THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

Appellate Case No. 2016-000749

Kyle Pertuis,.....Respondent,

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

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

In response to the complaint seeking a protective order, Pertuis counterclaimed, alleging common-law and statutory claims for his oppression as a minority shareholder and seeking a court-ordered buyout of his shareholder position.

The parties were realigned, so that Pertuis became Plaintiff, and Mark Hammond and Larkins Restaurant Group became Defendants. The case was assigned to the Business Court for trial.

A non-jury trial was held in this case on May 28, 29, 2013. Mark Hammond and Larkins

Restaurant Group filed their motion for directed verdict on May 31, 2013, because the Trial Court did not entertain post-trial motions, in court, at the conclusion of the case.

On June 18, 2013, the Trial Court announced its decision in its First Order: the Trial Court amalgamated the corporate entities, Larkins Restaurant Group, treating them as one unified business operation; the Trial Court awarded Pertuis, based on his oppression as a minority shareholder, a 7.2% interest in Front Roe Restaurants, Inc., the Trial Court awarded Pertuis $99,116 for distributions which Pertuis should have received, had Pertuis been a 7.2% shareholder; the Trial Court ordered a buyout of Pertuis' shareholder interests in Larkins Restaurant Group. The Trial Court entered its First Order on July 3, 2013, relying on a submission by counsel for Pertuis, which had also been sent to counsel for Defendants prior to the Trial Court's ruling.

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

Petitioners then perfected an Appeal to the Court of Appeals. During the course of oral arguments, conducted on October 14, 2015, counsel for Respondent incorrectly recalled that Petitioners had properly raised and received an adverse ruling on the issue of amalgamation of the

corporate entities, parties to this action and on other issues.. The Court of Appeals, however, on review of the Record, determined that Petitioners had not properly preserved the amalgamation issue, and other issues, for appellate review.

Petitioners moved the Court of Appeals to supplement the Record with evidence that the amalgamation issue, and other issues, had been perfected for appellate review. The Court of Appeals denied Petitioners' Motion to Supplement the Record on Appeal, which was filed after the oral argument held in this case.

On February 24, 2016, the Court of Appeals issued its opinion. *Pertuis* v. *Front Roe Restaurants, Inc.* 2016-UP-091 (S.C.Ct.App. Filed Feb. 24, 2016). The Court of Appeals upheld the Trial Court's judgment in the case, in every regard..

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

Petitioners then filed their Petition for Writ of Certiorari, which was granted by this Court on March 27,2017.

STANDARD OF REVIEW

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to any of the members of Larkins Restaurant Group, or to Pertuis, personally. (R.p. 344, ll. 9-17).

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

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

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

ARGUMENTS

1. **That Petitioners may have failed to preserve issues for argument on appeal matters not, because the Court of Appeals nevertheless addressed and denied all issues asserted by Petitioners on their appeal in the Court of Appeals, on factual grounds.**

Petitioners assert that the Court of Appeals erred in failing to permit Petitioners to supplement the Record in this case. Because Petitioners lacked support in the Record, Petitioners, in the view of the Court of Appeals, lacked factual support for the issues which Petitioners asserted as a basis for reversal of the Trial Court's judgment. Petitioners assert, first, that the Court of Appeals unfairly and harshly applied the provisions of the South Carolina Appellate Court Rules, ("SCACR"), in finding that Petitioners had failed to properly preserve issues on appeal. Respondent asserts that the Court of Appeals, however, correctly articulated in detail the failure of Petitioners to preserve issues for appeal, as provided under SCACR and under applicable case law.

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

Respondent notes that, despite the Court of Appeals holding that Petitioners may have failed to preserve issues, the Court of Appeals nevertheless proceeded to address each of the issues raised on appeal by Petitioners, on the facts. A pragmatist might, therefore, suggest that the asserted error of the Court of Appeals in applying SCACR as an alternative basis for denying

Petitioners' appeal, is nugatory.

II. The Lower Courts correctly held that Larkins Restaurant Group was an amalgamated group of business entities, operated as a "de facto partnership, from the Larkins Restaurant Group's "nerve center" in Greenville, South Carolina.

a. Amalgamation.

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

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

The Lower Court applied the holding in *Magnolia North Property Owners' Assn., Inc.* v. *Heritage Communities, Inc.*, 725 SE 2d 112, 397 SC 348 (Ct.App. 2012), to amalgamate the corporate entities for purposes of resolving the intra-corporate shareholder dispute presented in this case. The Record shows that the corporate entities have identical ownership, the corporate entities have been operated as a unified business operation. Judicial amalgamation, for the purpose of adjudicating the common issues of this case, offers judicial economy in the resolution of identical claims arising from identical factual scenarios.

Pertuis, therefore, argues that *Magnolia*, *supra*, and its antecedent cases, should apply to

this case, first for judicial economy, but also to afford parties in parallel, intra-corporate shareholder disputes an opportunity to litigate, in a single case, their differences. A single venue for the resolution of amalgamated corporate issues offers fair play and economy to the disputants.

Indeed Pertuis argues that *Magnolia* should apply to open the same door to single-venue, intra-corporate litigation disputes as *Magnolia* offers to parties tortiously damaged by multiple entities which have been fractured to avoid common liability. Pertuis respectfully submits that it is a logical extension of the *ratio decidendi* of *Magnolia*, to apply *Magnolia* to this case. Pertuis cites the following from *Magnolia* to support his assertion that he should be allowed to litigate his claims in a single action:

> The evidence revealed an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.
>
> *Magnolia, supra*, citing *Mid-South Mgment. Co.* v. *Sherwood Dev. Corp.*, 374 SC 588, 649SE2nd 135 (Ct.App. 2007).

The record of this case reflects a blurring of the legal distinction between the members of Larkins Restaurant Group sufficient to subject the members to Pertuis' claims, in one action in South Carolina.

Based on the foregoing, Pertuis submits that the application of *Magnolia, supra*, to amalgamate the members of Larkins Restaurant Group, for purposes of adjudicating these identical intra-corporate shareholder disputes in a single action, is correct.

b. Severance for valuation.

Mark Hammond and Larkins Restaurant Group find irreconcilable conflict between the amalgamation of the corporate entities, for adjudication, and the severance of the entities for separate, individual economic valuation. Mark Hammond and Larkins Restaurant Group argue

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

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

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

> 1. There is disagreement as to ownership percentages;
>
> 2. The entities are in different locations and are quite diverse in terms of revenues and profitability;
>
> 3. One of the entities is leased from a related entity owned by Mr. and Mrs. Hammond.
>
> (Pltf. Exh. 9, p. 2, R.p. 464).

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

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

Pertuis submits that amalgamation for consolidating shareholder claims in litigation does

not dictate amalgamation for evaluation. Rather, Pertuis supports Dr. Alford's observations that the unique economic features of the amalgamated entities and the dispute about ownership percentages requires the evaluator to look at the "fair value" of the entities separately.

III. The Lower Courts properly found that the "nerve center" of the amalgamated "Larkins Restaurant Group" was, and is, Greenville, South Carolina.

From the myriad of jurisdictional challenges in State and Federal Courts, there has evolved a judicial doctrine which holds that the "nerve center" of a business entity is the location whence its officers direct, control, and coordinate the business activities of the entity. *Hertz Corp.* v. *Friend*, 559 US 77, 130 S.Ct. 1181, 175 LED 2nd 1029 (2010). In this case, there is abundant evidence that, during all times pertinent to this case, the "Larkins Restaurant Group" was directed, controlled, and coordinated by Pertuis from the business location of Front Roe Restaurants, Inc., one of the members of "Larkins Restaurant Group," which is located on S. Main Street, Greenville, SC.

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

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

The preponderance of the facts adduced in this case confirms that the "nerve center"

which was the principal place of the combined businesses entities operating as "Larkins Restaurant Group" was Greenville, South Carolina. *Hertz, supra.*

IV. The Lower Courts correctly applied equitable principles to enforce a minority shareholder's rights to increased shares of stock, based on an offer and acceptance and part performance by the parties.

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

> **SHAREHOLDER DISTRIBUTIONS**
>
> If I did not achieve 10% ownership in 2008, we will extend the current program through 2009 in order to equalize current ownership across the board. *Distributions going forward after the close of 2009 will be based on 10% ownership.*
>
> (Pltf. Exh. 6; R.p. 454)(Emphasis Added).

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

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

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

By any reasonable interpretation, the exchange set forth above, ("email agreement"), presents the classic offer and acceptance which creates an enforceable contractual agreement. Performance of the terms of the email agreement set forth above followed, while Pertuis and Mark Hammond waited for the formal documents from corporate counsel, Curt Stodghill. Indeed, the boat was conveyed to Pertuis and his salary was increased to match the employment agreement. (R.p. 70, ll. 1-3; Rp. 337, l. 2-p. 338, l. 10). Pertuis pressed through the summer of 2009, and into the fall, for the documentation of the email agreement promised to him by Mark Hammond. (R.p.,71, ll. 14-20). Pertuis testified:

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

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

Pertuis' frustration with the lack of documentation for his achieving 10% ownership in Larkins on the River Restaurant was based on history. Earlier, there had been a document which set the level of performance of Larkins on the River Restaurant which would trigger vesting of an additional 9% shareholder ownership in Pertuis. Unhappily, the original written document has disappeared. Mark Hammond, throughout this matter, advised Pertuis that Larkins on the River Restaurant had not yet reached the goal line for Pertuis' vesting to occur. Yet, under Pertuis' management, Larkins on the River Restaurant had gone from gross revenues of $1,000,000 in

2005 to $3,500,000 in 2009. (R.p. 50, ll. 11-19). Yet, Mark Hammond claimed that the restaurant had not performed well enough to trigger vesting for Pertuis. Somehow, the goal line was being moved to prevent the vesting of 10% ownership in Pertuis. (R.p. 311, l. 10-p. 312, l. 5). Pertuis argues that Mark Hammond was doing a "bait and switch" on Pertuis to keep Pertuis employed while not giving Pertuis 10% ownership in Larkins on the River Restaurant, as promised. In the corporate context, Mark Hammond had breached his fiduciary duty to honor his contractual obligation to convey 10% ownership to Pertuis, as demonstrated by the email agreement set out above.

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

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

> Equity regards and treats that as done which ought to be done, we note that this doctrine applies in those cases only where the party seeking to invoke it has established a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.
>
> *Wilkie, supra*, 187 SC at 394.

The foregoing equitable maxim was derived from an extensive extract cited in *Wilkie* by the Master in Equity, Richland County, from Volume 1, *Pomeroy's Equity Jurisprudence*, Fourth

Edition, Section 364. The extensive quotation[3] included the proposition that the maxim applied not only "to **express executory contracts**, and to those dispositions of property which give rise to an equitable conversion..." The *Wilkie* case was founded on the application of the equitable maxim to effect equitable performance of an express executory contract, an insurance policy in *Wilkie;* just so, the Trial Court determined to effect the email agreement by which Pertuis was to receive 10% shareholder interest in Larkins on the River Restaurant because the email contract was also an express executory contract.

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

1. Hammond's breach of his fiduciary duties to Pertuis amounts, under the email agreement which was supported by valuable consideration, to constructive fraud, for which equitable relief is appropriate;

2. In his Initial Brief, Hammond concedes that *Wilkie* should be applied to correct constructive fraud by employing a constructive trust;

3. The Trial Court and the Court of Appeals have not re-written the parties' contract; the email agreement established a contract for which performance by a fiduciary was required, and for the breach of which application of equitable principles is appropriate.

4. Hammond incorrectly characterizes the *Wilkie* case as inapposite for express executory contracts though it was thus employed by the Master of Equity, Richland County, with the approval of the SC Supreme Court;

5. Hammond incorrectly argues for a restrictive interpretation of the scope of application of the equitable maxim.

In *Wilkie*, the Lower Court found an apt precedent for authority to remedy Mark Hammond's breach of the email agreement which had promised that Pertuis would enjoy 10% ownership in

---

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

Larkins on the River Restaurant.

V. The Lower Courts correctly found that Beachfront Foods, Inc., had a "zero" value for the determination of buyout of an oppressed shareholder.

The parties to this action do not dispute that Pertuis was a 10% shareholder of Beachfront Foods, Inc., ("BF"). In its Order, dated July 3, 2013, the Trial Court assigned a "zero" value to BF. Pertuis' 10% interest in BF, therefore, had "zero" value in the calculation of the ordered buyout of Pertuis 10% interest in BF.

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

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

It is noteworthy that BF shows, (Pltf. Exh. 8, R.p. 488), a negative value in approximately

the same amount as the amount of the loans made to BF by Mark Hammond and/or Larkins Restaurant Group. On cross-examination, Mark Hammond conceded that there were no extant, written promissory notes documenting the shareholder loans. Mark Hammond conceded that no interest had been paid on the shareholder loans. (R.p. 247, l. 3- p. 248, l. 12; R.p. 303, l. 12-p. 305, l. 10).

Louis Manios testified on behalf of Mark Hammond and Larkins Restaurant Group. Mr. Manios was qualified as an expert whose area of expertise was accounting; he agreed that financial statements should be governed by Generally Accepted Accounting Principles, ("GAAP")(R.p. 386, ll. 14 -18). On examination, Mr. Manios conceded that an undocumented shareholder loan, on which no interest was paid, loses its qualification as a loan and, under GAAP, is treated as a contribution to equity, rather than debt. (R.p. 387, ll. 11-23; R.p. 395, l. 24-p. 398, l. 15). Mr. Manios's otherwise opaque testimony left the clear impression that a stale note should have been capitalized on the books of BF and treated as equity.

Mark Hammond testified (R.p. 247, ll. 3-14) that the loans to BF were shown on the books as loans rather than as capital contribution to avoid dilution problems. Hammond testified that he did not wish for the loans to be classified as capital contributions, because, then Pertuis' percentage would have been diluted, which Mark Hammond wished to avoid. (R.p. 247, ll. 3-14). Mark Hammond, apparently, was unaware that §33-6-300, *SC Code of Laws, 1976, as amended*, provides that shares issued as compensation to employees, such as Pertuis' shares in BF, do **not** enjoy protection from dilution. It is, therefore, more likely that, by terming the funds transferred to BF as "loans," rather than as capital contributions, Mark Hammond gave himself a priority to recover the "loans" as creditors rather than accepting a junior standing as shareholders who had made a capital contribution. These "loans" were made to BF without any shareholder meetings or

board of directors meetings of BF. (R..p.346. l. 10-p.349, l. 9). Additionally, Mark Hammond testified that he continued to support BF to avoid his personal liability on the bank debt of BF. (R.p. 324 l.24-p. 325, l. 5). In any event, it is fair to assert that Mark Hammond "disguised" the capital contributions as "loans" to avoid complying with proper corporate governance, to avoid liability on a personal guaranty, and to achieve a priority of payment over their fellow shareholder, Pertuis, all of which are violations of their corporate fiduciary duties to Pertuis.

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

VI. This case presents oppressive acts which are actionable, as established by the *Kiriakides* case.

The landmark SC case for the oppression of minority shareholders is *Kiriakides* v. *Atlas Food Systems and Services, Inc.*, 541 SE2nd 257, 343 SC 587, (S.Ct. 2001). In *Kiriakides*, the SC Supreme Court set out criteria (*Kiriakides, supra*, 541 SE2d 267, 268, 343 SC 605, 606) sufficient to order a buyout of the minority shareholders. The *Kiriakides* criteria are here juxtaposed with the italicized facts in the record of this case:

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

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

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

Mark Hammond fails to tender the acquisition of Lake Lure Property to the corporations in which Pertuis is a shareholder; Mark Hammond opens a new Greenville restaurant without offering the opportunity to the existing Greenville Restaurant from which funding for the new restaurant is borrowed;

(R.p. 318, l. 7-p. 319, l. 18; p. 344, ll. 9-17)

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

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

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

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

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

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

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

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

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

6. Total estrangement between majority and the minority;

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

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

7. Low-ball buyout offer to minority;

Mark Hammond offered $0 to Pertuis for his ownership interest in Larkins Restaurant Group, after Hammond declared that Pertuis' ownership interest

would be worth $250,000;

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

8. No public trading in stock of corporation;

the Larkins Restaurant Group is not publicly traded.

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

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

Pertuis presented evidence that the corporations of which he is a shareholder were excluded from a real estate opportunity at Lake Lure. In fact, Mark Hammond never presented the Lake Lure real estate opportunity to any of the corporations for acceptance or rejection, a condition precedent required to allow a shareholder to personally take advantage of the corporate opportunity. (R.p. 346, l. 10- p. 349, l. 9)(§33-8-310, *SC Code of Laws, 1976, as amended*). As to the Lake Lure real estate opportunity, Mark Hammond materially failed to meet his affirmative fiduciary duty. Likewise, cross-examination established that Mark Hammond had opened a new Greenville restaurant, "Grill Marks," using funds from Larkins on the River Restaurant, (R.p. 344, ll. 9-19), without proffering the opportunity for acceptance or rejection of opening a new

restaurant to Larkins on the River Restaurant. This misappropriation of the new restaurant corporate opportunity constitutes a material breach of Hammond's fiduciary duty to Larkins on the River Restaurant, in which Pertuis is a shareholder. These are classic examples of misappropriation of corporate opportunities by the majority shareholders, to the damage of the corporations in which Pertuis is a shareholder. In these transactions, Mark Hammond blithely ignores the requirements of *§33-8-310, SC Code of Laws, 1976, as amended*, and the parallel common -law rule governing the required proffer of a corporate opportunity first to the corporation. *Gilbert* v. *McLeod Infirmary*, 219 SC, 64 SE 2d 524 (1951); *Straight* v. *Goss*, 678 SE 2d 443, 383 SC 189 (Ct.App. 2009).

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

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

parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence."

For Hammond to deny Pertuis the liquidation of the fruit of 9.5 years of Pertuis' labor, which is tied up in the form of corporate stock, invites the application of *Meiselman* v. *Meiselman*, 309 NC 279, 307 SE 2d 551 (NC 1983). *Meiselman* found that a primary consideration in oppression of minority shareholder cases is that the minority's investment is captured, unable to be liquidated because of the closely-held nature of the corporations, as presented in this case. While *Kiriakides* focused primarily on the requisite misconduct of the oppressing majority shareholder(s), *Meiselman* offers the thwarted "reasonable expectations" of the oppressed minority as a basis for ordering a buyout of the minority's shares. In this case, Hammond offered $0 for Pertuis' stock.(R.p. 78, ll. 18-20). Hammond's offer contrasts ironically with Hammond's earlier declaration (made, no doubt, as a part of the "*incent ruse*") that Pertuis' shareholding would be worth $250,000.[5] (Pltf. Exh. 1, R.p. 424). Accordingly, Pertuis suggests that his "reasonable expectations" derived from his working for the Larkins Restaurant Group for 9.5 years should be honored in this case.

Pertuis (R.p. 150, ll. 16-25) testified that he never received his pro-rata shareholder distributions. Mark Hammond testified that Pertuis' shareholder distributions were commingled with, or disguised as, Pertuis' bonus payments. (R.p. 330, ll. 20-25). Pertuis argues that Mark Hammonds' curious treatment of Pertuis' bonus payments and distributions does not meet the

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

standards of corporate fiduciary duties owed to Pertuis, *Lesesne* v. *Lesesne*, 413, SE2d 847, 307 SC 67 (Ct.App. 1992). Pertuis further argues that Mark Hammond's murky mingling of Pertuis' bonus payments and distribution payments amounts to more of the "oppressive acts" required by the *Kiriakides* case.

Perhaps the most compelling of the oppressive acts perpetrated by Mark Hammond on Pertuis was the breach of the email agreement by Mark Hammond. Hammond accepted Pertuis' demand for full 10% ownership in the corporations, across the board. (Pltf. Exh. 6, R.p. 454; Pltf. Exh. 7, R.p. 456; R.p. 335, l. 8- p. 338, l. 10). Hammond, however, played possum, though, when Pertuis pressed for formal documentation of the email agreement. (R.p. 70, l. 14 - p. 71, l. 20). Perhaps Hammond's inaction was designed to prevent Pertuis from final realization that Pertuis had been tricked and that Pertuis' position as a full 10% shareholder, despite promises, reassurances, euphemistic coverups, would never become reality.

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

It appears anomalous, though, that Hammond would wish for anything but Pertuis' departure under fair and equitable terms. Hammond, as a seasoned businessman, should realize that a disaffected and mistreated minority shareholder in a closely-held corporation may precipitate ongoing judicial intervention, sooner or later. For this reason, Pertuis respectfully suggests that it would be a sound exercise of judicial policy to uphold the buyout ordered in this

case, where there exists an irreconcilable intra-corporate shareholder dispute in which there are violations of corporate fiduciary duties, as presented in this case. *Kiriakides, supra.*.

VII. Because Pertuis alleged and proved impropriety in the shareholder/bonus distributions which Pertuis received, the Lower Courts correctly compensated Pertuis for his non-receipt of shareholder/bonus distributions.

Mark Hammond and the Larkins Restaurant Group appeal that portion of the Order of the Trial Court which requires payment of $99,117 to Pertuis for unpaid shareholder/bonus payments. The Court of Appeals upheld the Trial Court's judgment that Mark Hammond and the Group owed Pertuis $99117. Hammond and the Group have asserted, however, that Pertuis did not seek relief for the non-payment of the shareholder/bonus payments in his Complaint, so the Trial Court was not empowered to order the payments. Hammond and the Group cite *Pittman Mortgage Co., Inc.* v. *Edwards*, 327 SC 72, 488 SE2d 335 (S.Ct. 1997), for the proposition that where there is no prayer for specific relief the tribunal may not exceed its authority by granting relief not prayed for. Hammond and the Group also assert that the award of $99,117 by the Trial Court is not supported in the record of the trial

Pittman, supra, presents a case tried by an Arbitration Panel, pursuant to the Uniform Arbitration Act, §§15-48-10, *et seqq., SC Code of Laws, 1976, as amended.* The substantive law which applied in the *Pittman* arbitration proceeding was Georgia law. In *Pittman*, there was no general, omnibus prayer for "such other and further relief as this Court may deem just and proper," as presented by Pertuis' Amended Complaint. (R.p. 24). The arbitration proceeding was limited to the relief sought in the claimant's pleadings. In contrast to *Pittman*, Pertuis' case was tried in Court of Common Pleas, before a judge vested with the plenary power of the Court of

Common Pleas. Accordingly, Pertuis asserts that *Pittman* does not apply to Pertuis case because Pertuis' case was not conducted as an arbitration proceeding subject to the limits of an arbitration proceeding, under Georgia law.

Pertuis further asserts that *Pittman* is not applicable to Pertuis' case because Pertuis complained (R.p. 18) about the impropriety of the bonus/shareholder distributions. Pertuis then, in his prayer, asked for general relief from the alleged acts of oppression of Hammond and the Larkins Restaurant Group: "and Pertuis prays for such other and further relief as this Court may deem just and proper." (R.p. 24). In his Complaint, then, Pertuis specifically complained about the bonus/shareholder distribution problem and Pertuis asked for such relief from the alleged problem as the Court, in its plenary power, might fashion. Pertuis, therefore, argues that the award of unpaid bonus/shareholder payments comports with the following citation set forth in *Pittman*: "...the incidental or auxiliary relief granted must be within the limits of the issues made by the pleadings and be of the same general nature."

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

> "there never was a distribution check cut specific as a distribution. They were included in bonuses if they were included. And I was never clear on what was what or how much was taken.
> (R.p. 150, l. 21 - p. 151 10).

The Trial Court followed up the foregoing testimony of Pertuis with the following colloquy (R.p. 151, ll. 2-13):

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

THE WITNESS: Bonus payouts.

THE COURT: Bonus payouts?

THE WITNESS: Yeah.

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

THE WITNESS: Whether it was bonus or shareholder distributions.

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

THE WITNESS: There's no way to know.

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

Mark Hammond testified as follows:

> As I have already articulated in one of the earlier exhibits, one of the things Kyle wanted was to have as much of his earnings in case or at least to avoid taxes. So as I promised I would do, we would take as much of his bonus eligibility and write it as a distribution if we could.
>
> (R.p. 274, ll. 15-20)

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

The Trial Court received in evidence the tax returns for Larkins on the River. (Deft. Exh. 31A, R.p. 812). The Trial Court found that Pertuis should have been a 7.2% shareholder in Larkins on the River. (Order, July 18, 2013, R.pp. 4-12). Based on Pertuis' percentage of

ownership for 2008, 2009, 2010, 2011, and 2012, Pertuis should have received $99,117 in shareholder distributions which Pertuis did not receive. There is ample evidence in the record for the Trial Court's ruling that Pertuis had earned 7.2% ownership for which the Trial Court correctly awarded $99,117 in unpaid shareholder distributions, as sought by Pertuis in his Amended Complaint. The Court of Appeals correctly upheld this finding of the Trial Court.

CONCLUSION

For the reasons set forth above, or, pursuant to Rule 220(c) South Carolina Appellate Court Rules, on any grounds appearing in the Record on Appeal, Pertuis urges this Court to confirm the Orders and Opinions of the Lower Courts in this case.

Respectfully Submitted,

Dated: 6/09/17

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

Appellate Case No. 2016-000749

Kyle Pertuis,.....Respondent,

v.

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

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

The undersigned attorney hereby certifies that the Brief of Respondent in the above-referenced case complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Dated: 6/05/17

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above-referenced case has been served upon opposing counsel pursuant to Rule 211(a) of the South Carolina Appellate Court Rules.

Dated: 6/05/17

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