Front Roe never achieved the profit margin necessary to get Mr. Pertuis to 10% ownership. (R.p.104, l. 2 - p.105, l. 7; p.127, 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. (R.p.105, l. 9 - p.106, 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. (R.p.106, l. 22 - p.108, 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. (R.p.50, l. 20 - p.51, l. 3). Mr. Pertuis did not communicate to the Hammonds any concerns about ownership, even during their annual meetings to discuss future business plans. (R.p.51, ll.4-15). Mr. Pertuis had questions about formalizing their agreement with the vesting schedule for Front Roe. (R.p.53, ll.7-18; p.55, ll.3-7; pp.423-425). 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." (R.p.54, ll.17-23; p.104, ll.7-18; pp.511-513). Mr. Hammond did not tell Mr. Pertuis how much ownership he would have in Front Roe. (R.p.54, l. 24 - p.55, 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.” (R.p.55, ll.14-22; p.426). 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. (R.p.56, 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. (R.p.108, l. 19 - p.109, l. 3). The parties met at Sanibel Island, Florida, in February 2009. (R.p.56, ll.18-21; p.109, 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. (R.p.56, ll.15-21; p.427).

In the email, Mr. Hammond mentioned forming an “umbrella corporation” or choosing “another means to equalize” Mr. Pertuis’ ownership interest across the three companies. (R.p.57, 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. (R.p.58, 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. (R.p.58, ll.16-24; p.109, l. 14 - p.110, 18; pp.515-516). 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. (R.p.113, l. 17 - p.114, l. 10; p.115, ll.15-24). At no time did Mr. Pertuis tell Mr. Hammond that they did not have to wait for the returns. (R.p.114, 21 - p.

115, 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." (R.p.59, ll.2-7; p.113, 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. (R.p.59, 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." (R.p.59, l. 23 - p.60, 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. (R.p.60, l. 4 - p.61, l. 6; p.429; p.517). Mr. Pertuis presented the document to Mr. Hammond in December 2008 and there was one redrafted with some language about "whatever point 5 was." (R.p.61, ll.7-19). Mr. Pertuis obtained this document so that he could get the agreement "formalized" and "stop worrying about it." (R. p.61, 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." (R.p.110, l. 23 - p.111, 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." (R.p.111, ll.1-5).

In April 2009, Mr. Hammond sent an email to Mr. Pertuis. (R.p.111, ll.11-24;

p.539). 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. (R.p.111, l. 25-p.113, 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. (R.p.62, ll.5-17; p.66, ll.1-2; p.451). The document stated Mr. Pertuis had a current annual salary of \$55,000 with a bonus of \$50,000. (R.p.63, ll.1-4). His shareholder distribution was "8 percent of net SD." (R.p.63, 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. (R.p.63, l. 9 - p.64, l. 13).

Mr. Pertuis agreed that the boat was originally used to transport customers to and from the property on Lake Lure. (R.p.128, l. 22 - p.129, 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." (R.p.129, ll.10-19). Mr. Pertuis thereafter insured the boat in his name. (R.p.129, ll.20-22; pp.547-549). The address on the policy, however, was "Larkins on the Lake." (R.p.130, ll.4-6). Lake Point paid the premium. (R.p.130, ll.7-21). He agreed that he did not list \$12,000 income on his 2008 tax returns for the boat. (R.p.130, l. 22 - p.131, 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." (R.p.64, ll.17-21; p.116, ll.12-21). This would have extended the agreement into

2009 for Mr. Pertuis to obtain 10% "across the board." (R.p.117, ll.3-18; p.128, ll.4-12).

Mr. Pertuis already owned 10% of Lake Point and Beachfront. (R.p.116, ll.19-24). He did not, however, own 10% in Front Roe. (R.p.116, l. 25 - p.117, l. 2; p.128, 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. (R.p.64, l. 22 - p.65, 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." (R.p.65, 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. (R.p.65, ll.20-25; p.118, l. 3 - p.119, l. 14; p.132, ll.20-25). Mr. Pertuis did not think Mr. Hammond hampered the lawyers from producing the documents. (R.p.118, ll.21-24).

Mr. Pertuis identified his response to the June 27, 2009 document. (R.p.66, l. 18 - p.67, l. 4; p.454). 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. (R.p.67, ll.6-13; p.68, ll.4-13; p.149, l. 19 - p.150, 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." (R.p.67, l. 23 - p.68, l. 3). Mr. Pertuis also requested a time line for completing the documents. (R.p.68, ll.17-24). The response was sometime in July 2009. (R.p.68, l. 25 - p.69, l. 2).

Mr. Hammond subsequently responded to his counterproposal. (R.p.69, ll.12-19;

p.456). 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." (R.p.69, ll.22-25).

Thereafter Mr. Pertuis' annual salary was \$67,000 and Mr. Hammond conveyed the boat to him. (R.p.70, ll.4-13). Mr. Hammond did not give him a stock certificate for 10% of Front Roe. (R.p.70, 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. (R.p.70, l. 19 - p.71, l. 1). The Hammonds always responded that the documents were coming. (R.p.71, 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. (R.p.71, 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." (R.p.71, l. 21 - p.72, l. 9).

In October 2009, Mr. Pertuis confronted Mr. Hammond with his frustration over no documentation. (R.p.73, ll.6-9). Mr. Pertuis wrote an email on October 6, 2009, enumerating the issues he was experiencing at the time. (R.p.131, l. 22 - p.132, l. 2). Mr. Pertuis mentioned that he had not received his 1% distribution. (R.p.133, l. 18 - p.134, l. 5). He said nothing, however, about being treated unfairly. (R.p.132, ll.3-17). Mr. Pertuis told the Hammonds he "needed some time to clear my head." (R.p.73, ll.12-19; p.131, ll.9-18; pp.550-553). Mr. Hammond told him to call the lawyer and the documents should be done, and Mr. Pertuis did so. (R.p.73, l. 21 - p.74, l. 2). The lawyer working on the documents was out sick. (R.p.74, ll.4-7; p.133, ll.7-11).

Mr. Pertuis then took 10 days off to consider his situation with the Hammonds and the business. (R.p.74, ll.8-10). Mr. Pertuis exchanged emails with Mr. Hammond during this time and Mr. Hammond suggested they meet. (R.p.74, ll.11-24). They met in Columbus, North Carolina, so Mr. Hammond could address the situation. (R.p.74, l.25-p.75 l.2; p.134, ll.10-17). Mr. Hammond answered the questions Mr. Pertuis had sent him but he could not recall the details of the conversation. (R.p.75, ll.4-8; p.134, l.17-p.135, l.4). Mr. Pertuis continued his time off to consider the situation. (R.p.75, 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. (R.p.75, ll.21-24). Mr. Pertuis began to drive toward the Hammond's home on the appointed date, but he was late. (R.p.76, ll.2-5; p.135, 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. (R.p.76, ll.5-8; p.135, l. 12). This was the location for the meeting "if there was going to be termination." (R.p.76, ll.9-11).

Mr. Hammond and Mr. Pertuis met in one of the banquet rooms. (R.p.76, 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." (R.p.76, ll.16-22; p.138, ll.12-24). Mr. Pertuis responded "okay." (R.p.76, ll.23-24; p.138, l. 24). He asked Mr. Hammond to allow him to tell the staff and he then told them simply that he was moving on. (R.p.77, 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." (R.p.77, ll.10-14). Because Mrs. Hamnond 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. (R.p.77, 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. (R.p.136, l. 16 - p.138, l. 10).

Mr. Hammond told Mr. Pertuis that the Hammonds had decided to buy Mr. Pertuis' shares. (R.p.77, ll.18-23). Mr. Hammond said he would get with his accountant and present Mr. Pertuis with a price. (R.p.77, l. 24 - p.78, l. 2). Mr. Hammond eventually presented an offer of \$12,000 if Mr. Pertuis would return the boat, meaning the net offer was zero. (R.p.78, ll.5-23; p.141, l. 9 - p.142, l. 1; p.555).

On December 2, 2009, Mr. Hammond sent Mr. Pertuis an email stating they were rescinding the offer to purchase Mr. Pertuis' stock interest. (R.p.79, 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. (R.p.79, ll.20-23). Mr. Pertuis took this to mean the offer was "off the table." (R.p.79, ll.24-25; p.457). Mr. Pertuis responded that he needed information to obtain a third party evaluation. (R.p.80, 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.

(R.p.80, l. 16 - p.81, l. 4; p.144, l. 17 - p.145, l. 1; p.561). Mr. Pertuis said nothing about the Hammonds mistreating him. (R.p.145, ll.2-4).

Mr. Pertuis received no documents during the time he took off. (R.p.81, ll.5-13). He also received no further offers to purchase his stock. (R.p.81, ll.14-16). He sold the boat about a year and a half before trial. (R.p.81, ll.19-23).

Mr. Pertuis hired Charles Alford to perform a third-party evaluation of the company. (R.p.82, ll.9-15). Mr. Alford asked for financial documents and records. (R.p.82, ll.16-22; p.83, ll.12-17). Although Mr. Pertuis received some documents from the accountant, he never received anything for Mr. Alford's use. (R.p.83, 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. (R.p.86, ll.1-20; p.147, l. 13 - p.148, l. 5). His response stated that he wanted the documents "unrestricted in any way." (R.p.148, ll.21-24; p.579). Once the court entered a protective order he received the information he sought. (R.p.149, ll.5-12).

After Mr. Pertuis left the company on October 12, 2009, he did not do anything for about six months. (R.p.84, ll.4-8). He posted his resume on "Monster.com" soliciting work as "a restaurant consultant." (R.p.142, l. 11 - p.143, l. 5). Anyone wanting to retain his services likely would have included a competitor of Larkins. (R.p.143, ll.6-9). During this time Mr. Pertuis was requesting financial information from the Hammonds. (R.p.145, l. 5 - p.146, l. 12; p.563). In March 2010, he took a position as a management consultant working for a company out of Chicago, Illinois. (R.p.84, ll.14-21). That job lasted a little over one year. (R.p.84, 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. (R.p.85, 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." (R.p.85, ll.22-25).

Appellants objected to this line of questioning on grounds of relevance. (R.p.85, 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." (R.p.85, 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...." (R.p.85, ll.7-10). The court simply stated, "well, go ahead. Go ahead." (R.p.85, l. 11). Mr. Pertuis agreed there was nothing in his pleadings about wrongful termination. (R.p.139, ll.3-22; pp.965-972). He also admitted that he stated in an email in January 2010 that he "resigned" before the documents were finalized. (R.p.146, l. 13 - p.147, l. 1).

Mr. Pertuis stated that during the period 2005 through 2008, the Hammonds were treating the businesses as a partnership. (R.p.51, ll.16-18). He agreed there were exchanges of funds and personnel between the businesses. (R.p.51, l. 22 - p.52, l. 1). Mr. Pertuis felt like he was included in the business planning meetings "for a reason." (R.p.52, ll.18-20). By the late summer or early fall 2009 Mr. Pertuis had been with the Hammonds 9 ½ years. (R.p.72, 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." (R.p.87, 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. (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 Mr. Pertuis 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 Mr. Pertuis 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). Mr. Pertuis 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).

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. (R.p.139, l. 18 - p.140, l. 13). Prior to November 2011, Mr. Pertuis did not allege any misconduct or minority oppression. (R.p.140, l. 14 - p.141, 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. (R.p.150, l.16-p.151, l.10). There was no way to determine whether he received a bonus or a distribution. (R.p.151, ll.7-13). Since he left Mr. Pertuis has not received any distributions. (R.p.419, ll.14-24). He also never received any notice of a shareholder meeting. (R.p.420, ll.1-11). He has received a K-1 showing his interests at 10% in Beachfront and Lake Point and 1% in Front Roe. (R.p.420, 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. (R.p.213, ll.3-9; p.974). The parties stipulated that Mr. Pertuis made no notification pursuant to § 6037 at any time since 2007. (R.p.213, ll.9-11; p.213, l. 23 - p. 214, l. 21; p.215, ll.1-4; p.974).

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. (R.p.227, 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. (R.p.228, ll.15-20). He stayed in the restaurant business and has been in that business ever since. (R.p.228, 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. (R.p.229, ll.1-8). He eventually was moved to the Human Resources Department in the training facility in Southern California. (R.p.229, ll.8-13). He was in that position for about 4 years. (R.p.229, ll.14-15). He then moved to a marketing focus and eventually moved to Arkansas in that capacity. (R.p.229, l. 16 - p. 230, l. 12). He spent about 15 of the 20 years in training and developing management. (R.p.230, ll.14-20).

The Hammonds loved the restaurant business and looked for opportunities to purchase a going concern. (R.p.230, ll.23-25). They did not have a lot of capital so they looked for someone who could "seller finance." (R.p.230, l. 25 - p.231, 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. (R.p.231, ll.2-5). They found the opportunity in North Carolina, met with the seller, reviewed the books with their accountant, and purchased the business. (R.p.231, ll.5-9).

The business was called "Jimmy's Original." (R.p.231, ll.10-11). They ran it under that name for a few months but eventually chose the name "Larkins on the Lake." (R.p.231, ll.13-16). This is now "Lake Point Restaurant." (R.p.231, ll.20-21). The Hammonds were originally the only shareholders. (R.p.231, l. 22 - p.232, l. 1). They financed the purchase and personally guaranteed the money. (R.p.232, ll.2-4). They also sold everything they could, including two boats and two cars they owned in Arkansas, for the down payment. (R.p.232, ll.5-7). The seller carried most of the financing, and the Hammonds obtained a small bank loan as a line of credit. (R.p.232, 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. (R.p.232, ll.14-22). The Hammonds found Mr. Pertuis' resume on the internet. (R.p.232, l. 23 - p.233, l. 4). In the summer 2000, or a little more than a year after the purchase, Mr. Pertuis came on board. (R.p.232, ll.10-12). The Hammonds hired him as their general manager for Larkins on the Lake. (R.p.233, ll.5-8). They agreed to relocate him and his wife. (R.p.233, ll.8-10). Although stock ownership may have been discussed there were no promises or arrangements made at that time. (R.p.233, ll.11-16). His compensation included a salary and a bonus based on profit targets. (R.p.238, l. 18 - p.241, l. 21).

At some point the Hammonds made the option of ownership available to Mr. Pertuis: (R.p.233, ll.17-18). They were very impressed with his dedication to the business and they wanted to do something that was mutually beneficial. (R.p.233, ll.21-24). They wanted to keep Mr. Pertuis aboard and give him an incentive to stay the next several years. (R.p.233, l. 24 - p.234, ll.1). They wanted him to share in the business he was helping to grow and develop and be a shareholder. (R.p.234, 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." (R.p.234, ll.6-9). It was important to have continuity and consistency in management. (R.p.234, 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." (R.p.234, ll.17-24; p.234, l.25-p.235, l.3).

A few years after Mr. Pertuis came on board the Hammonds had the opportunity to acquire another restaurant in town. (R.p.235, 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. (R.p.235, 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. (R.p.235, ll.12-15). They secured a loan from a local bank, purchased the business (Beachfront) with some seller financing, and started to operate. (R.p.235, ll.15-16; p. 246, ll.2-7).

The Hammonds made Mr. Pertuis the same ownership offer that they made him

for Lake Point. (R.p.235, ll.17-20). They would grant him shares of corporate stock based on a vesting schedule over time. (R.p.235, 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." (R.p.235, ll.21-24). The longer he stayed the more ownership he gained in Beachfront similarly to the Lake Point arrangement. (R.p.235, l. 24 - p. 236, l. 1; p.309, l. 22 - p. 310, l. 7). By 2005 Mr. Pertuis was vested 10% in both Beachfront and Lake Point. (R.p.317, ll.15-25).

Some friends of the Hammonds who lived in Greenville also had a home at Lake Lure. (R.p.248, 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." (R.p.248, ll.16-24). Mr. Rock was interested in selling the restaurant but had not decided on a price. (R.p.248, l. 23 - p.249, 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. (R.p.249, 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. (R.p.251, ll.19-24). The Hammonds were able to assume the owner's loan as part of the purchase price. (R.p.251, l. 25 - 252, l. 2). Mr. Hammond then secured financing from another bank for part, and the rest came from the Hammonds' savings. (R.p.252, ll.2-4). The loans were secured by mortgages on the Hammonds' home. (R.p.252, ll.5-15). The financial risk at Front Roe was significantly higher than the other two businesses. (R.p.252, ll.16-18). The Hammonds paid \$1.205 million for the restaurant. (R.p.349, ll.10-14).

Front Roe is under a lease with the Peace Center. (R.p.289, ll.17-19). They negotiated a new lease for 18 years - an initial 3-year term and three five-year options. (R.p.289, l. 21 - p.290, l. 3). At the time of trial they had 9 ½ years left. (R.p.290, ll.4-6). In recent years the Peace Center has renovated its facility, increased the rent, and opened a competing restaurant. (R.p.290, l. 7 - p.297, l. 6; p.956; p.958; p.964). The Peace Center has so far refused to extend the lease. (R.p.357, 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. (R.p.249, l. 22 - 250, l. 19). The ownership track of the other two restaurants was spread out over five years. (R.p.250, 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." (R.p.250, l. 23 - p. 251, 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%. (R.p.251, ll.10-18; p. 259, ll.23-25; p. 275, ll.21-24; p. 277, ll.9-20; p. 308, l. 24 - p. 309, l. 1; p. 311, l. 21 - p. 312, l. 5; p. 356, ll.9-13). Although they reduced this agreement to a writing, Mr. Hammond was unable to locate the document. (R.p.252, l. 25 - p.253, l. 6; p. 308, 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. (R.p.253, ll.7-14).

Mr. Pertuis moved from North Carolina to Greenville and the Hammonds paid for

a car in his name. (R.p.256, ll.6-13). They covered his expenses and the company loaned him \$10,000 as a down payment on a home. (R.p.256, ll.13-21). The loan was repaid through offsets from bonuses Mr. Pertuis was due. (R.p.256, l. 23 - p.257, l. 5). Mr. Pertuis agreed to the arrangement. (R.p.257, ll.10-14). They also increased his base salary from \$45,000 to \$55,000. (R.p.271, ll.18-19).

Mr. Hammond helped develop Mr. Pertuis professionally by regular personal coaching about the business. (R.p.215, ll.20-24; p. 236, l. 2 - p.238, l. 17; p.502). He paid for Mr. Pertuis to have executive coaching, attend workshops, and leadership seminars. (R.p.215, l. 25- p.216, l. 8). It was the Hammonds' intent to help Mr. Pertuis "become the best manager for our business as possible." (R.p.216, ll.8-10). Mr. Pertuis was the "director of operations" for the restaurants. (R.p.249, 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. (R.p.227, l. 21 - p.228, l. 6; p.278, l. 20 - p.279, l. 1; p.320, ll.15-16; p.323, ll.14-18).

Both of the North Carolina restaurants were seasonal, making profits only from Memorial Day to Labor day. (R.p.246, ll.12-20; p.280, l. 23 - p.281, l. 1). Sometimes the restaurants needed cash infusions to make payroll and continue operation during the off-season. (R.p.246, 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. (R.p.247, ll.3-14). Mr. Pertuis knew money was being loaned but voiced no objection. (R.p.247, 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. (R.p.248, ll.1-8). Mr. Pertuis never made any capital contribution or loan to any of the three companies. (R.p.252, ll. 19-24).

In 2005, Front Roe had not performed at a level where Mr. Pertuis had vested any interest. (R.p.254, ll.22-25). After 2006 the restaurant finally turned from a negative to a positive in operating income. (R.p.255, ll.1-4). At that point Mr. Pertuis was granted a 1% interest. (R.p.255, ll.5-7; p.320, ll.10-11). Front Roe never achieved net profit of \$500,000, however. (R.p.275, l.25-p.276, l.3).

The vesting threshold for Front Roe never changed. (R.p.308, 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." (R.p.276, 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. (R.p.242, l. 17 - p.244, l. 9; p.253, l. 15 - p.254, l. 13; p.505; p.507; p.508; p.509; p.511). 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." (R.p.244, ll.10 - p.245, 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. (R.p.255, l. 24 - p. 256, l. 1). Then if Mr. Pertuis had more bonus than his shareholder distributions would allow, they would run it through payroll.(R.p.256, ll.2-4). Treating the bonus in this manner helped Mr. Pertuis with tax treatment. (R.p.274, ll.15-20). Any time Mr. Pertuis was entitled to a distribution he received it. (R.p.330, ll.20-25).

By 2007, the lease on the property upon which Lake Point sat was coming to an end. (R.p.265, ll.15-19). The Hammonds had tried to acquire the property and by 2007, the owner agreed to sell it to them. (R.p.265, ll.19-21; p.318, l. 6). The Hammonds felt it was imperative to acquire the property to continue the enterprise beyond the existing lease. (R.p.266, 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. (R.p.266, ll.5-8). He met with the seller's attorney and accountant and then agreed to a price. (R.p.266, ll.8-10). The seller gave them a 30-year fixed mortgage. (R.p.266, ll.12-16). Lake Point now pays rent to the new real estate holding company the Hammonds formed, Largo Properties, LLC. (R.p.266, l. 17 - p.267, l. 10; p.268, ll.1-11). Because of the drop in the real estate market since 2007, however, the Hammonds owe more on the property than it was worth. (R.p.267, ll.11-17). They personally guaranteed repayment of the loan. (R.p.268, 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. (R.p.267, ll.18-20). At no point did Mr. Pertuis ask to participate in the acquisition. (R.p.267, 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. (R.p.318, ll.7-22).

In 2008 Mr. Pertuis and Mr. Hammond had a conversation regarding Mr. Pertuis' future. (R.p.257, l. 17 - p.258, l. 1). Mr. Hammond wrote a memorandum regarding some of the questions Mr. Pertuis had. (R.p.257, l. 24 - p. 258, l. 7; p.511). The memo sets forth options for Mr. Pertuis going forward, including the "hope" that he would become a

10% owner in Front Roe. (R.p.258, ll.11-16). This was based on a trend in Greenville in 2007 that indicated the restaurant would reach the necessary threshold in 2008. (R.p.258, l. 17 - p.259, l. 3; p.260, l. 13 - p.261, l. 1).

In January 2009, Mr. Pertuis sent Mr. Hammond an email with a list of questions about Mr. Pertuis' future. (R.p.261, l. 13 - p.262, l. 18; p.514). 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. (R.p.262, l. 19 - p.263, l. 10; p.515). 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. (R.p.263, l. 22 - p.264, l. 12; p.264, l. 23 - p.265, l. 3; p.268, l. 15 - p.269, l. 25; p.336, l. 25 - p.337, l. 14; p.539). Mr. Pertuis was to provide a draft of an employment or buy/sell agreement including language to address his concerns. (R.p.264, ll.15-17). They anticipated the document would be drafted by April 30, 2009. (R.p.264, ll.17-18). Mr. Pertuis presented a draft agreement. (R.p.264, ll.19-22; p.517).

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. (R.p.265, ll.7-10). There were different leases and tax elements and would have been to no one's benefit. (R.p.265, ll.11-14).

In June 2009, Mr. Hammond sent Mr. Pertuis 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 Mr. Pertuis to choose regarding his future compensation. (R.p.270, l. 21 - p.271, l. 12). This included payment to Mr. Pertuis of 8% of "net shareholder distributions." (R.p.271, ll.20-25). At the time Mr. Pertuis 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 Mr. Pertuis 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 Mr. Pertuis' ownership as more than 1% in Front Roe. (R.p.276, ll.9-18). Mr. Pertuis 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). 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." (R.p.278, ll.13-19; p.543). It was clear to them both 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).

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. (R.p.217, ll.13-18).

Paramount to that would be getting some kind of shareholder agreement in place.

(R.p.217, ll.18-19). The summer months are busy for Larkin's on the River because of various activities, including weddings and a concert series. (R.p.279, l. 24 - p.280, l. 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. (R.p.217, ll.20-25).

Corporate counsel was drafting those documents toward the end of the summer and the beginning of the fall 2009. (R.p.218, ll.3-5; p.281, ll.2-16; p.283, 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. (R.p.284, 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. (R.p.216, ll.15-18; p.217, 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." (R.p.216, 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." (R.p.216, l. 24 - p.217, 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. (R.p.218, ll.10-14).

Mr. Hammond stayed in touch with Mr. Pertuis during the week off. (R.p.218, ll.15-17). He offered to meet with Mr. Pertuis which Mr. Pertuis felt was helpful. (R.p.218, ll.18-19; p.283, ll.7-16; pp.550-553). They met about mid-week so 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. (R.p.218, 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. (R.p.219, 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. Once 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.

(R.p.219, ll.6-18). At the end of the meeting Mr. Pertuis did not indicate to Mr. Hammond the direction in which he was leaning. (R.p.219, ll.19-24). All Mr. Hammond wanted Mr. Pertuis to do was "to make a decision that was going to work for him." (R.p.220, 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." (R.p.220, ll.19-25; p.313, 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. (R.p.220, l. 25 - p.221, l. 3).

The following Sunday the Hammonds were in Greenville for the Fall Festival.

(R.p.220, ll.16-19). Larkins had a booth at the festival. (R.p.221, ll.4-8). They ran into Mr. Pertuis and his family. (R.p.221, 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. (R.p.221, ll.12-16; p.314, l. 20 - p.315, l. 1; p.352, ll.14-21). The next day Mr. Pertuis was late and around 9:20 a.m. Mr. Hammond called him. (R.p.221, ll.20-23; p.315, 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. (R.p.221, ll.23-24; p.352, l.25-p.353, l. 19)

Mr. Hammond was disappointed but was not angry. (R.p.221, l. 25 - p.222, l. 1). The Hammonds drove to Greenville and met Mr. Pertuis at Larkins on the River. (R.p.222, 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. (R.p.222, ll.6-18). Mr. Pertuis wanted to say goodbye to the staff and Mr. Hammond agreed. (R.p.315, l. 25 - p. 316, 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." (R.p.316, ll.2-12; p. 316, l. 22 - p.317, l. 10; p.353, 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. (R.p.222, l. 21 - p.223, l. 9). After Mr. Pertuis left the revenue at Front Roe was in a steady increase the same as almost any restaurant in Greenville. (R.p.223, ll.10-18).

Mr. Hammond denied that he fired Mr. Pertuis. (R.p.215, ll.18-19; p.313, 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. (R.p.218, 6-8; p.219, 1.25-p.220, 1.2).

Once Mr. Pertuis resigned, Mr. Hammond asked for his keys and for the return of the boat's title. (R.p.223, 11.19-23). 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. (R.p.223, 1.24-p.224, 1.4). They paid Mr. Pertuis through the end of that month. (R.p.224, 11.5-10).

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. (R.p.284, 1. 20 - p.285, 1. 4; p.554). Mr. Hammond looked at the most recent records that were completed, which were the 2007 tax returns. (R.p.224, 11.19-20). He also looked at what the Quickbooks showed for 2008 in terms of cash flow, book value, and intrinsic value. (R.p.224, 11.20-22). Mr. Hammond then came up with a "rough number" and talked with the accountant who "kind of concurred." (R.p.224, 11.22-24). They applied "the normal minority shareholder interest discounts" and came up with a value of about \$12,000 to \$15,000. (R.p.224, 1. 24 - p.225, 1. 1; p.350, 1. 10 - p.351, 1. 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." (R.p.225, 11.2-8).

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." (R.p.225, 11.9-19; p. 285, 11.8-23; p.563). 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. (R.p.225, l. 23 - p.226, l. 6). Mr. Hammond was willing to provide the information if Mr. Pertuis would enter into a confidentiality agreement. (R.p.226, ll.7-9). He presented a draft agreement to Mr. Pertuis and would have removed any recitations that were unnecessary to the document. (R.p.226, ll.10-24).

Mr. Pertuis was unwilling to enter into a confidentiality agreement so Mr. Hammond talked with their attorney. (R.p.226, l. 25 - p. 227, 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. (R.p.227, ll.3-10). The information was ultimately forwarded to Mr. Pertuis' lawyer. (R.p.286, l.6-p.289, l. 9; p.563; p.889; p.904; p.918).

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. (R.p.227, ll.14-20). He had never said that he believed that Mr. Hammond or the company had done anything illegal. (R.p.228, ll.2-6).

Mr. Hammond discussed the boat transfer. (R.pp.547-549). The Hammonds had bought the boat for themselves. (R.p.281, ll.21-25). A year or two later they wanted to buy a different boat. (R.p.281, l. 25 - p.282, l. 1). They gave the first boat to the restaurant to use for business and pleasure and kept the boat at the restaurant. (R.p.282, ll.1-6). The insurance cost for corporate ownership was about 10 times what private ownership would be. (R.p.282, ll.7-13). The Hammonds approached the general manager, Louis Bentley,

but he was apprehensive about transferring the title to him. (R.p.282, ll.13-16). Mr. Hammond then talked with Mr. Pertuis, who agreed to title it in his name. (R.p.282, 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. (R.p.282, ll.19-23). Lake Point restaurants paid the insurance. (R.p.282, l. 24 - p.283, l. 4; pp.547-549). The boat was included as part of Mr. Pertuis' compensation package. (R.p.333, ll.4-9; p.338, 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." (R.p.342, l. 16 - p.343, l. 12). The corporations loaned money to the new entity. (R.p.343, ll.13-25; p.345, 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. (R.p.344, ll.9-14).

The shareholders met at least once a year, although they met more often than that. (R.p.346, ll.16-17). There was no notices of shareholder meetings. (R.p.346, l. 18- p.347, l. 3). There was no agenda for the meetings sent out. (R.p.347, ll.4-6). Mr. Pertuis was never afforded the chance to vote on the directors. (R.p.347, ll.7-11). They also do not have formal minutes. (R.p.348, l. 7 - 325, l. 9).

Mr. Hammond stated the three corporations have common officers and directors. (R.p.358, ll.5-9). They are in different locations and do not share the same phone numbers. (R.p.358, ll.10-15). 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). The shareholder interests are not the same in all three, and they are not all incorporated in

the same state. (R.p.358, ll.1-5). Front Roe files taxes in South Carolina, while Lake Point and Beachfront file in North Carolina. (R.p.359, ll.6-13). The corporations all have separate loan obligations to third parties. (R.p.359, l. 24 - p.360, l. 1). They each have separate contracts with third parties. (R.p.360, ll.2-4). They have separate accounting records, bank records, and credit cards. (R.p.360, 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.” (R.p.6). 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 (R.p.6). 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 Beachfront³ 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.” (R. p.173, ll.23-24; p.175, ll.15-21). Louis Manios valued Beachfront at a negative <-\$620,000>. (R. p.381, l.25-p.382, l.12). The trial court found Beachfront had “no value,” (R. p.10) 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. (R. pp.7-8). 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]." (R. p. 8; 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. (R. p. 8, 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 than the other two businesses. (R. pp. 100-104).

Mr. Pertuis agreed to this different arrangement for Front Roe. (R.p.103, l. 25 - p. 104, l. 1). Mr. Pertuis also agreed that Front Roe never achieved the profit margin necessary to get Mr. Pertuis to 10% ownership. (R.p.104, l. 2 - p.105, l. 7; p.127, 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. (R.p.105, l. 9 - p.106, l. 4). He was listed as a 1% owner on the tax documents that he received each year but voiced no objection. (R.p.49, l. 23 - p.50, l. 10; p.120, ll.5-15; pp.812-888). 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. (R.p.116, l. 25 - p.117, l. 2; p.128, 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 be done," citing to *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938). (R.p.8). *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.” (R. p. 7). The court then valued Mr. Pertuis combined 10% interest in these entities at \$507,000. (R. pp. 13-14). 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>. (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 trial court, however, found Beachfront had “no value,” (R. p. 10) but the only evidence is a negative value.

This finding, therefore, lacks support in the record. *See Silver v. Abstract 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. (R. pp. 8-9). 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.” (R. p. 9). The court stated Mr. Pertuis “was excluded from a real estate opportunity in connection with [Larkins on the River].” (R. p. 9). 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. (R. pp. 42-43, 98-99). 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.” (R. p. 9). The only evidence was that Pertuis 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.” (R. p. 9). 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.” (R. p. 9). 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. (R. p. 9). 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." (R. p. 12). 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." (R pp. 10-11). 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." (R. p. 9). 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].” (R p. 11). 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.

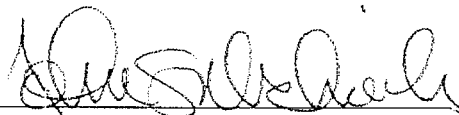
207 S.C. 63, 68-69, 34 S.E.2d 488, 490 (1945) (Citations omitted).

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,



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December 3, 2014

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.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

WHERE CORPORATIONS WERE UNITED FOR TRIAL, AS A *DE FACTO* PARTNERSHIP,
CAN THE CORPORATIONS BE SEPARATELY VALUED?

WHERE MANAGING GENERAL PARTNER OF *DE FACTO* PARTNERSHIP
WAS RELOCATED TO GREENVILLE S.C., FROM WHICH
CENTRAL LOCATION THE OVERALL BUSINESS ACTIVITIES
OF THE *DE FACTO* PARTNERSHIP WERE SUPERVISED AND CONDUCTED,
IS NERVE CENTER OF PARTNERSHIP GREENVILLE, S.C.?

WHERE MAJORITY SHAREHOLDERS BREACHED PROMISE
MADE TO MINORITY SHAREHOLDER TO GRANT INCREASED EQUITY IN
CORPORATION, CAN COURT EQUITABLY ENFORCE PROMISE?

CAN MAJORITY SHAREHOLDERS COMPLAIN THAT VALUATION
OF CORPORATION DID NOT REFLECT
BUSINESS REALITY AFTER MAJORITY SHAREHOLDERS
HAD MANIPULATED VALUE OF CORPORATION,
FOR BENEFIT OF MAJORITY SHAREHOLDERS?

WHERE MAJORITY SHAREHOLDERS ENGAGE IN AN ONGOING
BAIT AND SWITCH PROGRAM DESIGNED TO RETAIN
MINORITY SHAREHOLDER'S EMPLOYMENT WITHOUT
ISSUING PROMISED STOCK TO MINORITY SHAREHOLDER, HAS
MATERIAL BREACH OF CORPORATE FIDUCIARY DUTIES OCCURRED?

WHERE MAJORITY SHAREHOLDER ADMITS
THAT BONUSES PAYABLE TO EMPLOYEE/MINORITY SHAREHOLDER
WERE DISGUISED AS CORPORATE DISTRIBUTIONS,
AND WHERE MINORITY SHAREHOLDER NEVER
ACTUALLY RECEIVED DISTRIBUTIONS, CAN
MAJORITY SHAREHOLDER OBJECT TO COURT
ORDERING THAT DISTRIBUTIONS BE ACTUALLY MADE?

STATEMENT OF THE CASE

This case arose from the refusal of Appellants/Respondents, (jointly, Mark and Larkin Hammond, and the three appealing corporate entities, “Larkins Restaurant Group”) to provide Respondent/Appellant minority shareholder, (“Pertuis”), fair access to the financial records of Larkins Restaurant Group. Mark Hammond would not allow access to the corporate records of Larkins Restaurant Group unless Pertuis waived his shareholder claims. Pertuis refused to waive his shareholder claims. Mark Hammond and Larkins Restaurant Group (who have *jointly* shared common counsel throughout this case) then commenced this action, on March 1, 2010, purportedly to protect the confidentiality of the corporate financial records sought by Pertuis. The Lower Court ordered confidentiality for the corporate financial records. After the Lower Court’s protective order, however, Pertuis, had to file numerous Motions to Compel, to secure the corporate financial records which he needed. (R.pp. 976-980).

In 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 shareholder position.

The parties were realigned, so that Pertuis became Plaintiff, and Mark Hammond and Larkins Restaurant Group became Defendants.

A non-jury trial was held in this case on May 28, 29, 2013. Mark Hammond and Larkins Restaurant Group filed their motion for directed verdict on May 31, 2013, because the Lower Court did not entertain post-trial motions, in court, at the conclusion of the case.

On June 18, 2013, the Lower Court announced its decision: the Lower Court

amalgamated the corporate entities, Larkins Restaurant Group, treating them as one unified business operation; the Lower Court awarded Pertuis, based on his oppression as a minority shareholder, a 7.2% interest in Front Roe Restaurants, Inc., the Lower Court awarded Pertuis \$99,116 for distributions which Pertuis should have received, had Pertuis been a 7.2% shareholder; the Lower Court ordered a buyout of Pertuis' shareholder interests in Larkins Restaurant Group. The Court entered its First Order on July 3, 2013, relying on a submission by counsel for Pertuis, which had also been sent to counsel for Defendants prior to the Lower Court's ruling.

On July 19, 2013, Mark and Larkin Hammond and Larkins Restaurant Group filed their joint Motion to Alter or Amend the Lower Court's First Order of July 3, 2013. As partial basis for the relief sought, defendants asserted that there had been *ex parte* communication between counsel for Pertuis and the Court, due to counsel sending a submission to the Court, prior to sending the submission to counsel for Defendants. The Lower Court issued its Second Order, granting partial relief to Defendants for arithmetical errors in the First Order and emphatically stating that there had been no decision made on the submission by counsel for Pertuis, until after the submission had been received by counsel for Mark and Larkin Hammond and Larkins Restaurant Group.

STANDARD OF REVIEW

This appeal arises from the Lower Court's adjudication of shareholder oppression claims. *Ballard v. Roberson*, 399 SC 588, 733 SE2d 107 (S.Ct. 2012), citing *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct.App.2009), holds that a shareholder oppression action is one in equity. This Court may, therefore, find facts, in this case, according to its own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d

21, 24 (S.Ct. 2011). This broad scope does not, however, relieve the appellant of his burden to show that the trial court erred in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (S.Ct. 2001). *Pinckney* also stands for the proposition that an appellate review of an equitable action for shareholder oppression does not require that the Appellate Court disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses. *Pinckney, supra*, at 387, 544 S.E.2d at 622.

FACTS

Insofar as the standard of review for a shareholder oppression case, such as this, is trial *de novo*, Pertuis offers the following facts and the following Exhibits for consideration.

Kyle Pertuis, (“Pertuis”), met **Mark and Larkin Hammond**,¹ (“Mark Hammond”), in 2000, when Pertuis was employed at an upscale restaurant in Arkansas. (R.p. 34, ll. 14-19). At the time of the initial meeting with Pertuis, Mark Hammond a restaurant on Lake Lure, N.C. (“Larkins on the Lake”). (R.p. 35, ll. 6-10). Mark Hammond hired Pertuis to become the general manager for the day-to-day operations of Larkins on the Lake and to upgrade the menu of the restaurant. (R.p. 12, ll. 13-17). Larkins on the Lake was owned by Lake Point Restaurant, Inc. (“LP”). At the time of hiring Pertuis, Mark Hammond had limited restaurant experience from supervising Taco Bell operators for Pepsico, (R.p. 229, ll. 15-24). Hammond, therefore, needed help from Pertuis in learning how to run a full-service restaurant. (R.p. 313, l. 17-p. 314, l. 19).

¹Larkin Hammond made no appearance at any stage of this case; she is implicitly referred to in all references to “Mark Hammond,” though, because she and her husband constitute the majority shareholder bloc in each of the corporations which are parties to this action.

Pertuis was successful in improving the profitability of Larkins on the Lake. (R.p. 36, l. 24 - p. 37, l. 9). So, to insure Pertuis' continued involvement, Mark Hammond and Pertuis agreed on an employment agreement and a five-year shareholder vesting schedule with LP. (R.p. 234, ll. 4-24). Pertuis became a 10% shareholder in LP. (R.p. 40, ll. 21-24).

Mark Hammond acquired another restaurant at Lake Lure, which became named Malarkie's. (R.p. 41, ll. 10-14). Malarkie's was owned by Beachfront Foods, Inc. ("BF") (R.p. 41, 2-7). To insure Pertuis' commitment to the success of Malarkie's, Mark Hammond and Pertuis entered into an employment agreement and a five-year shareholder vesting schedule with Pertuis earning BF stock on a graduated schedule. (R.p. 40, ll. 14-20, p. 234, ll. 4-9). Pertuis became a 10% shareholder in BF. (R.p. 40, ll. 21-24).

In 2007, Beachfront Foods, Inc., sold Malarkie's. (R.p. 41, ll. 5-7). BF then built a restaurant in Columbus, N.C., "Larkins Carolina Grill." (R.p. p. 41, ll 10-19). BF currently owns and operates Larkins Carolina Grill. (R. p. 41, ll. 9-16). Larkins Carolina Grill does not, however, thrive; Mark Hammond keeps Larkins Carolina Grill operating with loans from Larkins Restaurant Group, for which there are no promissory notes and for which there are not any interest payments made. (R.p. 305, ll. 1-10)(Pltf. Exh. 9, R. p. 488). BF will turn profitable after the bank financing has been satisfied. (R.p. 324, l. 24-p. 325, l. 9). Mark Hammond supports BF with loans to avoid Mark Hammond's personal liability for the BF's bank loan. (R.p. 324, l. 24-p. 325, l. 5).

In 2007, Mark Hammond individually purchased the real estate location on which Larkins on the Lake was located. (R.p. 42, l. 6-p. 43, l. 8). Participation in the acquisition was not offered to Pertuis or to BF by Mark Hammond. (R.p. 42, l. 24-p. 43, l. 8; R. p. 318, l. 1-p. 319, l. 18). There was discussion with Pertuis about the real estate transaction. (R. p. 266, l. 5-

p. 267, l. 17). But, there is no record of offering this opportunity to any of the corporations jointly owned by Mark Hammond and Pertuis; Mark Hammond created a separate LLC for the ownership of the real estate. (R.p. 318, l. 1-l. 22). Mark Hammond will not concede that the opportunity of the business location for Larkins on the Lake Restaurant could properly belong to the Lake Point Restaurants, Inc., the owner of Larkins on the Lake, in which Pertuis was also a shareholder. (R.p. 319, ll. 4-18).

In 2005, a restaurant location at the Peace Center in Greenville became available. (R.p. 44, ll. 7-14). Mark Hammond purchased the restaurant for approximately 1.5 million dollars. (R.p. 44, ll. 19-25). Pertuis moved to Greenville to better manage the Greenville location, for which he was the General Manager and to provide supervision for the other locations. (Defendants' Exh. 5, R. p. 509; R. p. 47, l. 18-p. 48, l. 5). The new restaurant was named Larkins on the River; it was, and is, owned and operated by a corporation, Front Roe Restaurants, Inc. ("FRR")².

Mark Hammond and Pertuis agreed that Pertuis would be compensated additionally for his supervision of the new restaurant, Larkins on the River. (Def. Ex. 5, R. p. 509). Pertuis was promised a vesting schedule for Pertuis to become a 10% shareholder in FRR, but Mark Hammond cannot find a copy of the vesting agreement. (R.p. 253, ll. 4-6; R. p. 323, ll. 10-16). Mark Hammond granted Pertuis a 1% ownership interest in FRR (R.p. 251, ll. 8-18), but Mark Hammond denied that Pertuis had qualified for the vesting of his full 10% interest in FRR. (Pltf. Exh. 5, R. p. 509). Under Pertuis' management, the revenues of Larkins on the River improved from 1million to 3.5 million from 2005 to 2008. (R.p. 50, ll. 11-16). Throughout this period,

²Mark Hammond referred to the group of restaurants as "Larkins Restaurants, Inc." (Def. Exh. 5, R. p. 509).

Mark Hammond is operating the three corporations as a partnership. (Def. Exh. 5, R. p. 509). The corporations all have the same shareholders, directors. (R.p. 358, ll. 5-9). There were no shareholder meetings, no meetings of Boards of Directors, no minutes of meetings. (R.p. 346, l. 10-p. 347, l. 14). There were frequent inter-corporate loans and transfers of funds. (R. p. 247, l. 3-p. 248, l. 12). Mark Hammon put together business plans every year, for the corporate members of Larkins Restaurant Group. (R.p. 239, ll. 4-20). The Larkins Restaurant Group is managed as Mark Hammond had, earlier in his career, managed various Taco Bell locations owned by a parent company, PepsiCo, (R.p. 241, ll. 18-21). While managing the corporations, Mark Hammond referred to the group of restaurants as "Larkins Restaurants, Inc." (Def. Ex. 5, R. p. 509). Mark Hammond prepared business plans from 2005 to 2008 for the restaurants. (R. p. 305, l. 11-p. 306, l. 12) , in the manner similar to his earlier management of Taco Bells for PepsiCo.

In late 2008, Pertuis became restive about his ownership in Larkins on the River (R.p. 263, l. 1 10). Pertuis was concerned that the Larkins on the River vesting schedule was unavailable, and it appeared that the threshold figure for Pertuis to become a 10% shareholder was protean, subject to change at the whim of Mark Hammond. (R.p. 311, l. 2-p. 313, l. 1). An exchange of emails ensued. (Pltfs. Exhs. 5,6,7, R. pp.451-456). Pertuis submitted a proposed shareholder/compensation agreement for consideration by Mark Hammond. (Pltf. Exh. 4, R. p. pp. 447-450). Mark Hammond proposed a new compensation package with various options, including 10% ownership in Larkins on the River for Pertuis. (Pltf. Exh.5, R. p. 509; Deft. Exh .12, R. pp. 540-542). Pertuis counterproposed, accepting one of the options, which provided for compensation and 10% distributions in 2009 and thereafter. (Pltf.Exh. 6, R. p. 454-455). Mark Hammond accepted Pertuis' counterproposal which included 10% distributions from the

corporations, meaning that Pertuis would become a 10% shareholder in Larkins on the River, in 2009 and thereafter. (Plt. Exh. 7, R. p. 456). At last, Pertuis had written confirmation of his across-the-board ownership of 10% stock of all of the members of Larkins Restaurant Group, in 2009, which would have, according to Mark Hammond, a street value of \$250,000. (Pltf. Exh. 1, R. p. 424).

After one year and three months, in October, 2009, Pertuis still had not received formal documentation of the deal struck in the exchange of emails, during the previous summer. (R.p. 341, ll. 1-p. 342, l. 15). He wanted clarity for his status as an employee/shareholder. (R.p. 339, l. 18 -p. 340, l. 6). Mark Hammond would not explain his failure to proffer the documentation for Pertuis' receiving 10% ownership in Larkins on the River. (R.p. 341, l. 8 - p. 342, l. 9).

Another concern for Pertuis was the failure of Mark Hammond to make financial distributions to shareholders consistent with the corporate K-1 schedules for taxes. (R.p. 58, l. 16- p. 59, l. 7). Pertuis understood that Mark Hammond was disguising his bonus as a shareholder distribution, so he never knew if he had received his shareholder distribution, or a bonus. (R.p. 95, ll. 7-11; R.p. 96, ll. 1-6; R.p. 150, ll. 16-p. 151, l. 13). Mark Hammond conceded that Pertuis' bonus checks were being disguised as shareholder distributions. (R.p. p. 274, ll. 11-13). Dr. Alford testified that the bookkeeping of the Larkins Restaurant Group was "loose." (R.p.p. 183, l. 1- p. 184, l. 17).

Mark Hammond opened a new restaurant in Greenville named Grill Marks. (R.p. 342, ll. 16-23). Mark Hammond caused Larkins on the River to loan \$200,000 to Grill Marks. (R.p. 343, ll. 21-22). Mark Hammond caused Larkins on the Lake to loan \$75,000 to Grill Marks. (R.p. 342, ll. 18-20). Mark Hammond did not offer participation in the new business opportunity to any of the members of Larkins Restaurant Group, or to Pertuis, personally. (R.p.

344, ll. 9-17).

In October, 2009, Pertuis had become weary of seeking documentation of his employment/shareholder vesting status. (R.p. 70, l. 1- p. 71, l. 20). As a result of the failure of Mark Hammond to live to his promise to Pertuis, Pertuis resigned from his position as General Managing Partner of the Larkins Restaurant Group. (R.p. 73, l. 10-p. 77, l. 17). Mark Hammond directed Pertuis to come to Greenville, which was an agreed-upon signal that Pertuis was to resign. (R.p. p. 76, ll. 2-8). Mrs. Larkin Hammond knew, before the resignation was made, that Pertuis was no longer an employee. (R.p. 77, ll. 16-17).

Mark Hammond made an offer to purchase Pertuis' stock in the "Larkins Restaurants" in exchange for the return of a boat which earlier been conveyed to Pertuis as partial compensation for Pertuis. (R.p. 78, ll. 3-20). Pertuis determined that he should have a valuation of the Larkins Restaurant Group performed, so he could sensibly negotiate with Mark Hammond about the sale of his stock. (Pltf. Exh. 8, R.p. 457). Accordingly, Pertuis asked for copies of the financial records of the members of the Larkins Restaurant Group in which he was a shareholder." (Pltf. Exh. 8, R.p. 457). Mark Hammond refused to give Pertuis copies of the financial records, unless Pertuis signed a Confidentiality Agreement which stipulated that Pertuis only owned 1% of Larkins on the River. (Deft. Exhs. 36A, 37A, R. pp. 938-954). Pertuis refused to waive his claim for 10% ownership of Larkins on the River. (Deft. Exh. 26, R.p. 578).

Mark Hammond then commenced this action, seeking protection for the financial information of Larkins Restaurant Group.

ARGUMENTS

1. The Lower Court correctly ruled that the corporate entities in this action were operated together out of Greenville, SC.

a. Amalgamation.

During the trial of this case, Pertuis testified that the corporations share personnel, (R.p. 52, ll. 1-20), that he served as General Managing Partner for all of the corporations, (R.p. 47, ll. 6-21), that he had been relocated to Greenville, from which he managed all of the restaurants. (R.p. 47-6-21). Pertuis testified that he went to the various locations 4-6 days a week from Greenville and that he had contact with Mark Hammond everyday. (R.p. 48, ll. 4-22).

Mark Hammond testified that the business plans for the Larkins Restaurant Group were prepared together, (R.p. 305, ll. 11- p. 306, l. 14). Hammond conceded that Pertuis' title was "Managing General Partner," verifying that the Larkins Restaurant Group was being operated as a partnership with a General Managing Partner. (R.p. 326, ll. 1-8; cf. Pltf. Exh. 8, R. P. 509).

The Lower Court applied the holding in *Magnolia North Property Owners' Assn., Inc. v. Heritage Communities, Inc.*, 725 SE 2d 112, 397 SC 348 (Ct.App. 2012), 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 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 SC 588, 649SE2nd 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 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.

b. Severance for valuation.

Mark Hammond and Larkins Restaurant Group find irreconcilable conflict between the amalgamation of the corporate entities, for adjudication, and the severance of the entities for separate, individual economic valuation. Mark Hammond and Larkins Restaurant Group argue that the Lower Court determined that it could afford the aggrieved minority shareholder a forum in which to fully litigate his claims against all parties, by amalgamating the corporate entities. Accordingly, Mark Hammond and Larkins Restaurant Group argue, Pertuis must live with a consolidated value for the corporate entities as one business unit.

The Lower Court, however, permitted the valuation experts, Dr. Alford for Pertuis and Mr. Manios for Mark Hammond and Larkins Restaurant Group, to break down the amalgamated entities for evaluation purposes. Pertuis argues that it is entirely defensible to assert that, once amalgamated for adjudication, the entities may be separately and individually evaluated, because the valuation process is a subsequent, separate and distinct phase of equitably establishing the buyout price for the parties, or “fair value.”

Dr. Alford addressed the separate evaluation issue in his report:

1. There is disagreement as to ownership percentages;
2. The entities are in different locations and are quite diverse in terms of revenues and profitability;
3. One of the entities is leased from a related entity owned by Mr. and Mrs. Hammond.

(Pltf. Exh. 9, p. 2, R.p. 464).

Based on his observations, Dr. Alford proceeded with a separate valuation for each of the entities, seeking to reach a “fair price” for the corporations which were otherwise united for litigation purposes.

The valuation of Mr. Manios, who was the expert for Mark Hammond and Larkins Restaurant Group, did not disagree with Dr. Alford’s valuation of the members of Larkins Restaurant Group as separate entities.

Pertuis submits that amalgamation for consolidating shareholder claims in litigation does not dictate amalgamation for evaluation. Rather, Pertuis supports Dr. Alford’s observations that the unique economic features of the amalgamated entities and the dispute about ownership percentages requires the evaluator to look at the “fair value” of the entities separately.

II. The Lower Court properly found that the “nerve center” of the amalgamated “Larkins Restaurant Group” was, and is, Greenville, South Carolina.

From the myriad of jurisdictional challenges in State and Federal Courts, there has evolved a judicial doctrine which holds that the “nerve center” of a business entity is the location whence its officers direct, control, and coordinate the business activities of the entity.

Hertz Corp. v. Friend, 559 US 77, 130 S.Ct. 1181, 175 LED 2nd 1029 (2010). In this case, there is abundant evidence that, during all times pertinent to this case, the “Larkins Restaurant Group” was directed, controlled, and coordinated by Pertuis from the business location of Front Roe Restaurants, Inc., located on S. Main Street, Greenville, SC.

During the trial of this case, Pertuis testified that the corporations share personnel, (R.p. 52, l. 1), that he served as General Managing Partner for all of the corporations, (R.p. 47, ll. 18-p. 48, l. 5), and that he had been relocated to Greenville, from which he managed all of the restaurants. (R.p. 47, ll. 6-21). Pertuis testified that he went to the various locations 4-6 days a week from Greenville. (R.p. 48, ll. 6-17).

Mark Hammond testified Pertuis’ title was “Managing General Partner,” verifying that the Larkins Restaurant Group was being operated as a partnership with a *General Managing Partner located in Greenville, SC.* (R.p. 326, ll. 6-8; cf. Deft. Exh. 5, R. p. 509).

The preponderance of the facts adduced in this case confirms that the “nerve center” which was the principal place of the combined businesses entities operating as “Larkins Restaurant Group” was Greenville, South Carolina. *Hertz, supra.*

III. The Lower Court correctly applied equitable principles to enforce a minority shareholder’s rights to increased shares of stock, based on an offer and acceptance

and part performance by the parties.

By his email dated June 27, 2009, Mark Hammond presented Pertuis with several contractual options for Pertuis' future employment and shareholder vesting with Larkins on the River. (Pltf. Exh. 5, R.p. 452). Pertuis responded to Hammond's June 27th email with a proposed "NEW PLAN" for Pertuis' employment and shareholder vesting in FRR. (Pltf. Exh. 6, R.pp. 454, 455). Pertuis' email presented a chart with a 10% shareholder distribution for him, conveyance of a boat to Pertuis, and new disability insurance. (Pltf. Exh. 6, R.pp. 454, 455).

Further, Pertuis' email stated:

SHAREHOLDER DISTRIBUTIONS

If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership across the board. *Distributions going forward after the close of 2009 will be based on 10% ownership.*

(Pltf. Exh. 6; R.p. 454)(Emphasis Added).

By his email dated June 30, 2009, (Pltf. Exh. 7, R.p. 456), Mark Hammond accepted Pertuis' offer:

Thanks, Kyle. We're looking forward to the next 10 years also. *I'll get these details to Curt to incorporate into the employment agreement and ask him about the timeline as well.* (Emphasis added).

In his courtroom testimony, Mark Hammond conceded that he had agreed to Pertuis' counterproposal (R.p. 337, l. 2-p. 338, l. 10).

By any reasonable interpretation, the exchange set forth above, ("email agreement"), presents the classic offer and acceptance which creates an enforceable contractual agreement. Performance of the terms of the email agreement set forth above followed, while Pertuis and Mark Hammond waited for the formal documents from corporate counsel, Curt Stodghill. Indeed, the boat was conveyed to Pertuis and his salary was increased to match the employment

agreement. (R.p. 70, ll. 1-3; Rp. 337, l. 2-p. 338, l. 10). Pertuis pressed through the summer of 2009, and into the fall, for the documentation of the email agreement promised to him by Mark Hammond. (R.p., 71, ll. 14-20). Pertuis testified:

My frustration continued to build. It just seemed like there was one thing after another. These documents weren't being done. It had been months now since the agreement. It just, to me, continued to say nothing's going to happen. We're just going to keep playing this game. (R.p. 71, ll. 14-20).

One might fairly argue that Mark Hammond was not going to allow Pertuis to have documentation that he was to become a 10% of Larkins on the River Restaurant. Throughout this period, Pertuis was a minority shareholder in the Larkins Restaurant Group to whom Mark Hammond, as the majority shareholder, owed corporate fiduciary duties of, *inter alia*, complete honesty and fair dealing.

Pertuis' frustration with the lack of documentation for his achieving 10% ownership in Larkins on the River Restaurant was based on history. Earlier, there had been a document which set the level of performance of Larkins on the River Restaurant which would trigger vesting of an additional 9% shareholder ownership in Pertuis. Unhappily, the original written document has disappeared. Mark Hammond, throughout this matter, advised Pertuis that Larkins on the River Restaurant had not yet reached the goal line for Pertuis' vesting to occur. Yet, under Pertuis' management, Larkins on the River Restaurant had gone from gross revenues of \$1,000,000 in 2005 to \$3,500,000 in 2009. (R.p. 50, ll. 11-19). Yet, Mark Hammond claimed that the restaurant had not performed well enough to trigger vesting for Pertuis. Somehow, the goal line was being moved to prevent the vesting of 10% ownership in Pertuis. (R.p. 311, l. 10-p. 312, l. 5). Pertuis argues that Mark Hammond was doing a "bait and switch" on Pertuis to keep Pertuis employed while not giving Pertuis 10% ownership in Larkins on the River

Restaurant, as promised. In the corporate context, Mark Hammond had breached his fiduciary duty to honor his contractual obligation to convey 10% ownership to Pertuis, as demonstrated by the email agreement set out above.

The Lower Court, however, determined to apply equitable apportionment of Pertuis' vesting claim. Larkins on the River Restaurant had realized \$361,498 in net profits in 2008. (Deft. Exh. 31D, R.p. 832). Mark Hammond testified that the threshold figure for vesting was \$500,000. (R.p. 251, ll. 10-18). But, because Mark Hammond had materially breached his fiduciary duties to Pertuis, by "bait and switch" and by outright breach of the email agreement set forth above, the Lower Court, in its equitable power, determined that the damages sustained by Pertuis justified an award of 7.2% interest in Larkins on the River Restaurant.

The Lower Court employed equitable principles articulated in *Wilkie v. Philadelphia Life Ins. Co.*, 197 SE 375, 187 SC 382 (1938):

Equity regards and treats that as done which ought to be done, we note that 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.

Wilkie, supra, 187 SC at 394.

The foregoing equitable maxim was derived from an extensive extract cited in *Wilkie* by the Master in Equity, Richland County, from Volume 1, *Pomeroy's Equity Jurisprudence*, Fourth Edition, Section 364. A review of the extensive quotation³ included the notation that the maxim applied not only "to **express executory contracts**, and to those dispositions of property which

³The Supreme Court approved the findings and conclusions of the Master in Equity, Richland County, in *Wilkie*, including the citation and discussion from *Pomeroy*.

give rise to an equitable conversion...” The *Wilkie* case was founded on the application of the equitable maxim to effect equitable performance of an express executory contract, an insurance policy in *Wilkie*, just as the email agreement by which Pertuis was to receive 10% shareholder interest in Larkins on the River Restaurant was also an express executory contract.

The objection of Mark Hammond and the Larkins Restaurant Group to the Lower Court’s application of *Wilkie* is misplaced for the following reasons:

1. Hammond’s breach of his fiduciary duties to Pertuis amounts, under the email agreement which was supported by valuable consideration, to constructive fraud, for which equitable relief is appropriate;
2. In his Initial Brief, Hammond concedes that *Wilkie* should be applied to correct constructive fraud by employing a constructive trust;
3. The Lower Court has not re-written the parties’ contract; the email agreement established a contract for which performance by a fiduciary was required, and for the breach of which application of equitable principles is appropriate.
4. Hammond incorrectly characterizes the *Wilkie* case as not apposite for express executory contracts though it was thus employed by the Master of Equity, Richland County, with the approval of the SC Supreme Court;
5. Hammond incorrectly argues for a restrictive interpretation of the scope of application of the equitable maxim.

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.

IV. The Lower Court correctly found that Beachfront Foods, Inc., had a “zero” value for the buyout of an oppressed shareholder.

The parties to this action do not dispute that Pertuis was a 10% shareholder of Beachfront Foods, Inc., (“BF”). In its Order, dated July 3, 2013, the Lower Court assigned a “zero” value

to BF. Pertuis' 10% interest in BF, therefore, had "zero" value in the calculation of the ordered buyout of Pertuis 10% interest in BF.

Mark Hammond and Larkins Restaurant Group, however, object to the Lower Court concluding that BF had "zero" value for purposes of a court-ordered buyout of an oppressed shareholder. Indeed, Mark Hammond and Larkins Restaurant Group argue that BF had a *negative* value which should operate as a setoff against the values of the other corporate members of Larkins Restaurant Group.

Dr. Charles Alford, Ph.D., testified at the trial of this case. Dr. Alford also submitted a written report that documented his economic analysis of the value of the constituents of Larkins Restaurant Group, including BF. (Pltf. Exh. 8, R.p. 459). At Page 23, (R.p. 485), of his report, Dr. Alford noted that BF had a negative value. Dr. Alford further noted, however, that, excluding loans to BF by majority shareholders, would result in a "small positive adjusted net value." (Pltf. Exh. 8, R.p. 485) Dr. Alford concludes that net proceeds from the sale of BF would be used to pay off corporate obligations including the loans to BF from the majority shareholders. Dr. Alford stated: "Therefore final proceeds due to ownership would be \$0." (Pltf. Exh. 8, R.p. 485).

It is noteworthy that BF shows, (Pltf. Exh. 8, R.p. 488), a negative value in approximately the same amount as the amount of the loans made to BF by Mark Hammond and/or Larkins Restaurant Group. On cross-examination, Mark Hammond conceded that there were no promissory notes documenting the shareholder loans. Mark Hammond conceded that no interest had been paid on the shareholder loans. (R.p. 247, l. 3- p. 248, l. 12; R.p. 303, l. 12-p. 305, l. 10). Louis Manios testified on behalf of Mark Hammond and Larkins Restaurant Group. Mr. Manios was qualified as an expert whose area of expertise was accounting; he agreed that

financial statements should be governed by Generally Accepted Accounting Principles, (“GAAP”)(R.p. 386, ll. 14 -18). On examination, Mr. Manios conceded that an undocumented shareholder loan, on which no interest was paid, loses its qualification as a loan and, under GAAP, is treated as a contribution to equity, rather than debt. (R.p. 387, ll. 11-23; R.p. 395, l. 24-p. 398, l. 15). Mr. Manios’s otherwise opaque testimony left the clear impression that a stale note should have been capitalized on the books of BF and treated as equity.

Mark Hammond testified (R.p. 247, ll. 3-14) that the loans to BF were shown on the books as loans rather than as capital contribution to avoid dilution problems. Hammond testified that he did not wish for the loans to be classified as capital contributions, because, then Pertuis’ percentage would have been diluted, which Mark Hammond wished to avoid. (R.p. 247, ll. 3-14). Mark Hammond, apparently, was unaware that §33-6-300, *SC Code of Laws, 1976, as amended*, provides that shares issued as compensation to employees, such as Pertuis’ shares in BF, do **not** enjoy protection from dilution. It is, therefore, more likely that, by terming the funds transferred to BF as “loans,” rather than as capital contributions, Mark Hammond gave himself a priority to recover the “loans” as creditors rather than accepting a junior standing as shareholders who had made a capital contribution. These “loans” were made to BF without any shareholder meetings or board of directors meetings of BF. (R..p.346. l. 10-p.349, l. 9). Additionally, Mark Hammond testified that he continued to support BF to avoid his personal liability on the bank debt of BF. (R.p. 324 l.24-p. 325, l. 5). In any event, it is fair to assert that Mark Hammond “disguised” the capital contributions as “loans” to avoid complying with proper corporate governance, to avoid liability on a personal guaranty, and to achieve a priority of payment over their fellow shareholder, all of which are violations of their corporate fiduciary duties to Pertuis.

Accordingly, Pertuis argues that, under GAAP, BF's financial statement, after capitalizing the loans to BF from Mark Hammond and/or Larkins Restaurant Group show a small positive value, after converting the shareholder loans to equity. The Lower Court, therefore, was correct in concurring with Dr. Alford's "zero" valuation of BF.

V. This case presents oppressive acts which meet the criteria set in the *Kiriakides* case.

The landmark SC case for the oppression of minority shareholders is *Kiriakides v. Atlas Food Systems and Services, Inc.*, 541 SE2d 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court set out criteria (*Kiriakides, supra*, 541 SE2d 267, 268, 343 SC 605, 606) sufficient to order a buyout of the minority shareholders. The *Kiriakides* criteria are here juxtaposed with the italicized facts in the record of this case:

1. Unilateral action to deprive the shareholder of correct shareholding percentage:

Mark Hammond does not cooperate with the execution of the email agreement for Pertuis' vesting of 10% ownership in Larkins on the River Restaurant;
(R.p. 70, l. 14-p. 71, l. 20)

2. Refusal to offer opportunity to minority shareholder to participate in related enterprises;

Mark Hammond fails to tender the acquisition of Lake Lure Property to the corporations in which Pertuis is a shareholder; Mark Hammond opens a new Greenville restaurant without offering the opportunity to the existing Greenville Restaurant from which funding for the new restaurant is borrowed;
(R.p. 318, l. 7-p. 319, l. 18; p. 344, ll. 9-17)

3. Minority shareholder cannot participate in future salary, distributions, and profits;

Mark Hammond terminates Pertuis by use of "incent ruse", a "bait and switch" ploy to keep Pertuis employed by false promises of increased shareholding which never come to fruition; Pertuis continued to believe that his employment is protected by his shareholder status;

(R.p. 70, ll. 14-22; p. 76, l. 15-p. 77, l. 14;
p. 341, ll. 1-25)

4. Majority continues to reap the benefits from the corporations;

Mark Hammond continues to operate the Larkins Restaurant Group for profit, while Pertuis is deprived of the reasonable expectations of shareholding: employment, shareholder distributions, increased value of stock, new restaurant opportunities;

(R.p. 78, ll. 3-23)

5. Adequate financial strength in the corporations to afford a buyout;

Larkins on the River Restaurant had \$200,000 "stored away," which it used to loan to a new restaurant in Greenville;

(R.p. 343, l. 21-p. 344, l. 8)

6. Total estrangement between majority and the minority;

upon Pertuis' recognition of the "bait and switch" scheme practiced on Pertuis by Mark Hammond for years, there is permanent estrangement between Hammond and Pertuis; the majority accused Pertuis of stealing a boat;

(R.p. 147, ll. 13-16)

7. Low-ball buyout offer to minority;

Mark Hammond offered \$0 to Pertuis for his ownership interest in Larkins Restaurant Group, after Hammond declared that Pertuis' ownership interest would be worth \$250,000;

(R.p. p. 78, ll. 18-20;
Pltf.Exh. 1, R.p. 424)

8. No public trading in stock of corporation;

the Larkins Restaurant Group is not publicly traded.

Kiriakides, pp. 267-268, pp. 342-343, supra.

Additionally, Plaintiff submits that the Supreme Court, in *Kiriakides, supra*, held that

“oppressive” and “unfairly prejudicial” are elastic terms whose meaning varies with the circumstances presented in a particular case. *Kiriakides, supra*, p. 602; p. 266. The Supreme Court also noted that this was a fact-sensitive review and should therefore be determined by a case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior. *Kiriakides, supra*, p. 603; p. 266. Pertuis submits that the terms “oppressive” and “unfairly prejudicial” are apt terms to describe the wrongful, intra-corporate acts of Mark Hammond.

Pertuis presented evidence that the corporations of which he is a shareholder were excluded from a real estate opportunity at Lake Lure. In fact, Mark Hammond never presented the Lake Lure real estate opportunity to any of the corporations for acceptance or rejection, a condition precedent required to allow a shareholder to personally take advantage of the corporate opportunity. (R.p. 346, l. 10- p. 349, l. 9)(§33-8-310, *SC Code of Laws, 1976, as amended*). As to the Lake Lure real estate opportunity, Mark Hammond materially failed to meet his affirmative fiduciary duty. Likewise, cross-examination established that Mark Hammond had opened a new Greenville restaurant, “Grill Marks,” using funds from Larkins on the River Restaurant, (R.p. 344, ll. 9-19), without proffering the opportunity for acceptance or rejection of opening a new restaurant to Larkins on the River Restaurant. This misappropriation of the new restaurant corporate opportunity constitutes a material breach of Hammond’s fiduciary duty to Larkins on the River Restaurant, in which Pertuis is a shareholder. These are classic examples of misappropriation of corporate opportunities by the majority shareholders, to the damage of the corporations in which Pertuis is a shareholder. In these transactions, Mark Hammond blithely ignores the requirements of §33-8-310, *SC Code of Laws, 1976, as amended*, and the parallel common-law rule governing the required proffer of a corporate opportunity first to the

corporation. *Gilbert v. McLeod Infirmary*, 219 SC, 64 SE 2d 524 (1951); *Straight v. Goss*, 678 SE 2d 443, 383 SC 189 (Ct.App. 2009).

Pertuis submits that, in addition to otherwise satisfying the eight dispositive criteria from *Kiriakides* set out above, this case presents a novel form of minority shareholder oppression: the “*shareholder incent ruse*.”⁴ Under the “*shareholder incent ruse*, Mark Hammond was moving the goal line of the vesting schedule for Plaintiff’s acquisition of 10% of Larkins on the River, without making full and fair disclosure to Pertuis, who was already a 1% shareholder. (R.p. 310, l. 17- p. 313, l. 1). Akin to “bait and switch”, the “*shareholder incent ruse*” was designed to keep Pertuis in thrall as the Managing General Partner for the three corporations at a lower salary, but with illusory promises of increased shareholding. Undoubtedly, Mark Hammond’s use of the “*shareholder incent ruse*” on Pertuis, as a minority shareholder, presents a gross violation of the majority’s corporate fiduciary obligations of fair dealing, full disclosure, and honesty in fact owed to Pertuis. *Island Car Wash v. Norris and Rhodes*, 292 SC 595, 358 SE2d 150 (Ct. App. 1987)(“Courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.”)

For Hammond to deny Pertuis the liquidation of the fruit of 9.5 years of Pertuis’ labor, which is tied up in the form of corporate stock, invites the application of *Meiselman v. Meiselman*, 309 NC 279, 307 SE 2d 551 (NC 1983). *Meiselman* found that a primary consideration in oppression of minority shareholder cases is that the minority’s investment is

⁴Pertuis is unsure of the meaning of the word “*incent*” as used by Mark Hammond (R. p. 309, l. 24); Pertuis believes, however, that the word is somehow related to “*incentive*.”

captured, unable to be liquidated because of the closely-held nature of the corporations, as presented in this case. While *Kiriakides* focused primarily on the requisite misconduct of the oppressing majority shareholder(s), *Meiselman* offers the thwarted “reasonable expectations” of the oppressed minority as a basis for ordering a buyout of the minority’s shares. In this case, Hammond offered \$0 for Pertuis’ stock.(R.p. 78, ll. 18-20). Hammond’s offer contrasts ironically with Hammond’s earlier declaration (made, no doubt, as a part of the “*incent ruse*”) that Pertuis’ shareholding would be worth \$250,000.⁵ (Pltf. Exh. 1, R.p. 424). Accordingly, Pertuis suggests that his “reasonable expectations” derived from his working for the Larkins Restaurant Group for 9.5 years should be honored in this case.

Pertuis (R.p. 150, ll. 16-25) testified that he never received his pro-rata shareholder distributions. Mark Hammond testified that Pertuis’ shareholder distributions were commingled with, or disguised as, Pertuis’ bonus payments. (R.p. 330, ll. 20-25). Pertuis argues that Mark Hammonds’ curious treatment of Pertuis’ bonus payments and distributions does not meet the standards of corporate fiduciary duties owed to Pertuis, *Lesesne v. Lesesne*, 413, SE2d 847, 307 SC 67 (Ct.App. 1992). Pertuis further argues that Mark Hammond’s murky mingling of Pertuis’ bonus payments and distribution payments amounts to more of the “oppressive acts” required by the *Kiriakides* case.

Perhaps the most compelling of the oppressive acts perpetrated by Mark Hammond on Pertuis was the breach of the email agreement by Mark Hammond. Hammond accepted Pertuis’ demand for full 10% ownership in the corporations, across the board. (Pltf. Exh. 6, R.p. 454; Pltf.

⁵*Kirkiakides supra*, did not eliminate “reasonable expectations” from the matrix of criteria under consideration in oppression of minority shareholder cases. (“In this regard, we note that we do not hold that a court may never consider the parties’ reasonable expectations....”*Kiriakides, supra*)

Exh. 7, R.p. 456; R.p. 335, l. 8- p. 338, l. 10). Hammond, however, played possum, though, when Pertuis pressed for formal documentation of the email agreement. (R.p. 70, l. 14 - p. 71, l. 20). Perhaps Hammond's inaction was designed to present Pertuis with the final, slow realization that Pertuis had been tricked and that Pertuis' position as a full 10% shareholder, despite promises, reassurances, euphemistic coverups, would never become reality.

There is ample evidence that Mark Hammond, as the majority shareholder, materially breached the fiduciary duties, directly and indirectly, which Hammond owed to Pertuis, the minority shareholder, sufficient to meet the standards of the *Kirkiakides* case. Indeed, Pertuis can fairly assert that he was oppressed by Hammond so that this Court can affirm the Lower Court's finding of minority shareholder oppression and affirm the Lower Court's ordered buyout to allow the parties to separate and pursue other interests.

It appears anomalous, though, that Hammond would wish for anything but Pertuis' departure under fair and equitable terms. Hammond, as a seasoned businessman, should realize that a disaffected and mistreated minority shareholder in a closely-held corporation may precipitate ongoing judicial intervention, sooner or later. For this reason, Pertuis respectfully suggests that it would be a sound exercise of judicial policy to uphold the buyout ordered in this case, where there exists an irreconcilable intra-corporate shareholder dispute in which there are violations of corporate fiduciary duties, as presented in this case. *Kiriakides, supra.*

VI. Because Pertuis alleged impropriety in his shareholder/bonus payments, the Lower Court was empowered to provide relief for Pertuis' non-receipt of shareholder/bonus/ payments, under Pertuis' omnibus prayer for "such other and further relief as the Court might deem just and proper."

Mark Hammond and the Larkins Restaurant Group appeal that portion of the Order of the Lower Court which requires payment of \$99,117 to Pertuis for unpaid shareholder/bonus payments. Hammond and the Group assert that Pertuis did not seek relief for the non-payment of the shareholder/bonus payments, so the Lower Court was not empowered to order the payments. Hammond and the Group cite *Pittman Mortgage Co., Inc. v. Edwards*, 327 SC 72, 488 SE2d 335 (S.Ct. 1997), for the proposition that where there is no prayer for specific relief the tribunal may not exceed its authority by granting relief not prayed for. Hammond and the Group also assert that the award of \$99,117 by the Lower Court is not supported in the record of the trial

Pittman, supra, presents a case tried by an Arbitration Panel, pursuant to the Uniform Arbitration Act, §§15-48-10, *et seq.*, SC Code of Laws, 1976, as amended. The substantive law which applied in the *Pittman* arbitration proceeding was Georgia law. In *Pittman*, there was no general, omnibus prayer for “such other and further relief as this Court may deem just and proper,” as presented by Pertuis’ Amended Complaint. (R.p. 24). The arbitration proceeding was limited to the relief sought in the claimant’s pleadings. In contrast to *Pittman*, Pertuis’ case was tried in Court of Common Pleas, before a judge vested with the plenary power of the Court of Common Pleas. Accordingly, Pertuis asserts that *Pittman* does not apply to Pertuis case because Pertuis’ case was not conducted as an arbitration proceeding subject to the limits of an arbitration proceeding.

Pertuis further asserts that *Pittman* is not applicable to Pertuis’ case because Pertuis complained (R.p. 18) about the impropriety of the bonus/shareholder distributions. Pertuis then, in his prayer, asked for general relief from the alleged acts of oppression of Hammond and the Larkins Restaurant Group: “and Pertuis prays for such other and further relief as this Court may deem just and proper.” (R.p. 24). In his Complaint, then, Pertuis specifically complained about

the bonus/shareholder distribution problem and Pertuis asked for such relief from the alleged problem as the Court, in its plenary power, might fashion. Pertuis, therefore, argues that the award of unpaid bonus/shareholder payments comports with the following citation set forth in *Pittman*: "...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."

Pertuis testified (R.p. 58, ll. 16-22) that shareholder distributions were not being made on an annual basis according to completed K-1 forms. Hammond and the Group left Pertuis in the dark by their handling of the shareholder/bonus distributions. (R.p. 123, l. 14- p. 126, l. 7).

Pertuis made it clear that

"there never was a distribution check cut specific as a distribution.
They were included in bonuses if they were included. And I was
never clear on what was what or how much was taken.

(R.p. 150, l. 21 - p. 151 10).

The Lower Court inquired followed up the foregoing with the following colloquy (R.p. 151, ll. 2-13):

THE COURT: Okay. And what would be commingled with that check?

THE WITNESS: Bonus payouts.

THE COURT: Bonus payouts?

THE WITNESS: Yeah.

THE COURT: So there is no way to determine from what was paid to you
whether you had--

THE WITNESS: Whether it was bonus or shareholder distributions.

THE COURT: One percent, eight percent, or ten percent. There's no
way to know.

THE WITNESS: There's no way to know.

THE COURT: All right. I don't have anything else. Thanks.

Mark Hammond testified as follows:

As I have already articulated in one of the earlier exhibits, one of the things Kyle wanted was to have as much of his earnings in case or at least to avoid taxes. So as I promised I would do, we would take as much of his bonus eligibility and write it as a distribution if we could.

(R.p. 274, ll. 15-20)

On further examination, Hammond testified that Pertuis couldn't know whether he was getting a bonus or a shareholder distribution. (R.p. 327, l. 21 - 328, l. 17). Pertuis and Hammond testified that the bonus checks were drawn as shareholder distributions. If Pertuis was receiving a bonus, disguised as a distribution, then Pertuis was **not** receiving the actual shareholder distribution.

The Lower Court received in evidence the tax returns for Larkins on the River. (Def't. Exh. 31A, R.p. 812). The Lower Court found that Pertuis should have been a 7.2% shareholder in Larkins on the River. (Order, July 18, 2013, R.pp. 4-12). Based on Pertuis' percentage of ownership for 2008, 2009, 2010, 2011, and 2012, Pertuis should have received \$99,117 in shareholder distributions which Pertuis did not receive. There is ample evidence in the record for the Lower Court's ruling that Pertuis had earned 7.2% ownership for which the Lower Court correctly awarded \$99,117 in unpaid shareholder distributions, as sought by Pertuis in his Amended Complaint.

CONCLUSION

For the reasons set forth above, or, pursuant to Rule 220(c) South Carolina Appellate Court Rules, on any grounds appearing in the Record on Appeal, Pertuis urges this Court to

confirm the Orders of the Lower Court in this case.

Dated: 12/2/14

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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

Kyle Pertuis, ... Respondent/Appellant,

v.

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

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ARGUMENTS

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 shareholder 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). Pertuis 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 asserts 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 participate. 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.

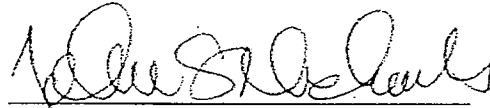
The Court should reverse the trial court's finding of an amalgamation of companies but then ordering an award to Mr. Pertuis based upon separate treatment of each company's value.

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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