

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC 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-23-1646
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.

REPLY

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ARGUMENTS

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

Respondent asserts that the Court of Appeals “correctly articulated in detail the failure of Petitioners to preserve issues for appeal....” (Return, p. 4). Respondent also contends his counsel’s statement at oral argument that the issues were preserved was a “misstatement.” (Return, p. 4). Finally, Respondent claims the Court of Appeals addressed the issues on the merits apart from its denial of Petitioners’ motion to supplement the record and the Court’s determination that the issues were not preserved. (Return, p. 5). The Court should not be persuaded by these arguments.

The Court of Appeals expressly stated, “We decline to accept this late filing, *which would render some of the briefed arguments unpreserved.*” (App. p. 2)(emphasis added). Although the Court went further to state that even if it considered the arguments preserved, it would affirm, the Court continued to dispose of the issues on error preservation grounds.

For instance, the Court stated “there is no indication in the record presented to this court that [Petitioners] 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 [Respondent] based upon a separate treatment of each company.” (App. p. 3). This is a reference to the initial record without the proffered supplemental record that the Court declined to accept. That supplemental record contained the motion to reconsider under Rule 59, SCRCF, in which Petitioners did, in fact, challenge both the finding of amalgamation and the finding of a unified *de facto* partnership. (S. pp. 15-18, point (6)).

Petitioners fail to understand Respondent's counsel's contention that his admission at oral argument that the issues were, in fact, preserved, was a misstatement. (Return, pp. 3, 4). Respondent *never* contended in his brief to the Court of Appeals that the issues argued had not been raised or ruled upon. Respondent also did not oppose the motion to supplement the record that Petitioners filed the day after oral argument, and Respondent filed no response to that motion correcting this supposed "incorrect recall" or "misstatement." When Petitioners filed their Petition for Rehearing raising this precise point and pointing to Respondent's counsel's agreement at argument that the issues were preserved, Respondent filed no response offering to correct this purported "misstatement" which formed the basis for footnote 1 of the Court of Appeals' opinion.

It makes sense that Respondent's counsel would have agreed at argument that these issues were raised and ruled upon because they were. It also makes sense that Respondent would not have filed any opposition disputing Petitioners' contention that the issues were preserved because they were. Respondent's claim of incorrect recall and misstatement now is completely inconsistent with Respondent's actions at *multiple* junctures.

Finally, contrary to Respondent's contention, the Court of Appeals did not address the merits of all issues raised on appeal. And insofar as it may have addressed those issues on the merits, the Court's rulings are flawed as pointed out in the Petition.

The Court of Appeals' decision to raise error preservation *sua sponte*, decline Petitioner's prompt request to supplement the record, and then declare the record insufficient to demonstrate the issues were raised or ruled upon is fundamentally unfair and fails to serve the policy of deciding matters on the merits. The issues were raised, and Respondent knows

they were raised. The Court should grant the Petition in this matter, permit briefing and argument, and reverse the Court of Appeals' opinion disposing of these issues on error preservation grounds.

II. The Trial Court Misapplied *Magnolia North Property Owners' Ass'n.* and the Court of Appeals Misapprehended the Trial Court's Ruling

Respondent does not deny that the trial court did, in fact, apply the amalgamation rules found in *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). (Return, pp. 5-6). Respondent contends the case "affords a rationale for the Trial Court to consolidate an array of intra-corporate shareholder disputes into one piece of litigation." (Return, p. 5). Respondent asserts that *Magnolia* should be expanded to reach the facts of this case, where he contends he is both in a *de facto* partnership made up of all of the business entities that the trial court then valued as separate entities and the "amalgamation of corporate entities" rules set forth in *Magnolia* would apply. Respondent cites no authority to support the rulings of the trial court and the Court of Appeals, and that makes sense because there are no such authorities out there. Nor would there be given the nature of these two inconsistent theories.

The Court should grant this Petition and reverse the Court of Appeals' affirmance of the trial court's inconsistent rulings regarding amalgamation of the entities yet assigning the various entities separate treatment when identifying Respondent's purported interest in each.

III. The *Wilkie* Case Does Not Support the Trial Court Award of 7.2% of Front Roe to Respondent

Respondent argues the trial court correctly relied upon *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938) in awarding him a 7.2% interest in Front Roe even though the business did not achieve the threshold necessary for Respondent to receive the agreed-upon 10% interest. (Return, pp. 6-7). Respondent does not address the first argument Petitioner makes here – that the Court of Appeals erred in finding the trial court did not rely upon *Wilkie* even though that is precisely what the trial court said it was doing.

Second, Petitioners adequately explained in their brief and the petition for rehearing why the trial court's reliance upon *Wilkie* was erroneous. The Court of Appeals dodged that question by erroneously declaring the trial court did not rely upon *Wilkie*. Respondent does not respond to Petitioners' argument on that point.

Third, Petitioners explained that Respondent never sought such "equitable" relief but maintained he was entitled to the full 10% share in Front Roe even though the business had not met the required threshold. Respondent merely contends fairness dictates that the court change their deal and rewrite the contract, and he cites no authority for this "rule" other than *Wilkie*. (Return, pp. 6-7).

The Court should grant this Petition and reverse the trial court's application of *Wilkie* to justify awarding relief Respondent did not seek and which is not supported by the record.

IV. Respondent's "General Prayer" for Relief did not support the Trial Court's Award to Respondent of \$99,117 for Alleged Unpaid "Shareholder Distributions"

Both the Court of Appeals and the trial court ignored the fact that Respondent failed to specifically plead for the separate relief of a monetary award for alleged unpaid "shareholder distributions." Instead, Respondent relied upon his general prayer for relief, and tied this claim to the trial court's earlier erroneous finding that Respondent owned 7.2% of Front Roe. (App. pp. 117-119). He continues to do so in his return. (Return, p. 9).

The Court of Appeals held the issue was not preserved, the general prayer supported the award, and the issue was tried by consent. (App. p. 11). These rulings, however, are in error because, as Petitioners pointed out, Respondent's complaint does not sufficiently seek this relief. *See, e.g., McMaster v. Strickland*, 322 S.C. 451, 454, 472 S.E.2d 623, 625 (1996) ("[i]f the facts alleged are broad enough to warrant relief, it matters not how narrow the specific prayer may be if the bill contains a prayer for general relief."); *Mortgage Loan Co. v. Townsend*, 156 S.C. 203, 226, 152 S.E.2d 878, 886 (1930) ("The relief to be granted [under a prayer for general relief] depends not upon that asked for in the prayer but it must be such as is warranted by some allegation contained in the pleadings.").

The Court should reverse the trial court's rulings regarding purported shareholder distributions.

CONCLUSION

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

May 20, 2016

Respectfully submitted,



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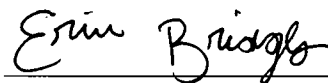
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PROOF OF SERVICE

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

Robert C. Wilson, Jr., Esquire
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May 20, 2016



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