

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

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S.C. SUPREME COURT

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

Appellate Case No. 2016-000749

Kyle Pertuis, Respondent,

v.

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

BRIEF OF PETITIONERS

John S. Nichols, SC Bar # 4210
BLUESTEIN NICHOLS THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com
Attorney for Petitioners Mark and Larkin Hammond

Curtis Stodghill, SC Bar # 6458
STODGHILL LAW FIRM
P.O. Box 2431
Greenville, SC 29602
(864) 271-0966
curt@stodghill-law.com
*Attorney for Petitioners Front Roe Restaurants,
Inc., Beachfront Foods, Inc., Lake Point
Restaurants, Inc.*

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QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

On March 1, 2010, Front Roe Restaurants, Inc., brought an action seeking an order declaring that any disclosure of financial records to Respondent would be subject to a confidentiality agreement. The circuit court entered a protective order and Respondent received the information he requested.

The case changed into a minority shareholder oppression claim Respondent filed on September 6, 2012, and was tried in that context after the parties were realigned by agreement. Respondent sought damages for alleged minority shareholder oppression and an order requiring the Respondent to purchase the value of his shares in each corporation.

A non-jury trial was held May 28 and 29, 2013. In lieu of closing arguments the court directed the parties to submit their proposed findings of fact and conclusions of law by June 7, 2013. Petitioners filed their motion for directed verdict on May 31, 2013, because the court did not entertain motions on the record. Petitioners also filed their proposed findings of fact and conclusions of law as directed on June 7, 2013.

On June 18, 2013, the trial court notified counsel for the parties of its decision adopting Respondent's submission. The court found an amalgamation of companies, found there was oppression of Respondent, awarded Respondent a 7.2% interest in Front Roe, and awarded Respondent \$99,116.00 in distributions that were purportedly unpaid. The court entered the order July 3, 2013. On July 19, 2013, Petitioners filed a joint motion to alter or amend the judgment. On September 9, 2013, the trial court entered an order correcting mathematical errors in the original order but otherwise adhering to the prior judgment.

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

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

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

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

On March 10, 2016, Petitioners sought reconsideration. Respondent filed no return in opposition. On March 31, 2016, the Court of Appeals denied rehearing. Petitioners then sought review by this Court and on March 27, 2017, the Court granted the petition and issued the writ.

FACTS

This is an action in equity. *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (2012). The appellate 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 in this case.

Kyle Pertuis (Respondent). Respondent 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 Respondent 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 Respondent 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 Respondent 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). Respondent 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 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 Respondent's 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 Respondent'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 Respondent 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 Respondent 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 Respondent came down with them "a time or two, before it was a done deal." (R.p.44, ll.15-17). Respondent 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).

Respondent 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 Respondent would

move to Greenville. (R.p.46, ll.18-22; p.47, ll.14-17). Respondent 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 Respondent 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). Respondent’s ownership interest would increase as the business met certain profit margins. (R.p.103, ll.22-24). Respondent 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, Respondent 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 Respondent was the point person for them. (R.p.72, ll.19-23). The Hammonds gave Respondent 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 LLC, of which Respondent was not a member. (R.p.42, ll.18-23). Respondent knew nothing about the terms, only that the Hammonds were buying it. (R.p.42, l. 24 - p.43, l. 2). Respondent 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). Respondent stated "I don't deal with real estate." (R.p.99, l. 22).

From 2005 through 2009 the restaurants did very well and Respondent 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, Respondent 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 Respondent 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).

Respondent 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 Respondent 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 Respondent to 10% ownership. (R.p.104, l. 2 - p.105, l. 7; p.127, ll.10-25). Respondent 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). Respondent 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, Respondent 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). Respondent 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). Respondent 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 Respondent 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 Respondent how much ownership he would have in Front Roe. (R.p.54, l. 24 - p.55, l. 2).

Respondent 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). Respondent 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 Respondent an email on February 20, 2009, in which Mr. Hammond thanked Respondent 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” Respondent’s 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 Respondent 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 Respondent 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 [Respondent’s] 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 Respondent did not understand them, including entries showing loans to and from him. (R.p.59, ll.9-15).

The email stated that Respondent 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, Respondent 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). Respondent 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). Respondent 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). Respondent 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 Respondent. (R.p.111, ll.11-24; p.539). Although they had discussion about whether they should “wrap all three entities into one,” Respondent 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).

Respondent identified a document he received from Mr. Hammond on June 27, 2009 in response to a request by Respondent about restructuring his compensation package. (R.p.62, ll.5-17; p.66, ll.1-2; p.451). The document stated Respondent 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).

Respondent 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 Respondent stated, “if I was going to have it in my name, I was going to own it.” (R.p.129, ll.10-19). Respondent 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 Respondent to obtain 10% "across the board." (R.p.117, ll.3-18; p.128, ll.4-12). Respondent 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).

Respondent 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 Respondent 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). Respondent did not think Mr. Hammond hampered the lawyers from producing the documents. (R.p.118, ll.21-24).

Respondent identified his response to the June 27, 2009 document. (R.p.66, l. 18 - p.67, l. 4; p.454). Respondent 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). Respondent 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 Respondent’s 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 Respondent 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). Respondent had several meetings with Mr. Hammond to discuss the documents and things came to a head just before Respondent left. (R.p.71, ll.5-20).

Respondent 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, Respondent confronted Mr. Hammond with his frustration over no documentation. (R.p.73, ll.6-9). Respondent 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). Respondent 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). Respondent 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 Respondent 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).

Respondent then took 10 days off to consider his situation with the Hammonds and the business. (R.p.74, ll.8-10). Respondent 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 Respondent had sent him but Respondent could not recall the details of the conversation. (R.p.75, ll.4-8; p.134, l.17-p.135, l.4). Respondent continued his time off to consider the situation. (R.p.75, ll.9-11).

Mr. Hammond eventually emailed Respondent 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). Respondent 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). Respondent claimed this was the location for the meeting “if there was going to be termination.” (R.p.76, ll.9-11).

Mr. Hammond and Respondent 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 Respondent was “going to be moving on.” (R.p.76, ll.16-22; p.138, ll.12-24). Respondent 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. Hammond was not at the meeting this exchange told Respondent that she was telling people that Respondent was leaving before he met with Mr. Hammond. (R.p.77, ll.14-17). Respondent 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 Respondent that the Hammonds had decided to buy Respondent's interests. (R.p.77, ll.18-23). Mr. Hammond said he would get with his accountant and present Respondent with a price. (R.p.77, l. 24 - p.78, l. 2). Mr. Hammond eventually presented an offer of \$12,000 if Respondent 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 Respondent an email stating they were rescinding the offer to purchase Respondent's stock interest. (R.p.79, ll.19-20). The email added that if Respondent 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). Respondent took this to mean the offer was "off the table." (R.p.79, ll.24-25; p.457). Respondent responded that he needed information to obtain a third party evaluation. (R.p.80, ll.7-12). In the email, Respondent 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). Respondent said nothing about the Hammonds mistreating him. (R.p.145, ll.2-4).

Respondent 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).

Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 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). Respondent's 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). Respondent 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).

Respondent 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). Respondent 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 Respondent 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, Respondent had regular communication with Mr. Hammond regarding either an annual assessment or where he stood as far as how the business was doing or where he stood on compensation. (R.p.92, l. 10 - p.93, l. 17; p.94, ll.15-17; p.100, ll.2-10; p.502; p.505; p.507; p.509). When Respondent started he was receiving a salary and a bonus that would be entirely taxable as income. (R.p.93, l. 22 - p.94, l. 22). He did not recall there ever being a bonus to which he was entitled but did not get. (R.p.94, l. 23 - p.95, l. 3). Mr. Hammond then advised Respondent that going forward, the bonuses would be paid to him through shareholder distributions as a way of saving him money. (R.p.93, l. 24 - p.94, l. 3; p.95, l. 4 - p.96, l. 6). Respondent never interacted with the accountant even though there was nothing that prohibited him from asking the accountant any questions. (R.p.96, l. 7 - p.97, l. 6).

Respondent 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, Respondent did not allege any misconduct or minority oppression. (R.p.140, l. 14 - p.141, l. 8).

Respondent 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 Respondent 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 Respondent 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 Respondent’s 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, Respondent 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 Respondent. (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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 "Larkins 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).

Respondent 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 Respondent 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 Respondent a 1% interest in 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 Respondent 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). Respondent 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).

Respondent 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 Respondent was due. (R.p.256, l. 23 - p.257, l. 5). Respondent 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 Respondent 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 Respondent to have executive coaching, attend workshops and leadership seminars. (R.p.215, l. 25- p.216, l. 8). The Hammonds intended to help Respondent “become the best manager for our business as possible.” (R.p.216, ll.8-10). Respondent was the “director of operations” for the restaurants. (R.p.249, ll.21-22). At no time did Respondent assert that he did not understand what he needed to do at Front Roe to earn a 10% 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 Respondent’s interest, the Hammonds would loan the company money. (R.p.247, ll.3-14). Respondent 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). Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent with tax treatment. (R.p.274, ll.15-20). Any time Respondent 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 Respondent 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 Respondent ask to participate in the acquisition. (R.p.267, ll.21-23). Mr. Hammond did not offer the opportunity to Respondent because it required capital of nearly \$200,000 that the Hammonds put up and this was for the benefit of all shareholders. (R.p.318, ll.7-22).

In 2008 Respondent and Mr. Hammond had a conversation regarding Respondent's future. (R.p.257, l. 17 - p.258, l. 1). Mr. Hammond wrote a memorandum regarding some of the questions Respondent had. (R.p.257, l. 24 - p. 258, l. 7; p.511). The memo sets forth options for Respondent 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, Respondent sent Mr. Hammond an email with a list of questions about Respondent's future. (R.p.261, l. 13 - p.262, l. 18; p.514). In February 2009 Mr. Hammond sent an email telling Respondent 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 Respondent's 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 Respondent 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). Respondent 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). Respondent 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 Respondent an email setting forth the review of his

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

The email also said "if we go with option A in that second column, we will extend the original timeline on the River into 2009 if the numbers for 2008 fall short of what you need under the original agreement to get you to 10 percent ownership across the board." (R.p.277, ll.1-8; pp.540-542). Respondent responded by saying "if I did not achieve 10 percent ownership in 2008, we will extend the current program for 2009 in order to equalize current ownership at 10 percent across the board." (R.p.278, ll.13-19; p.543). It was clear to 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).

Respondent 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 corporate counsel to get documents drafted 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 Respondent contact counsel about the status of the documents, which Respondent did, but the lawyer was out sick. (R.p.284, ll.2-14).

In late September or early October 2009, Mr. Hammond knew that Respondent had been concerned about a variety of things with his business, professional life, and personal life. (R.p.216, ll.15-18; p.217, ll.4-10). Respondent 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 Respondent during the week off. (R.p.218, ll.15-17). He offered to meet with Respondent which Respondent 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 Respondent's questions as Respondent was deciding what he wanted to do with his future. (R.p.218, ll.19-23). Respondent 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 Respondent did not indicate to Mr. Hammond the direction in which he was leaning. (R.p.219, ll.19-24). All Mr. Hammond wanted Respondent to do was "to make a decision that was going to work for him." (R.p.220, ll.3-12). They agreed that if Respondent 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 Respondent and his family. (R.p.221, ll.9-11). Respondent told the Hammonds he had decided to stay and would see them the next morning at their home at 9:00 a.m. (R.p.221, ll.12-16; p.314, l. 20 - p.315, l. 1; p.352, ll.14-21). The next day Respondent was late and

around 9:20 a.m. Mr. Hammond called him. (R.p.221, ll.20-23; p.315, ll.4-14). Respondent stated he had changed his mind and would meet them in Greenville instead, meaning that Respondent 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 Respondent at Larkins on the River. (R.p.222, ll.3-5). Mr. Hammond did not want Respondent to resign because they had invested a lot of time and resources in Respondent's business development and Respondent running the business allowed the Hammonds more free time. (R.p.222, ll.6-18). Respondent 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 Respondent 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 Respondent 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 Respondent 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 Respondent. (R.p.215, ll.18-19; p.313, l. 7). If he was going to fire Respondent 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, l.25-p.220, l.2).

Once Respondent resigned, Mr. Hammond asked for his keys and for the return of the boat's title. (R.p.223, ll.19-23). The Hammonds offered to work with Respondent 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, l.24-p.224, l.4). They paid Respondent through the end of that month. (R.p.224, ll.5-10).

Mr. Hammond contacted the CPA to alert him that the Hammonds would be buying back Respondent's stock and requested help in arriving at a value. (R.p.284, l. 20 - p.285, l. 4; p.554). Mr. Hammond looked at the most recent records that were completed (the 2007 tax returns). (R.p.224, ll.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, ll.20-22). Mr. Hammond then came up with a "rough number" and talked with the accountant who "kind of concurred." (R.p.224, ll.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, l. 24 - p.225, l. 1; p.350, l. 10 - p.351, l. 10). Respondent 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, ll.2-8).

Mr. Hammond had heard from Respondent and others in Greenville that Respondent "had been interested in pursuing a career as a hospitality consultant or a consultant to the restaurant industry." (R.p.225, ll.9-19; p. 285, ll.8-23; p.563). When Respondent requested copies of the QuickBooks files and other things Mr. Hammond felt were proprietary, he had concerns and told Respondent 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 Respondent would enter into a confidentiality agreement. (R.p.226, ll.7-9). He presented a draft agreement to Respondent and would have removed any

recitations that were unnecessary to the document. (R.p.226, ll.10-24).

Respondent was unwilling to enter into a confidentiality agreement so Mr. Hammond talked with their attorney. (R.p.226, l. 25 - p. 227, l. 3). The Hammonds filed a motion to have the court weigh the company's interest to protect proprietary information against Respondent's right to have information. (R.p.227, ll.3-10). The information was ultimately forwarded to Respondent's lawyer. (R.p.286, l.6-p.289, l. 9; p.563; p.889; p.904; p.918).

The only indication Respondent 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 Respondent, who agreed to title the boat in his name. (R.p.282, ll.17-18). The boat would be for the use of the restaurant as well as Respondent, and the Hammonds 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 Respondent's 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 called "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 Respondent 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 notice 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). Respondent 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 Court of Appeals Should Have Permitted Petitioners to Supplement the Record on Appeal and Should Not Have Ruled Petitioners' Issues Were Not Preserved for Appellate Review

At oral argument, the Court of Appeals expressed, *sua sponte*, its concern that the record did not indicate various arguments were raised to or ruled upon by the trial court. Because the Court had these concerns, Petitioners immediately 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] 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.”

The Court misapplied *Lewis*. This Court affirmed due to the “two issue rule” because the record demonstrated *without doubt* that the trial court had ruled for respondent on several alternative grounds and the appellant had appealed only one of them. Justice Hearn wrote:

While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved. *Here, we do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties*

nor the court of appeals raised it. Therefore, the two-issue rule precludes our consideration of Lewis's arguments.

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

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

Id. at 333, 730 S.E.2d at 287 (Toal, CJ, dissenting). In this case there is *no doubt* that the issues *were* raised. Respondent was *not* “silent” on the point like the respondent in *Lewis*; instead, Respondent *admitted* at oral argument that the issues *were* raised and ruled upon.

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

The Court of Appeals also ignored 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), SCRPC (Emphasis added). There is no doubt that Petitioners filed a motion for the trial court to amend its findings and reconsider its ruling as demonstrated by its order denying the same. Rule 52 permits appellate review even in the absence of such a motion.

The Court of Appeals repeatedly stated “[t]here is no indication in the record presented to this court” that various arguments were made, which is a reference to the original Record on Appeal. As noted above, Respondent did not remain silent about error preservation but expressly conceded that these issues were preserved. Furthermore, the contents of the supplemental record at minimum creates doubt about whether the arguments were made to the trial court and that the trial court ruled upon them all. And the trial court’s order disposing of the post-judgment motions removes all doubt.

Imposing error preservation requirements “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The lower court *had* the opportunity to rule on Petitioners’ arguments. The Court of Appeals misapprehended *I’On*’s stated intent of error preservation rules as well as the policies underlying the primary purpose of the judiciary, which is to see that issues are decided on the merits rather than technicalities. *Micronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548

S.E.2d 223 (Ct. App. 2001). 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. That purpose is not served by an overly zealous and incorrect application of the rule, especially where there is no doubt and no dispute that the issues were raised and ruled upon below.

Accordingly, the Court should reverse the Court of Appeals' decision to deny Petitioners' request (which Respondent did not oppose) to supplement the Record with the post-verdict motions that demonstrate these arguments were, in fact, preserved. The Court should consider the materials when reviewing this case.

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

The Court of Appeals held the trial court did not find the entities “amalgamated” under the standards enunciated in *Magnolia North Property Owners’ Ass’n, Inc. v. Heritage Communities, Inc.* Instead, the Court of Appeals found something different, that is, that a “*de facto*” partnership existed. The Court of Appeals’ decision is wrong for several reasons.

First, the trial court itself stated it was “applying the standards articulated in *Magnolia North Property Owners’ Ass’n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).” (R. p. 6). The trial court viewed the separate corporate entities involved in this case as having lost their separate identities, a concept that is at the heart of amalgamation under *Magnolia*. Although the trial court used the phrase “*de facto* partnership of the corporate entities,” the trial court expressly applied *Magnolia*, an amalgamation case. The Court of Appeals stated “the order itself never specifically found the

separate entities were amalgamated.” That statement overlooked that this was *precisely* what the trial court was doing, and why the trial court expressly stated it was applying *Magnolia* – to find otherwise renders the trial court’s cite to *Magnolia* meaningless.

Furthermore, everyone understood this case involved an amalgamation argument and ruling: the trial judge (R. p. 6), Respondent (App. pp. 101-104), and of course the Petitioners. Respondent *never* argued that the trial court’s use of *Magnolia* was merely a label and not controlling; in fact, Respondent specifically advocated that this case involved amalgamation *and only amalgamation*. (See Respondent’s argument on this point under the heading “Amalgamation” at App. pp. 101-102). There is *no* contention that the case involved anything but amalgamation of corporate entities under *Magnolia*.

The Court of Appeals also held that Petitioners’ argument that Respondent cannot argue amalgamation on the one hand and then seek separate valuation was conclusory and deemed that argument abandoned. This holding ignored the overall arguments *both* parties made here. Petitioners contended each entity was separate and should have been treated separately, while Respondent argued the three separate entities lost their separate character and were properly blended into an amalgamated entity. If Petitioners are correct, then the entities should be valued separately – no authority is needed for that principle. If Respondent is correct – that the entities became one amalgamated entity – then they should be valued as one entity (using the correct values for each). That is the nature of amalgamation.

The Court of Appeals also noted Petitioners’ own expert valued the entities separately. Separate valuation, however, was logical since Petitioners contended each entity retained its own separate identity, the entities were not amalgamated, and the entities should

have been treated separately in determining Respondent's interest, if any, in each.

Accordingly, the Court should reverse the inconsistent rulings below regarding amalgamation of the entities yet assigning the various entities separate treatment when identifying Respondent's purported interest in each.

III. The Court of Appeals Erred in Affirming the Trial Court's Finding of an Amalgamated Business Located in Greenville, South Carolina

The Court of Appeals found Petitioners' argument here did not explain prejudice from a finding that the "locus" of the business was in Greenville; and that there was evidence to support this finding. This Court should reverse that ruling. Had Petitioners not challenged this finding (that the amalgamated business is located in Greenville), the Court of Appeals may have found it to have been an unchallenged alternative ruling.

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

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. 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's finding that the parties owned one "amalgamated" company located in Greenville lacks any support in the evidence.

As argued above, the trial court erred in applying the principles of *Magnolia* in finding an amalgamation of entities. If the entities were not amalgamated, they were not all located in Greenville, and there is no evidence to support otherwise.

Accordingly, the Court should reverse the ruling below that the entities became amalgamated and that the blended entity had its locus in Greenville, South Carolina.

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

In ruling upon this issue, the Court of Appeals ignored several points. This Court should reverse.

First, in disagreeing with Petitioners' argument that the trial court did, in fact, reject Respondent's claim to a 10% ownership, the Court of Appeals ignored the trial court's specific finding that the business *never* obtained the required threshold for Respondent to attain a 10% ownership. (R. pp. 7-8). Instead, the trial court announced it was going to award Responding 7.2% as a matter of equity representing 72% of the threshold required to vest. As a basis for this ruling, the trial court stated "equity regards and treats as done that which in good conscience ought to be done," citing to *Wilkie v. Philadelphia Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375 (1938). (R. p. 8). Respondent, however, did not seek this graduated award

but claimed *only* entitlement to the full 10%.

Second, the Court of Appeals stated it did not believe the trial court intended to analogize this case to *Wilkie*. The trial court, however, stated that this was precisely what it was doing. (R. pp. 7-8). Additionally, Respondent himself contended the trial court “employed” this maxim from *Wilkie* to reach the result. (App. pp. 107-108). In fact, Respondent stated in his brief: “In *Wilkie*, the Lower Court found an apt precedent for authority to remedy Mark Hammond’s breach of the email agreement which had promised that Pertuis would enjoy 10% ownership in Larkins on the River Restaurant.” (App. p. 108).

The Court of Appeals noted Petitioners argued the maxim from *Wilkie* that “equity regards and treats as done that which in good conscience ought to be done” is “generally applied in cases involving constructive trusts imposed due to fraud,” but rejected this argument, stating Petitioners cited no law in support of this proposition. This principle, however, 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). This is where this equitable maxim finds the most common usage, *i.e.*, is “generally applied.” This is also how Respondent contended the doctrine should be applied in this case, *i.e.*, to correct “constructive fraud.” (App. p. 108).

The Court of Appeals also noted that the *Wilkie* Court added the “doctrine applies in

those cases only where the party seeking to invoke it has established a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.” In applying this rule the Court stated Petitioners “*arguably*, owed a duty to [Respondent] to document his greater ownership in [Front Roe] based upon his continued management of the various entities.” (Emphasis added). Respondent, however, never based his claim of ownership on that theory; rather, he contended he was entitled to 10% pursuant to the parties’ express agreement, and the trial court found Front Roe never attained the necessary threshold. *Parker Peanut Co. v. Felder*, 207 S.C. 63, 68-69, 34 S.E.2d 488, 490 (1945) (“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.”); *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997) (citing *Parker*, Court found arbitration panel exceeded its powers by awarding respondent value of her shareholder’s equity; because pleadings represented the arbitration agreement in the case, absent an amendment of the pleadings or implied consent to consider relief not requested in the pleadings, panel could only consider issues contained within the pleadings and could only award the parties the relief they requested within the pleadings). Further, saying something “*arguably*” exists is not the same as saying an obligation is “clear,” as set forth in *Wilkie*.

Next, the evidence demonstrated that from 2007 forward, Respondent received a K-1 Form from Front Roe indicating he was a 1% owner. Respondent never filed a corrected

return with the IRS in which he asserted he owned any more than 1% in Front Roe. (R. p. 213, ll.3-11; p. 213, l. 23 - p. 214, l. 21; p. 214, ll.1-4; p. 420, ll.11-17; p. 974).

Finally, the Court of Appeals noted an email exchange as evidence of an attempt to frustrate Respondent's effort to achieve a 10% interest in Front Roe by "changing the threshold." *Pertuis v. Front Roe Restaurants*, slip at 9 n. 4. That exchange, however, demonstrates Respondent's understanding and agreement regarding the vesting schedule. The Record reveals that in June 2009, Mr. Hammond sent Respondent an email setting forth the review of his compensation. (R. p. 270, ll.18-19; pp. 540-542). The email set forth some options for Respondent to choose regarding his future compensation. (R. p. 270, l. 21 - p. 271, l. 12). This included payment to Respondent of 8% of "net shareholder distributions." (R. p. 271, ll.20-25). At the time Respondent owned 10% of Lake Point, 10% of Beachfront and 1% of Front Roe. (R. p. 272, ll.1-8). Mr. Hammond looked at the distributions to Respondent from 2007 as 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 is an aggregate and does not represent Respondent's ownership as being more than 1% in Front Roe. (R. p. 276, ll.9-18). Respondent had access to all of the information in the QuickBooks program. (R. p. 276, ll.19-25).

The email also said "if we go with option A in that second column, we will extend the original timeline on the River into 2009 if the numbers for 2008 fall short of what you need under the original agreement to get you to 10 percent ownership across the board." (R.

p. 277, ll. 1-8; pp. 540-542). Respondent responded by saying “if I did not achieve 10 percent ownership in 2008, we will extend the current program for 2009 in order to equalize current ownership at 10 percent across the board.” (R. p. 278, ll. 13-19; p. 543). It was clear to both parties that they were extending the initial program through 2009. (R. p. 279, ll. 2-7; p. 320, ll. 19-22; p. 335, ll. 13-19). Respondent resigned before the threshold was achieved.

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.”).

The Court should reverse the application of *Wilkie* to justify awarding relief Respondent did not seek and which is not supported by the record.

V. The Court of Appeals Erred in Affirming the Trial Court’s Finding of a “Zero” Value for Beachfront Foods, Inc.

In affirming the trial court’s finding that Beachfront had “no value,” the Court of Appeals ignored that the preponderance of the evidence did not support this finding. Rather, the only evidence was that Beachfront had a negative value. Dr. Alford testified that Beachfront had “negative equity” that he assessed at <-\$410,271>. (R. p. 173, ll. 23-24; p.

175, ll.15-21; p. 459). Louis Manios valued Beachfront at a negative <-\$620,000>. (R. p. 381, l.25- p. 382, l.12).

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

Additionally, the *only* evidence in the record is that Beachfront had a negative value, not a “zero” value. This is important because if the three entities were joined (either as an amalgamation as the trial court found and the parties argued, or as a “*de facto* partnership” as the Court of Appeals described the business), then the negative portion must offset any finding of positive value of other aspects of the blended entity’s overall value.

This Court should reverse the application of a “zero” value to Beachfront.

VI. The Court of Appeals Erred in Affirming the Trial Court’s Finding of Oppression of Respondent as a “Minority Shareholder”

The Court of Appeals rejected Petitioners’ argument that the trial court erred in finding oppression of Respondent as a “minority shareholder” under *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001), *Ballard v. Roberson*, 399

S.C. 588, 733 S.E.2d 107 (2012) and *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983).

The Court should reverse.

Although both courts below outlined a number of things the courts stated sufficiently demonstrated suppression of a minority shareholder in a close corporation, Petitioners outlined in their brief why these findings were either not supported by the Record or did not meet the tests set forth in S.C. Code Ann. § 33-14-300 (2006), *Kiriakides, Ballard* and *Meiselman*. (App. pp. 78-85). Petitioners reference those arguments here.

The courts below misapprehended the appropriate tests for suppression of a minority shareholder in a close corporation and the evidence in the Record. Furthermore, the Court of Appeals ignored its own finding, that is; that the parties engaged in a “*de facto*” partnership, *not* a corporation of any kind. Thus, Respondent would have been a *partner* and not a minority shareholder in the corporations or in one amalgamated business. *Kiriakides, Ballard* and their progeny apply to freeze-out of minority shareholders, not partners in a partnership, *de facto* or otherwise. *See Mason v. Mason*, 412 S.C. 28, 53, 770 S.E.2d 405, 418 (Ct. App. 2015) (applying these principles in a case involving a dissolution of a statutory close corporation, and noting “the concern and focus in shareholder oppression cases is that the minority faces a trapped investment and an indefinite exclusion [from] participation in business returns”). *Cf.* S.C. Code Ann. § 33-41-910 (2006), *et seq.* (setting forth rules for dissolution of a partnership).

This Court should reverse the courts’ below in their application of the tests set forth in *Kiriakides, Ballard* and *Meiselman*.

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

The Court of Appeals affirmed the trial court's award of \$99,117 to Respondent for allegedly unpaid "shareholder distributions" from the business. The Court of Appeals ignored the fact that Respondent failed to specifically plead for this separate relief. Instead, Respondent relied upon his general prayer for relief, and tied this claim to the trial court's earlier erroneous finding that Respondent owned 7.2% of Front Roe. (App. pp. 117-119).

Second, the only evidence in the case was that throughout their association, Respondent had regular communication with Mr. Hammond regarding either an annual assessment or where he stood as far as how the business was doing or where he stood on compensation. (R. p. 92, l. 10 - p. 93, l. 17; p. 94, ll.15-17; p. 100, ll.2-10; p. 502; p. 505; p. 507; p. 509). When Respondent began he was receiving a salary and a bonus that would be entirely taxable as income. (R. p. 93, l. 22 - p. 94, l. 22). He did not recall there ever being a bonus to which he was entitled but did not get. (R. p. 94; l. 23 - p. 95, l. 3). Mr. Hammond then advised Respondent that going forward, the bonuses would be paid to him through shareholder distributions as a way of saving him money. (R. p. 93, l. 24 - p. 94, l. 3; p. 95, l. 4 - p. 96, l. 6). Respondent never interacted with the accountant even though there was nothing that prohibited him from asking the accountant any questions. (R. p. 96, l. 7 - p. 97, l. 6). The evidence revealed this treatment was to Respondent's benefit from a tax standpoint. (R. p. 274, ll.15-20).

Third, the Court of Appeals inappropriately found the issue tried by consent under Rule 15, SCRCPP. In doing so, the Court ignored that the trial court did not find that the issue

was tried by consent, the Respondent did not argue the issue was tried by consent, and the evidence upon which Respondent claimed entitlement to this amount was relevant to other disputed issues in the case, that is, whether Respondent had achieved the necessary threshold to have the agreed upon 10% interest in Front Roe, and what the value of that interest would be. *See Williams v. Addison*, 314 S.C. 35, 38, 443 S.E.2d 582, 584 (Ct. App.1994) (Court will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record-introduced as relevant to some other issue which would support the amendment; the opposing party may not be conscious of the relevance of the evidence to issues not raised by the pleadings if the relevance is not otherwise made clear); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000) (implied consent to amendment of pleadings will not be found if all of the parties did not recognize it as an issue at trial). Additionally, Respondent made no motion to amend to conform to the evidence, nor did he contend on appeal that the issue was tried by consent.

The Court should reverse the rulings regarding purported shareholder distributions.

CONCLUSION

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

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

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

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

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

Respectfully submitted,

April 26, 2017



John S. Nichols, SC Bar # 4210
BLUESTEIN NICHOLS THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

Attorney for Petitioners Mark and Larkin Hammond

Curtis Stodghill, SC Bar # 6458
STODGHILL LAW FIRM
P.O. Box 2431
Greenville, SC 29602
(864) 271-0966
*Attorney for Petitioners Front Roe Restaurants,
Inc., Beachfront Foods, Inc., Lake Point
Restaurants, Inc.*

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. 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.

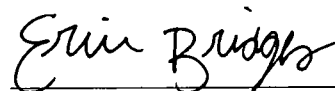
Front Roe Restaurants, Inc., Beachfront
Foods, Inc., Lake Point Restaurants, Inc.,
Mark Hammond and Larkin Hammond, Petitioners.

PROOF OF SERVICE

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

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

April 26, 2017



Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC