



# The Supreme Court of South Carolina

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August 16, 2018

The Honorable Paul B. Wickensimer  
Clerk of Court, Greenville County  
305 E North St  
Greenville SC 29601-2121

## REMITTITUR

Re: Kyle Pertuis v. Front Roe Restaurants, Inc.  
Lower Court Case No. 2010-CP-23-01646  
Appellate Case No. 2016-000749

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:

Curtis Warren Stodghill, Esquire

Robert C. Wilson, Jr., Esquire

Blake A. Hewitt, Esquire

Arthur Eugene Morehead, III, Esquire

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Kyle Pertuis, Respondent,

v.

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

Appellate Case No. 2016-000749

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

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Opinion No. 27823  
Heard November 14, 2017 – Filed July 5, 2018

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**REVERSED IN PART, VACATED IN PART, AND  
AFFIRMED AS MODIFIED IN PART**

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Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC,  
of Columbia and Curtis Stodghill, of Stodghill Law Firm,  
of Greenville, for Petitioners.

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

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**ACTING CHIEF JUSTICE KITTREDGE:** Petitioners Mark and Larkin

Hammond built and operated several successful restaurants in Lake Lure, North Carolina, and Greenville, South Carolina. The Hammonds hired Respondent Kyle Pertuis to manage the restaurants, and as part of his compensation, Pertuis acquired minority ownership interests in the three restaurants. Pertuis eventually decided to leave the business, and this dispute primarily concerns the percentage and valuation of Pertuis's ownership interests in the three restaurants. Following a bench trial, the trial court found the three corporate entities should be amalgamated into a "de facto partnership" operating out of Greenville, South Carolina. The trial court further awarded Pertuis a 10% ownership interest in the two North Carolina restaurants, a 7.2% ownership interest in the South Carolina restaurant, and a total of \$99,117 in corporate distributions from the restaurants. The trial court further concluded Pertuis was an oppressed minority shareholder, valued each of the three corporations, and ordered a buyout of Pertuis's shares. The court of appeals affirmed. *Pertuis v. Front Roe Restaurants, Inc.*, Op. No. 2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016). For the reasons explained below, we reverse in part, vacate in part, and affirm as modified in part.

## I.

The Hammonds, who are residents of Lake Lure, North Carolina, formed Lake Point Restaurants, Inc. (Lake Point), a North Carolina S-corporation, in 1998 and purchased a restaurant on the water at Lake Lure, North Carolina. The Hammonds were the sole shareholders with equal ownership in the corporation. The restaurant purchase was financed through personal contributions by the Hammonds, owner-financing, and third-party loans personally guaranteed by the Hammonds. The business operated as Larkin's on the Lake and remains a viable business today.

In 2000, the Hammonds hired Pertuis as a manager of the restaurant. As part of Pertuis's compensation package, the parties agreed Pertuis would earn a base salary plus bonuses based on profitability benchmarks, along with a 10% share in the business over the course of a five-year period at an agreed vesting schedule. The vesting schedule was time-based to incentivize Pertuis to remain with the company for a period of time. In accordance with the vesting schedule, by 2007, Pertuis owned a 10% share in Lake Point.

In 2001, the Hammonds formed Beachfront Foods, Inc. (Beachfront), which was also a North Carolina S-corporation, for the purpose of purchasing another restaurant on Lake Lure. As with Lake Point, the Hammonds were the sole shareholders with equal ownership interests; the restaurant purchase was financed

through personal contributions by the Hammonds, owner-financing, and third-party loans personally guaranteed by the Hammonds; and the parties agreed upon a five-year vesting schedule for Pertuis to attain a 10% ownership interest. The second restaurant was renovated and re-branded as MaLarKie's, which represented a combination of the parties' first names—Mark Hammond, Larkin Hammond, and Kyle Pertuis. When Beachfront was formed, Pertuis's job title became "Managing Partner," as his duties included oversight of both restaurants. Along with the increase in job duties, Pertuis's compensation expanded. Also as with Lake Point, by 2007, Pertuis owned a 10% share in Beachfront. For various reasons, MaLarKie's was not as successful as Larkin's on the Lake, and eventually Beachfront sold MaLarkie's and began operating a casual dining restaurant in nearby Columbus, North Carolina. This restaurant, Larkin's Carolina Grill, was the least profitable of the three restaurants at the time of trial, with a negative net income reported on its income tax returns each year from 2008–2012.

In 2005, the Hammonds formed Front Roe Restaurants, Inc. (Front Roe), a South Carolina S-Corporation and purchased Rene's Steakhouse in Greenville, South Carolina. As with the other two corporations at the time of their formation, the Hammonds were the sole shareholders of Front Roe with equal ownership interests, and the restaurant purchase was financed through personal contributions by the Hammonds and third-party loans personally guaranteed by the Hammonds. The business currently operates as Larkin's on the River and, at the time of trial, was the most profitable of the three corporations.

Several months after Front Roe was formed, Pertuis moved to Greenville and traveled to each of the restaurants weekly as part of his managerial duties. Although the parties agreed upon a vesting schedule for Pertuis to acquire up to a 10% interest in Front Roe, by all accounts this agreement, unlike the others, was based upon the restaurant's profitability benchmarks rather than length of service. Although none of the parties could produce a written vesting schedule, Mark Hammond testified the agreement was for Pertuis to receive a 1% interest the year Front Roe first became profitable and an additional 9% once the company achieved a net operating profit of \$500,000.

By 2007, Pertuis owned a 1% share of Front Roe; however, both Hammond and Pertuis agreed that, at the time of trial, Front Roe had never reached the \$500,000 profit benchmark. This fact is confirmed by Front Roe's tax returns. Pertuis has never made any capital contributions or personal loans to the companies, either during or after his employment.

By late 2008 to early 2009, the parties began discussing different compensation packages to allow Pertuis to reach a 10% ownership interest in Front Roe. Despite multiple conversations back and forth between Pertuis and Hammond, and the involvement of attorneys and tax professionals, Pertuis eventually became frustrated with the perceived delay in the process of formalizing what he hoped would be a new agreement. In early October 2009, Pertuis took some time off from the business to consider his options. In a lengthy email to the Hammonds, Pertuis cited the sources of his discontent as, among other things, feeling like his investment of time and energy into the business was not paying off financially, industry burnout, and trouble achieving work-life balance. Ultimately, the parties split ways, although it is unclear from the record whether the decision was Pertuis's, the Hammonds', or a mutual one.

After the parties' unsuccessful attempts to negotiate the Hammonds' purchase of Pertuis's shares of the businesses, which was exacerbated by disagreements over the value of Pertuis's shares and the extent to which Pertuis was entitled to certain business records, suit was filed.<sup>1</sup> Essentially, Pertuis argued he was an oppressed minority shareholder who had been "squeezed out" of the business in bad faith and that he was therefore entitled to a forced buyout of his shares, including a 10% ownership share in Front Roe.

Following a bench trial, the trial court found the three corporate entities—Lake Point (NC), Beachfront (NC), and Front Roe (SC)—should be amalgamated into a single business enterprise located in and operating out of Greenville, South Carolina. The trial court further found Pertuis was an oppressed minority shareholder and awarded Pertuis a 7.2% ownership interest in Front Roe, as well as \$99,117 in unpaid corporate distributions from Lake Point and Front Roe. The trial court valued each of the three corporations and ordered a buyout of Pertuis's

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<sup>1</sup> This lawsuit was initially filed by Front Roe as a declaratory judgment action, seeking a declaration that it did not have to turn over its corporate records to Pertuis without some sort of protection against the risk Pertuis might divulge confidential or "proprietary" information contained therein. Thereafter, Pertuis filed counterclaims and third-party claims; as a result, the parties were realigned, and the caption was changed to its current form.

shares by Petitioners.<sup>2</sup> The court of appeals affirmed. *Pertuis v. Front Roe Restaurants, Inc.*, Op. No. 2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016). This Court issued a writ of certiorari to review the court of appeals' decision.

Petitioners now argue the court of appeals erred in affirming the trial court's finding that the three corporations operated as a single business enterprise with its locus in Greenville and that the court of appeals erred in finding this argument to be unpreserved. Petitioners also contend the court of appeals erred in affirming the trial court's decision to award a 7.2% ownership interest in Front Roe and \$99,117 in shareholder distributions to Petitioner; in valuing Beachfront at \$0 rather than assigning it a negative value; and in finding Pertuis was an oppressed minority shareholder.

## II.

An action for stockholder oppression is one in equity. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (citation omitted). Therefore, this Court may find facts according to its own view of the evidence. *Id.* (citing *S.C. Dept. of Transp. v. Horry Cty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011)).

### A. Amalgamation or Single Business Enterprise

Petitioners claim the court of appeals erred in affirming the trial court's finding that amalgamation of the three corporate entities was warranted. We agree.<sup>3</sup> However,

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<sup>2</sup>It was unclear from the trial court's order whether the buyout of Pertuis's shares was to be by the Hammonds or the corporate entities. See N.C. Gen. Stat. § 55-14-31(d) (allowing a corporate entity to repurchase the shares of an oppressed minority shareholder to avoid the harsh remedy of judicial dissolution); S.C. Code Ann. § 33-18-420(a) (allowing similar purchase by either the corporation or one or more of its shareholders).

<sup>3</sup> The court of appeals erred in concluding this issue was not preserved for appellate review; further, it was an abuse of discretion for the court of appeals to raise this issue *sua sponte* then to deny Petitioners' request to supplement the record with materials in response to the court of appeals' questions at oral argument, particularly where counsel for Pertuis conceded the Hammonds' challenge was preserved. "Judicial economy is not served when a case, ripe for

before we reach the merits of this claim, we must first sort through the complicated issue of whether South Carolina or North Carolina law governs our evaluation of this veil-piercing theory.

### *1. Choice of Law*

At the outset, we acknowledge the trial court's finding that these three entities should be amalgamated into a single business enterprise with its locus in Greenville, South Carolina, is foundational to the consideration of all the remaining issues, including the issues of shareholder oppression, Pertuis's ownership percentages, and valuation issues. However, because Lake Point and Beachfront are North Carolina corporations that are not registered to do business in South Carolina, and based on the record, do not, in fact, conduct business in South Carolina, this preliminary issue presents a vexing choice of law question as to whether South Carolina or North Carolina law governs our inquiry.

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decision, is decided on a procedural technicality of this nature. In the interests of justice and fair play, cases should be decided on the merits when deficiencies of this nature can be easily corrected." *Silk v. Terrill*, 898 S.W.2d 764, 766 (Tex. 1995) (citation omitted) (finding an intermediate appellate court abused its discretion in denying a party's motion to supplement the record then concluding the resulting insufficiencies in the record procedurally barred the substantive consideration of the legal issues where the omitted documents had not previously been at issue and the appellate court was not in any way misled or its decision hindered or delayed); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "long-standing error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review . . . . Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." (quotation marks and citations omitted)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.").

"The choice of law rule generally applied to corporate law issues is the internal affairs doctrine, which provides that the internal matters of corporate governance are governed by the law of the state of incorporation." 1 William Meade Fletcher et al., *Fletcher Cyclopaedia of the Law of Corporations* § 43.72 (perm. ed., rev. vol. 2015). The "internal affairs" of a corporation consist of "the relations inter se of the corporation, its shareholders, directors, officers or agents." Restatement (Second) of Conflict of Laws § 302 cmt. a (1971). "States normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care." *Atherton v. F.D.I.C.*, 519 U.S. 213, 224 (1997) (citation omitted).

In South Carolina, our Legislature has made clear that this state is "not authorize[d]" to "regulate the organization or internal affairs of a foreign corporation" even if the corporation *is* registered to conduct business in South Carolina, which Lake Point and Beachfront are not. S.C. Code Ann. § 33-15-105(c) (2006); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (citation omitted) ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").

That being said, although "[v]eil piercing cases implicate corporate law[, they] involve disputes that reach beyond the confines of the corporation." 1 William Meade Fletcher et al., *Fletcher Cyclopaedia of the Law of Corporations* § 43.72 (perm. ed., rev. vol. 2015). Indeed, this threshold amalgamation issue is not as much a question of the inner-workings of foreign corporations as it is an assessment of whether these entities actually operate as a single business enterprise, and thus should be treated as a single entity. Further, one of the three corporate entities, Front Roe, is a South Carolina corporation; much of the conduct at issue occurred, at least in part, in South Carolina; and Pertuis, the minority shareholder, is a South Carolina resident. Accordingly, we conclude the application of South Carolina law is appropriate and that the internal affairs doctrine does not bar our review of this issue. *See TAC-Critical Sys., Inc. v. Integrated Facility Sys., Inc.*, 808 F. Supp. 2d 60, 65 (D.D.C. 2011) (explaining that resolving choice-of-law issues in veil-piercing cases involves an evaluation of the governmental policies underlying the conflicting laws and a determination of the extent to which a jurisdiction's policies would be advanced by having its law applied to the facts of the case under review); *cf. Robinson v. Estate of Harris*, 388

S.C. 645, 656, 698 S.E.2d 229, 236 (2010) ("Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." (quotation marks and citation omitted)). Having determined South Carolina law governs our evaluation of the amalgamation claim, we turn now to the merits.

## 2. *Amalgamation or Single Business Enterprise Theory*

The amalgamation of interests theory was first recognized in South Carolina by the court of appeals in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986), which involved three related corporations (a development corporation, a management corporation, and a construction corporation) that were sued for negligent construction and breach of warranty. The management corporation argued it was entitled to a directed verdict in its favor because it was merely the marketing and sales company; however, the record in *Kincaid* revealed that, in addition to sharing owners and corporate officers, the three companies shared a location, all companies were overseen by the management company, and business letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company." *Id.* at 96, 344 S.E.2d at 874. Based on that evidence, the court of appeals affirmed the trial court's finding that the corporate entities were properly regarded as a single entity because the evidence at trial showed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Id.* (quoting the trial court order).

Subsequently, this so-called amalgamation of interests theory was briefly referenced (but not examined) by this Court in *Kennedy v. Columbia Lumber and Manufacturing Co.*, 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989) (noting a "lender may be liable if it is so amalgamated with the developer or builder so as to blur its legal distinction." (citing *Kincaid*, 289 S.C. 89, 344 S.E.2d 869)). And it was also addressed in *Mid-South Management Co. v. Sherwood Development Corp.*, in which the court of appeals found the theory did not apply to the facts of that case because there was no evidence in the record that the corporate entities' identities or interests were blurred or could be confused with one another. 374 S.C. 588, 605, 649 S.E.2d 135, 144–45 (Ct. App. 2007) (per curiam). Most recently, the amalgamation theory was addressed by the court of appeals in a pair of construction defect cases—*Magnolia North Property Owners' Association v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), and *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App.

2011).<sup>4</sup>

The parties have not cited, and our research has not found, a decision of this Court examining the amalgamation of interests theory in detail. However, under this theory, as it has been recognized in other states,<sup>5</sup> where multiple corporations have

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<sup>4</sup> This Court dismissed certiorari as improvidently granted in both those cases on September, 30, 2015—just two weeks before the oral argument before the court of appeals in this case. See *Magnolia North Prop. Owners' Ass'n v. Heritage Communities, Inc.*, 414 S.C. 198, 777 S.E.2d 831 (2015), and *Pope v. Heritage Communities, Inc.*, 414 S.C. 199, 777 S.E.2d 832 (2015).

<sup>5</sup> See *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249–50, 1 Cal. Rptr. 2d 301, 301 (Ct. App. 1991) ("Generally, alter ego liability is reserved for the parent-subsidary relationship. However, under the single-enterprise rule, liability can be found between sister companies. The theory has been described as follows: In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it." (quotations and citation omitted)); *Green v. Champion Ins. Co.*, 577 So. 2d 249, 257 (La. Ct. App. 1991) ("When corporations represent precisely the same single interest, the court is free to disregard their separate corporate identity. . . . This is especially true where the corporations constitute a single business. Courts have been unwilling to allow affiliated corporations that are not directly involved to escape liability simply because of the business fragmentation." (citations omitted)); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 450–51 (Tex. 2008) (noting "[w]hen corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purpose. Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations," but cautioning that "the limitation on liability afforded by the corporate structure can be ignored only when

unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Although no other jurisdiction seems to use the term "amalgamation," other states have indeed recognized that, in some instances outside of the traditional veil-piercing context, certain enterprises choose to conduct their business in such a way that the law should no longer regard the various corporations as distinct entities.<sup>6</sup> Our research reveals that the underlying rationale for other states' decisions to treat various corporations as a single business entity varies; as one scholar has explained:

[J]udicial erection of a new [aggregate enterprise] entity occurs in situations where the corporate personality (as embodied in its charter, books and so forth) does not correspond to the actual enterprise, but merely to a fragment of it. The result is to construct a new aggregate of assets and liabilities. Typical cases appear where a partnership or a central corporation owns the controlling interest in one or more other corporations, but has so handled them that they have ceased to represent a separate enterprise and have become, as a business matter, more or less indistinguishable parts of a larger enterprise. The decisions disregard the paper corporate personalities and base liability on the assets of the enterprise. The reasoning by which courts reach this result varies: it is sometimes said that one corporation has become

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the corporate form has been used as part of a basically unfair device to achieve an inequitable result" (footnotes, quotation marks, and citations omitted)).

<sup>6</sup> See Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards A Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 Nw. U. L. Rev. 405, 422-23 (2006) (noting the other jurisdictions which have "recognized the idea of imposing liability on or finding jurisdiction over a 'single business enterprise' involving multiple corporations called by that name or something similar" include Arkansas, California, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, New York, North Carolina, Puerto Rico, Texas, Virginia, and Washington).

a mere "agency" of another; or that its operations have been so intermingled that it has lost its identity; or that the business arrangements indicate that it has become a "mere instrumentality."

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This category of cases stands still more squarely on the foundation of economic enterprise-fact. The courts disregard the corporate fiction specifically because it has parted company with the enterprise-fact, for whose furtherance the corporation was created; and, having got that far, they then take the further step of ascertaining what is the actual enterprise-fact and attach the consequences of the acts of the component individuals or corporations to that enterprise entity, to the extent that the economic outlines of the situation warrant or require.

Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 348 (1947).

Indeed, at least fourteen states around the country recognize some sort of single business enterprise theory. See Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards A Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 Nw. U. L. Rev. 405, 422–23 (2006) (noting other jurisdictions). It also appears virtually all of these states require evidence of some sort of injustice or abuse of the corporate form to warrant disregarding the distinct corporate entities and treating the businesses as a single enterprise. As the Texas Supreme Court has put it:

Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or . . . injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used . . . as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is

necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a "bedrock principle of corporate law"—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

Disregarding the corporate structure involves two considerations. One is the relationship between two entities . . . . The other consideration is whether the entities' use of limited liability was illegitimate.

*SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008). We agree with the reasoning of the Texas Supreme Court.

We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that. For this reason, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.

As with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy, and this doctrine "is not to be applied without substantial reflection." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (quoting *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984)). "If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons." *Id.* "The party seeking to pierce the corporate veil has the burden of proving that the doctrine should be applied." *Id.*

Here, the trial court found amalgamation was proper because the three entities had the same shareholders and the same managing partner (Pertuis) who oversaw all three restaurants. The trial court also found "there had been considerable movement of corporate funds between the three corporate Defendants, for which Defendants did not produce any documentation in the record of this case," and

noted the three restaurants shared a website. The trial court also found the parties had disregarded corporate formalities, including shareholder and board of directors meetings, in addition to the conveyance of a boat from the Hammonds to Pertuis "without any corporate formality . . . to avoid liability and high insurance premiums." The trial court concluded: "Accordingly, this Court finds and concludes, applying the standards articulated in *Magnolia North Prop. Owners Ass'n v. Heritage Communities, Inc.*, 725 SE2d 112, 397 SC 348 [sic] (Ct. App. 2012), that [the Hammonds] and [Pertuis] operated the three corporate Defendants as a *de facto* partnership of the corporate entities."

The court of appeals misconstrued both the trial court's holding and Petitioners' claims of error. Specifically, the court of appeals concluded that "amalgamation" and a "de facto partnership" were two separate legal concepts and that the trial court had found the three entities were a de facto partnership—not an amalgamated corporate entity. In affirming the trial court's purported de facto partnership finding, the court of appeals noted evidence that the three restaurants shared personnel (including Pertuis as general managing partner, who travelled to all three restaurants weekly) and that several emails among the parties referred to the relationship between Pertuis and the Hammonds as a "partnership."

We agree with Petitioners that the trial court's finding was one of amalgamation, despite its use of the phrase "de facto partnership," and we reverse the court of appeals.<sup>7</sup> Further, we find the trial court's analysis not only failed to assign the burden of proof to Pertuis, as the party seeking amalgamation, but also overlooked the corporations' status as S-Corporations, which are statutorily permitted to disregard the very corporate formalities identified by the trial court as lacking.<sup>8</sup> *See, e.g.*, S.C. Code Ann. § 33-18-200 to -210 (authorizing elimination of the requirement of a board of directors); *Id.* § 33-18-220 (authorizing an S-Corporation not to adopt bylaws); *Id.* § 33-18-230 (authorizing an S-Corporation not to hold an annual meeting). The Hammonds' failure to strictly comply with corporate

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<sup>7</sup> Although not raised by the parties, we note it is unclear under what circumstances, if any, this equitable veil-piercing remedy would be available or appropriate in an action among shareholders.

<sup>8</sup> *See* South Carolina Statutory Close Corporation Supplement, S.C. Code Ann. §§ 33-18-101 to -500 (2006).

formalities was expressly authorized by statute, and our thorough review of the extensive record yields no evidence of bad faith by the Hammonds. Thus, it was error to consider these three distinct corporations as a single business enterprise.<sup>9</sup>

Properly viewing these corporations as the three distinct entities they are, we further conclude that the internal affairs doctrine precludes consideration of any remaining issues as to the North Carolina corporations.<sup>10</sup> We therefore reverse the decision of the court of appeals and we vacate the trial court's decisions as they relate to Beachfront and Lake Point. Further, we affirm the finding that Pertuis is entitled to unpaid distributions from Front Roe, but we modify the amount awarded to \$14,142, which removes the funds attributable to the North Carolina corporations and limits the award to include only funds attributable to the South Carolina corporation.

### **B. Percentage of Pertuis's Shares in Front Roe**

Petitioners further contend the court of appeals erred in affirming the trial court's award of a 7.2% ownership interest in Front Roe to Pertuis. We agree and reverse.

It is undisputed Pertuis never received any share certificates for his ownership interest in Front Roe. The corporation's tax returns from years 2005 through 2012 indicated that, from 2007 forward, Pertuis's ownership interest in Front Roe was 1%.<sup>11</sup> It is further undisputed that Pertuis's claim to a 10% ownership interest in

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<sup>9</sup> In light of this disposition, we need not reach the issue of whether the court of appeals erred in affirming the trial court's finding that the locus of the "de facto partnership" was Greenville, South Carolina. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citation omitted) (explaining an appellate court need not address remaining issues when disposition of prior issue is dispositive).

<sup>10</sup> In light of this finding, we need not reach the issue of whether the court of appeals erred in affirming the trial court's finding of a \$0 value for Beachfront. *Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

<sup>11</sup> The trial court took judicial notice of I.R.C. § 6037, which requires a shareholder of an S-Corporation to notify the IRS if the information listed on the corporation's tax return is inaccurate. The parties further stipulated that Pertuis had received the requisite K-1 forms but had made no notification to the IRS of any inconsistencies.

Front Roe was tied to profitability benchmarks for that restaurant. Pertuis's reliance on e-mail exchanges with Mark Hammond are unavailing.

Pertuis testified that, as to the vesting schedule for his interest in Front Roe, Pertuis's ownership interest was based on certain unidentified profit margin goals; Pertuis explained, "There was an initial letter similar to form of this [sic] around a creative way to structure something. . . . It had a proposed way to do things going forward that we were going to solidify at a later date." However, Pertuis stated on direct examination:

Q. And at any time did you have any clear understanding about what it was going to take for you to be vested in an increased amount of ownership in the River [restaurant operated by Front Roe]?

A. No, I didn't have clarity on that other than that original document that was put together just kind of saying, hey, this is how we will structure [vesting.]

Pertuis further testified that he eventually became frustrated with the lack of details and approached the Hammonds about "formalizing our agreement with the vesting schedule at the River."

Pertuis relied upon a series of emails between Pertuis and Hammond in June 2009 regarding changes to Pertuis's compensation package. Specifically, Pertuis argued those emails constituted an offer by Hammond, a counteroffer by Pertuis, and an acceptance by Hammond. However, none of those emails referenced the specific profitability benchmark required for Pertuis to receive 10% ownership of Front Roe; rather, the purported "offer" and "counteroffer" both included language indicating the profit margin had not yet reached the set milestone—whatever it was.<sup>12</sup>

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<sup>12</sup> Specifically, Hammond's email stated "If we go with [compensation] Option A, we will extend the original [vesting] timeline on the River into 2009 if the final numbers for 2008 fall short of what you need under the original agreement to get you to the 10% ownership across the board." Likewise, in his "counteroffer" email, Pertuis stated, "If I did not achieve 10% ownership in 2008, we will extend current program through 2009 in order to equalize current ownership across the board."

The only evidence in the record of the specific profit margin dollar amount required for Pertuis to achieve a 10% ownership interest was Hammond's testimony that Pertuis "was granted one percent for when Front Roe turned profitable . . . and then an additional nine percent once the company had a net operating profit of \$500,000." There is no evidence in the record that Front Roe ever achieved a net operating profit of \$500,000.

The trial court characterized the vesting schedule as "missing" and concluded that the unavailability of the document was the Hammonds' fault. The trial court further found that because the loss of this document was not attributable to Pertuis, as an equitable matter, "this disputed ownership issue [should be treated] as if there was a graduated vesting schedule in place, so that [Pertuis] had achieved 72% of the [\$500,000] goal of 10% shareholding in [Front Roe], or 7.2% ownership of [Front Roe]." On that basis, the trial court concluded Pertuis's ownership interest in Front Roe was 7.2%. On appeal, the court of appeals affirmed, finding the trial court's equitable remedy was proper given that "[Pertuis] could not, himself, testify to the specific provisions in the missing vesting schedule."

This was error, for it erroneously shifted the burden of proof from Pertuis, as the plaintiff seeking to enforce the purported agreement, to the Hammonds. We therefore reverse. Even assuming a written stock agreement was unnecessary,<sup>13</sup> Pertuis failed to meet his burden of proving the existence of an oral agreement as to all the material terms of the contract—specifically including the required profit margin bench mark, which is perhaps the *most* material term.

The evidence in the record conclusively demonstrates that Pertuis's ownership share in Front Roe is 1%. The trial court determined the fair market value of Front Roe is \$1,376,000. Accordingly, the cost of purchasing Pertuis's shares in Front Roe is \$13,760. We affirm the balance of the court of appeals' decision pursuant to Rule 220, SCACR.

### III.

Based on the foregoing, we reverse the court of appeals findings as to

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<sup>13</sup> See *Springob v. Univ. of S.C.*, 407 S.C. 490, 495, 757 S.E.2d 384, 387 (2014) ("[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties.").

amalgamation, "*de facto* partnership," and the award of 7.2% ownership interest in Front Roe to Pertuis. We affirm as modified the court of appeals finding that Pertuis is entitled to unpaid shareholder distributions. We vacate the court of appeals opinion to the extent it makes any findings as to Beachfront and Lake Point, the two North Carolina corporations, and we affirm the balance of the judgment of the court of appeals pursuant to Rule 220, SCACR.

**FEW, JAMES, JJ., and Acting Justice Arthur Eugene Morehead III, concur.  
HEARN, J., dissenting in a separate opinion.**

**JUSTICE HEARN:** Respectfully, I dissent. While I concur fully in the majority opinion's treatment of the percentage of Pertuis's share in Front Roe and in its discussion of the amalgamation or single business enterprise theory, I part company with the majority's decision to rule on the single enterprise theory; instead, I would remand to the trial court to analyze the evidence under the framework we established today and to make findings of fact on that issue.

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

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

Kyle Pertuis, Respondent,

v.

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

Appellate Case No. 2013-002257

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

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

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**AFFIRMED**

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

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

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

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

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

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

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

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<sup>1</sup> Although counsel for Pertuis stated at oral argument that he believed the issues were properly preserved on appeal—i.e., they had been raised to and ruled upon by the trial court—the record presented to this court fails to support such. "[Our appellate courts] are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

*Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Hammonds and Pertuis operated the three corporate entities as a *de facto* partnership of the three corporate entities. On appeal, the Appellants contend the trial court erred in finding an amalgamation of the companies but then ordering an award to Pertuis based upon a separate treatment of each company, arguing the facts supporting amalgamation in *Magnolia* are not present here. They argue the trial court blended the companies into one *de facto* entity, but awarded Pertuis an amount for his separate interest in each company, but Pertuis "cannot have it both ways—either they are an amalgamated entity that should be evaluated as one entity (thus pulling in the negative value of [BFI] to reduce the overall value) in which [] Pertuis owns something less than 10% of the whole, or they are indeed separate entities with separate values and ownership interests and governed by separate state laws."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**AFFIRMED.**

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

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

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