THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

2016-UP-091 (S.C. Ct. App. Filed Feb. 24, 2016)
Case No. 2010-CP-23-1346
Appellate Case No. 2013-002257

Kyle Pertuis,.....Respondent,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Questions Presented....1

Statement of the Case....2

Arguments....4

1. **That Petitioners failed to preserve some issues for argument on appeal matters not, because the Court of Appeals nevertheless addressed and denied all issues asserted by Petitioners on appeal, on their merits....4**

2. **Amalgamation of jointly-owned businesses for trial by the Trial Court afforded the parties a single venue for adjudication, which should not have precluded individual evaluation of the businesses joined for joint adjudication, consistent with common-sense economics....5**

3. **The Trial Court correctly awarded Respondent 7.2% ownership in Petitioners' flagship restaurant based, inter alia, on the parties' course of dealings theretofore....6**

4. **The Trial Court and the Court of Appeals correctly honored the business reality of the equivalency of unserviced shareholder loans as, in effect, shareholder capital contributions to equity....7**

5. **The Trial Court and the Court of Appeals correctly found ample evidence of oppression of minority shareholder warranting a court-ordered buyout of minority shareholder's stock....8**

6. **The Trial Court and the Court of Appeals correctly held that Petitioners engaged in murky bookkeeping practices which concealed that Respondent had not received shareholder distributions as shown on tax return schedules....9**

Conclusion....9

Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondent Kyle Pertuis files this "Return to Petition for Writ of Certiorari" seeking denial of the Petition in *Pertuis v. Front Roe Restaurants, Inc.*, 2016-UP-091 (S.C. Ct. App. Filed Feb, 24, 2016).

Questions Presented

1. That Petitioners failed to preserve some issues for argument on appeal matters not, because the Court of Appeals nevertheless addressed and denied all issues asserted by Petitioners on appeal, on their merits.

2. Amalgamation of jointly-owned business for trial by the Trial Court afforded the parties a single venue for adjudication, which should not preclude individual evaluation of the businesses joined for joint adjudication, consistent with common-sense economics.

3. The Trial Court correctly awarded Respondent 7.2% ownership in Petitioners' flagship restaurant based, inter alia, on the parties' course of dealings theretofore.

4. The Trial Court and the Court of Appeals correctly honored the business reality of the equivalency of unserviced shareholder loans as, in effect, shareholder capital contributions to equity.

5. The Trial Court and the Court of Appeals correctly found ample evidence of oppression of minority shareholder warranting a court-ordered buyout of minority shareholder's stock.

6. The Trial Court and the Court of Appeals correctly held that Petitioners engaged in murky bookkeeping practices which concealed that Respondent had not received shareholder distributions as shown on tax return schedules.

STATEMENT OF THE CASE

On October 12, 2009, Kyle Pertuis, ("Pertuis"), resigned under pressure from his position as general manager of the corporate parties to this action, which he operated as parts of a unified business organization. At the time of his resignation, Pertuis was a minority shareholder in each of the corporate parties. After a low-ball offer for the purchase of Pertuis' minority shareholder's interest from the majority shareholders, Pertuis asked for financial information from the corporations to fairly assess the value of Pertuis' ownership.

The majority shareholders, however, refused to supply Pertuis with corporate financial data unless Pertuis signed a document waiving Pertuis' claim to 10% ownership in Front Roe Restaurants, Inc. Pertuis refused to waive his claim for 10% ownership in Front Roe Restaurants, Inc. Accordingly, this case began on March 1, 2010, when Front Roe Restaurants, Inc., brought this action to protect financial data from a minority shareholder's legitimate request for financial data.

In September, 2012, Pertuis asserted claims for his squeeze-out as a minority shareholder and claims for other losses imposed on Pertuis by the majority shareholders. The parties were realigned to afford Pertuis a forum for adjudicating his shareholder claims.

A bench trial was held on May 28, 29, 2013. The Trial Court directed the parties to submit proposed findings of fact and conclusions of law by June 7, 2013. Respondent and Petitioners complied with the Trial Court's direction. In the meantime, Petitioners had filed a Motion for Directed Verdict on May 31, 2013.

The Trial Court entered its Order on July 3, 2013. The Trial Court found, for purposes of

providing a single forum for adjudication of Pertuis' claims, that the corporate parties were operated as parts of a unified business organization. The Trial Court further found that the majority shareholders had oppressed Pertuis as a minority shareholder and, therefore, ordered the buyout of Pertuis' ownership interests in the corporate entities. The Trial Court found that Pertuis owned 7.2% of Front Roe Restaurants, Inc. The Trial Court awarded $99,116.00 for distributions that were never paid to Pertuis, despite the majority shareholders' efforts to camouflage their failure to distribute the amounts shown on tax return schedules.

Petitioners filed a Motion to Alter or Amend on July 19, 2013. On September 9, 2013, the Trial Court entered a supplemental order correcting certain arithmetical errors; the September 9th Order, however, otherwise reaffirmed the Trial Court's earlier Order entered on July 3, 2013.

Petitioners perfected an Appeal to the Court of Appeals. During the course of oral arguments, conducted on October 14, 2015, counsel for Respondent incorrectly recalled that Petitioners had properly raised and received an adverse ruling on the issue of amalgamation of the corporate entities, parties to this action. The Court of Appeals, however, on review of the Record, determined that Petitioners had not properly preserved the amalgamation issue and other issues, for appellate review.

Petitioners moved the Court of Appeals to supplement the Record with evidence that the amalgamation issue and other issues, had been perfected for appellate review.

On February 24, 2016, the Court of Appeals issued its opinion. *Pertuis* v. *Front Roe Restaurants, Inc.* 2016-UP-091 (S.C.Ct.App. Filed Feb. 24, 2016). The Court of Appeals denied Petitioners' Motion to Supplement the Record on Appeal, filed after the oral argument held in this case.

On March 10, 2016, Petitioners sought reconsideration of the Opinion of the Court of Appeals. Pursuant to Rule 240(e), SCACR, Pertuis did not file a response to Petitioners' Petition for Rehearing because he was not requested to do so by the Court of Appeals. On March 31, 2016, the Court of Appeals denied the Petition for Rehearing.

Petitioners then filed their Petition for Writ of Certiorari.

ARGUMENTS

1. That Petitioners failed to preserve issues for argument on appeal matters not, because the Court of Appeals nevertheless addressed and denied all issues asserted by Petitioners on Appeal, on their merits.

Petitioners seek the granting of a Writ of Certiorari from this Court, for review of the unpublished opinion of the Court of Appeals in this case. Petitioners seek the granting of a Writ of Certiorari, first, on the grounds that the Court of Appeals unfairly relied on the provisions of the South Carolina Appellate Court Rules, ("SCACR"), in finding that Petitioners had failed to properly preserve issues on appeal. The Court of Appeals, however, correctly articulated in detail the failure of Petitioners to preserve issues for appeal, as provided under SCACR and under applicable case law.

As secondary support of their assertion that the Court of Appeals unreasonably applied the Appellate Court Rules, Petitioners point to a misstatement by counsel for Respondents. Counsel for Respondents, during oral argument, incorrectly recalled that Petitioners had met the requirements of issue preservation. Petitioners now attempt to employ counsel's misstatement as a fulcrum to leverage this case, which is now six years old, into further review.

Respondent notes that, despite the Court of Appeals holding that Petitioners may have failed to preserve issues, the Court of Appeals nevertheless proceeded to address each of the issues raised on appeal by Petitioners, on their merits.

2. Amalgamation of jointly-owned businesses for trial by the Trial Court afforded the parties a single venue for adjudication, which should not have precluded individual valuation of the businesses joined for adjudication, consistent with common sense economics.

Petitioners assert that the Trial Court and the Court of Appeals misapprehended the holding in *Magnolia N. Prop. Owners' Ass'n., Inc.* v. *Heritage Cmtys, Inc.* 397 SC 348, 725 SE 2d 112 (SC Ct. App. 2012) as applicable to this case. Respondent replies that the *Magnolia* case afforded a rationale for the Trial Court to consolidate an array of intra-corporate shareholder disputes into one piece of litigation. To provide a single trial for the resolution of parties' business disputes, where the jointly-owned business entities are properly subject to the Trial Court's jurisdiction, is a salutary example of judicial economy. To limit the application of the *Magnolia* case to strictly identical facts, would deprive litigants of fair opportunity to seek economical resolution of their disputes where there are several corporate entities in play. The Trial Court, whether it declared the unified business entities to be amalgamated, or to be a *de facto* partnership, was employing the rationale of the *Magnolia* case as an appropriate basis to treat separate businesses, jointly owned and operated, as one unified entity for adjudication of intra-corporate disputes.

Petitioners also argue that there is fatal inconsistency in the Courts' rulings that, once the business entities were amalgamated for trial, the valuation experts performing the valuation of

the amalgamated entities were allowed to assess the business entities separately. Both of the experts presented valuations of the businesses separately, rather than as one amalgamated business, without any objection by the parties. Indeed, Dr. Alford, in his report and in his testimony, noted that the differences presented by each of entities was unique, which militated in favor of separate valuation of the entities. It is fair to assert that, just as the sum of the parts equals the whole, so does the separate valuation of the businesses in this case necessarily present the total value of the amalgamated businesses. Petitioners' argument fails to recognize the common-sense proposition that the fair value of a business is the value of its departments, divisions, subsidiaries, *etc.*, which may have separate values but which contribute to the value of the whole.

3. The Trial Court correctly awarded Respondent 7.2% ownership in Petitioners' flagship restaurant based, *inter alia*, on the parties' course of dealings theretofore.

The Trial Court, seconded by the Court of Appeals, looked to the rationale of the *Wilkie* v. *Philadelphia Life Ins. Co.*, 187 SC 382, 197 SE 375 (1938), as authority for its exercising equitable power to hold that Respondent should receive a 7.2% shareholder interest in Front Roe Restaurants, Inc. *Wilkie* afforded the Trial Court with precedent for determining whether Respondent's managerial efforts had resulted in profitability for which Respondent should receive a full 10% ownership in Front Roe Restaurants, Inc., The parties' could not present a formal, written contract to establish whether Respondents' ownership interest had vested or not. There was ample evidence of part performance by the parties. There was, however, uncertainty as to Respondent's meeting threshold levels of performance to realize full vesting of his 10%

ownership interest, on an all-or-nothing basis.[1] The Trial Court fairly looked to the parties' previous course of dealings, as embodied in the parties' previous shareholder agreements (which provided for a graduated vesting program), as a basis to declare that Respondent's acquired shareholder interest in Front Roe Restaurants was 7.2%. That Respondent had brought the corporation to handsome profitability, though apparently barely "missing" arbitrary standards imposed by the majority shareholder, was an invitation to equitably adjust the parties' agreement, per the *Wilkie* case.

4. The Court of Appeals correctly honored the business reality of the equivalency of unserviced shareholder loans as, in effect, shareholder capital contributions to equity.

Petitioners seek Writ of Certiorari to review the lower Courts' determination that Petitioners' loans to Beachfront Foods, Inc., ("BFI"), on which no interest had been paid and for which no other debt service had occurred should be treated as shareholders' equity in the valuation of BFI. It is axiomatic that loans to closely-held corporations by shareholders who do not receive interest on such loans are treated by the business community, for valuation purposes, as shareholder equity. Addition of the amount of shareholder loans to the balance sheet for BFI, as shareholder equity, produces a zero value, for BFI, rather than a negative value. The Trial Court, and the Court of Appeals, correctly applied standard valuation protocols, based on the testimony of Dr. Alford in Trial Court. Petitioners' grievance with this valuation of BFI is ill-founded.

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[1]Respondent notes that the threshold of profits for the vesting of his 10% ownership interest in Front Roe Restaurants, Inc., was a fluctuating, uncertain profit level, which Petitioners appeared to have manipulated in order to deprive Respondent of his promised ownership.

5. The Trial Court and the Court of Appeals correctly found ample evidence of oppression of minority shareholder warranting a court-ordered buyout of minority shareholder's stock.

The Trial Court, and the Court of Appeals found, *inter alia*, the following incidents of oppression of Respondent as a minority shareholder:

(1) Consistent refusal to provide written documentation of promised shareholder vesting plan;

(2) Majority's misappropriation of corporate opportunity to purchase real estate for corporation in which Respondent was minority shareholder;

(3) Majority's denial of participation in new restaurant funded by corporate loans from corporation in which Respondent was minority shareholder;

(4) Loss of employment, salary, benefits, bonus by Respondent;

(5) Majority shareholders continue to reap benefits while Respondent loses the benefits of his shareholder's rights;

(6) Corporate entities have adequate financial strength to buy out minority shareholder;

(7) Total estrangement between majority and minority shareholders;

(8) No public trading of stock of corporations;

(9) No stock dividends paid to Respondent since his departure;

(10) Respondent had to go to court to get financial information to assess the value of his shares;

(11) No observance of corporate formalities to afford minority shareholder participation in management of corporations;

(12) Majority misused corporate funds to resist Respondent's minority claims.

Despite the foregoing, Petitioners assert that the lower Courts erred in finding oppression of Respondent as a minority shareholder. Respondent replies that the holdings of *Ballard* v.

Roberson, 399 SC 588, 733 SE 2nd 107 (S.Ct. 2012), *Kiriakides* v. *Atlas Food Sys. & Servs., Inc.* 343 SC 587, 541 SE 2nd 257 (S.Ct. 2001, , and *Meiselman* v. *Meiselman,* 307 SE 2nd 551 (N.C. 1983), support the lower Courts' holdings that material oppression of Respondent, at the hands of the majority shareholders, has occurred and that such oppression warrants the court-ordered buyout granted to Respondent, to afford Respondent adequate relief.

6. The Trial Court and the Court of Appeals correctly held that Petitioners engaged in murky bookkeeping practices which concealed that Respondent had not received shareholder distributions as shown on tax return schedules.

Petitioners claim that Respondent did not seek compensation for unpaid distributions in his prayer for relief. As noted in the lower Courts, Respondent prayed for "such other and further relief as this Court may deem just and proper." From his omnibus prayer for relief, the Trial Court was empowered to award Respondent judgment for the unpaid distributions.

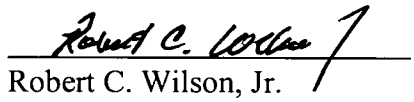
At the trial of this case, testimony developed that Petitioners had paid themselves distributions which were not given, *pro rata*, to Respondent. Further, there was testimony that Respondents' bonuses were disguised as distributions, which meant that the Respondent had not received the full amount due to him, *i.e.* bonus *and* distribution. The amount of unpaid distributions was determined by the Trial Court from the tax returns of Front Roe Restaurants, based on a shareholder ownership percentage of 7.2%. The Trial Court correctly adjusted the amounts due to Respondent based on evidence in the record.

CONCLUSION

From the foregoing, it is fair to conclude that this case does not present any novel

questions of law; that this case does not present dissent or disagreement in the appellate review of the case; that this case does not present a decision which is in conflict with prior decisions of the Supreme Court; and that this case does not present any constitutional issues which require resolution. Based on the absence of features that might warrant a grant of further appellate review, Respondent asks this Court to deny the Petition for Writ of Certiorari. Further, Respondent also asks that his Court deny the Petition for Writ of Certiorari so Respondent may finally conclude his quest for shareholder relief after six years of litigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he sent by US Mail, on the date set forth below, a copy of "Return to Petition for Writ of Certiorari" to counsel of record for Petitioners at the following addresses:

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