THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2020-000399

Teri Chappell, as Personal Representative of the Estate of Craig Chappell, on behalf of himself and others similarly situated, Appellant,

v.

Ladles Soups – James Island LLC; Ladlessoups, LLC; Ladles Soups At Cane Bay LLC; Ladles Soups At Citadel Mall LLP; Ladles Soups Calhoun LLC; Ladles Soups Cane Bay LLC; Ladles Soups Coosaw LLC; Ladles Soups Downtown Charleston, LLC; Ladlessoups Fresh Fields, LLC; Ladles Soups @ Freshfields Village, LLC; Ladlessoups Mainstreet, LLC; Ladles Soups Moncks Corner LLC; Ladlessoups Mount Pleasant, LLC; Ladles Franchise Development, LLC; Ladles Franchising Inc.; Ladles Fort Mill, LLC; Ladles Knightsville LLC; Ladles West Ashley; Teri Owens; Sue Allen, Tracy Allen, Steve Traeger, Erik Dyke, Julie Dyke, Stan Sutton, Carol Sutton, Jason Dalter, Kellie Henderson; Jane Doe 1-25 (Unknown Operating Company and Management Company Owners); John Doe 25-40 (Management Personnel), Defendants,

Of Which Ladles Franchising Inc., Ladlessoups, LLC, Sue Allen, and Tracy Allen are the Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 14, 2018, Appellant Craig Chappell brought this action asserting class-action claims against Respondents Ladles Franchising Inc., Ladlessoups, LLC, Sue Allen, and Tracey Allen as well as -- other Ladles Soups franchisee defendants for failure to pay wages under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 et seq., breach of contract, and conversion. (R. pp. 27-44; Complaint). Appellant encountered substantial challenges getting all of the defendants served. After Appellant was unable to effect service on all parties, on June 13, 2018, he filed a Motion for Extension of Time to Serve Summons and Complaint and Petition for Order of Publication which was granted on July 20, 2018. On or about June 20, 2018, Ladles Mt. Pleasant filed Answers to the Complaint. Next, an additional sixteen Ladles Soups franchisee defendants filed Answers on or about July 18, 2018. Finally, Respondents Ladles Franchising Inc., Ladlessoups, LLC, Sue Allen, and Tracey Allen ("Respondents" or "Franchisors") filed their Answer on or about August 1, 2018 (R. pp. 45-57; Answer).

Subsequent to Answers being filed by the Ladles Soups defendants, sixteen Ladles Soups franchisee defendants represented by the same counsel, which did not include Respondents, filed three motions. On July 24 and 28, 2018, a Motion to Disallow Class Certification, Motion to Dismiss Improper Parties, and Motion to Dismiss based on Rule 12(b)(6) were filed by 16 of the Ladles Soups franchisee defendants. (R. pp. 58-64; Defendants' Mot to Disallow Class Cert). A hearing on these motions was held and all three motions were denied by Orders dated January 29, 2019. (R. p. 3; January 29, 2019 Order denying Mot to Disallow Class Cert). On February 14, 2019, the Ladles Soups franchisee defendants filed a Motion to Reconsider the January 29, 2019 Order denying their Motion to Dismiss and was denied by Order dated March 6, 2019.

Appellant served written discovery on Respondents via e-mail on May 24, 2019. (R. pp. 80-92; R. pp. 93-100; Pl's INT and RFP). Respondents served answers and responses to

Appellant's written discovery on August 21, 2019 (R. pp. 101-115; R. pp. 116-124; Resp. to INT and RFP). On August 22, 2019, Appellant filed a Motion to Compel discovery responses from 16 of the Ladles Soups franchisee defendants and a Motion to Intervene or in the Alternative Amend the Complaint to Add an Additional Party on behalf of a Ladles Soup West Ashley employee. (R. pp. 125-154; Pl's August 22, 2019 Mot to Compel). Subsequently, Respondents filed their Motion for Summary Judgment on August 26, 2019. (R. pp. 161-181; Franchisors' MSJ). On September 11, 2019, Appellant filed a Motion for Class Certification. (R. pp. 238-298; Pl's Motion for Class Cert). On October 4, 2019, Appellant amended his Motion to Compel to include Respondents and Ladles Mt. Pleasant. (R. pp. 311-389; Pl's Amended Mot to Compel). Because no scheduling order in this matter had ever been put in place, on October 22, 2019, Appellant filed a Motion for Status Conference and Scheduling Order (R. pp. 390-392; Mot. for Status Conf. and Schd. Ord.). Finally, on December 23, 2019, Appellant filed a Motion to Deem Requests to Admit Admitted served against16 Ladles franchisee defendants who failed to respond. (R. pp. 413-441; Mot. to Deem RTAs Admitted).

On January 6, 2020, a hearing was held before the Honorable Bentley D. Price on Respondents' Motion for Summary Judgment and the Motion for Summary Judgment filed by 16 franchisee defendants as well as Appellant's Motion to Compel, Motion to Amend, Motion for Class Certification, and Motion to Deem Requests to Admit Admitted.

On January 7, 2020, the trial court issued an Order granting Appellant's Motion to Compel and denying Appellant's Motions to Intervene; denying the Motions for Summary Judgment of several Ladles franchisees; denying Appellant's Motion for Class Certification (without prejudice); denying Appellant's Motion to Amend; and denying Appellant's Motion for Requests to Admit to be deemed Admitted. (R. pp. 4-6; January 7, 2020 Order regarding several motions). On January 30, 2020, the Court issued its Order granting summary judgment in favor of

Respondents. (R. pp. 15-26; Order granting Sum. Jud.). On February 7, 2020, Appellant filed a Motion to Reconsider the trial court's Order. (R. pp. 588-684; Mot. to Recon.). On February 28, 2020, Appellant served his Notice of Appeal on Respondents.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.,* 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.,* 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.,* 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.,* 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354

S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.*

STATEMENT OF FACTS

Appellant Craig Chappell was an hourly employee at Ladles James Island and was paid and hourly wage, plus tips. However, although Appellant worked for and earned credit card tips and cash tips, he was only allowed to retain some cash tips while his employer retained all credit card and debit card tips. (R. p. 760, ll. 10-25; Depo. of Terri Owens for Ladles James Island at p. 25, ll. 10-25; R. p. 737, ll. 14-24; Depo. of Craig Chappell at p. 19, ll. 14-24). Appellant contends that there was a company-wide policy among all of the Ladles defendants, which began with Respondents, to withhold the credit card tips from their employees and that these employees suffered the same damages as Appellant (R. p. 756, ll. 18-25; R. p. 757, ll. 1-9; Depo. of C. Chappell at p. 129, ll. 18-25 and p. 130, ll. 1-9). Appellant further contends that, beginning with the original location in West Ashley (Respondents Ladlessoups, LLC, Sue Allen, and Tracy Allen), the company practice was to distribute cash tips each day among the employees working that day,

but retain tips charged by customers to credit or debit cards. (R. p. 804, ll. 6-25; R. p. 805, ll. 1-2; Sue Allen Depo. at p. 21, ll. 6-25; p. 22, ll. 1-2).

The Ladles Soups restaurant concept was created by Sue Allen and Tracy Allen with the first location opening in West Ashley in 2007, the second location opening on Kiawah Island (Ladles Freshfields Village) in 2008, and the third location opening in Summerville (Ladles Soups Kinghtsville) in 2009. In 2010, Sue Allen and Tracy Allen started Respondent Ladles Franchising, Inc. for the purpose of selling Ladles Soups franchises. Sue Allen's sisters, Teri Owens (current owner of Ladles James Island) and Carol Ellenburg (current owner of Ladles Downtown), worked at the Ladles West Ashley location where they learned the business before opening their own Ladles Soups restaurants on James Island and downtown Charleston, respectively. Ladles Mt. Pleasant owner, Julie Dyke, also worked at Ladles West Ashley and Ladles Knightsville (Summerville) and Ladles Freshfields Village (Kiawah Island) where she learned the business before she and her husband, Erik Dyke, opened the Ladles Mt. Pleasant location. (R. p. 790, ll. 13-25; R. pp. 791-794; R. p. 795, ll. 4-24; Depo. of Julie Dyke at p. 9, ll. 13-25; pp. 10-13; p. 20, ll. 4-24). Additionally, Corey Paul worked at the Ladles West Ashley location where he learned the business before opening his own location in Fort Mill, South Carolina. Mr. Paul eventually purchased the West Ashely location from Sue Allen in 2017.

Appellant Chappell brought his lawsuit on behalf of himself and others similarly situated, alleging class-action causes of action for failure to pay wages under the South Carolina Payment of Wages Act ("SCPWA"), breach of contract, and conversion. Appellant alleged in his Complaint that the Ladles defendants, including Respondents, wrongfully and intentionally withheld credit card tips that were rightly intended for Appellant and others similarly situated in violation of the SCPWA and that this was a company-wide policy of all Ladles defendants including Respondents. (R. p. 028, ¶2; R. pp. 034-037; Complaint at p. 2, ¶2; pp. 8-11).

On May 6, 2016, while at work, Appellant discovered a handwritten ledger kept at the Ladles James Island location that revealed the extent of its policy to withhold credit card tips from its employees. R. p. 036, ¶31; *Id.* at p. 10, ¶31. Appellant subsequently learned through conversations with a co-worker that the policy of withholding employee tips was a group-wide policy at all of the Ladles Soups locations. *Id.;* (R. p. 756, ll. 18-25; R. p. 757, ll. 1-9; Depo. of C. Chappell at p. 129, ll. 18-25 and p. 130, ll. 1-9). On May 7, 2016, Appellant Chappell confronted his manager, Teri Owens, who owns the Ladles James Island restaurant, telling her he thought it was wrong for an employer to retain its employees' credit card tips. R. p. 036, ¶32; *Id.* at ¶32. Appellant Chappell was immediately terminated when he complained about the policy of withholding credit card tips and filed the underlying lawsuit on February 14, 2018. R. p. 037, ¶33, *Id.* at p. 11, ¶33.

Franchisor Sue Allen testified at her deposition that while she owned the Ladles Soup locations at West Ashley, Freshfields Village (Kiawah Island), and Knightsville (Summerville), she only paid the employees their hourly wages and she retained the credit card tips to subsidize those employees' hourly wages. (R. p. 804, ll. 6-25; R. p. 805, ll.1-2; Depo. of S. Allen at p. 21, ll. 6-25; p. 22, ll. 1-2). At their depositions, representatives of Ladles James Island, Ladles West Ashley, and Ladles Fort Mill all confirmed that they have a policy of withholding credit card tips from their employees. (R. p. 760, ll. 10-25; R. p. 761, ll. 1-18; Depo. of T. Owens at p. 25, ll. 10-25; p. 27, ll. 1 -18 and R. p. 770, ll. 1-16; R. p. 772, ll. 3-5; Depo. of Corey Paul for Ladles West Ashley and Ladles Fort Mill[1] at p 32, ll. 1-16; p. 37, ll. 3-5). Ladles Mt. Pleasant owner, Julie Dyke, testified at her deposition that each month all of the credit tips for Ladles Mt. Pleasant are "distributed among all the employees based on how many hours they work." (R. p. 796, ll. 23-25;

[1] Mr. Paul owns Ladles West Ashley as well as Ladles Fort Mill.

R. p. 797, ll. 1-2; Julie Dyke Depo. at p. 24, ll. 23-25 and p. 25, ll. 1-2). However, at the October 29, 2019, hearing on Ladles Mt. Pleasant's Motion for Summary Judgment, their counsel confirmed that they only "turn over the tips, the credit card tips, through a bonus program to the employees." (R. p. 823, ll. 19-24; Ladles Mt. Pleasant Mot. SMJ Hr'g Tr., at p. 11, ll. 19-24). Ms. Dyke also testified at her deposition that she attended annual or biannual meetings with the Ladles franchisors and other Ladles franchisees where a tipping policy and wages were discussed. (R. p. 798, ll. 11-25; R. p. 799, ll. 1-7; Depo. of Julie Dyke for Ladles Mt. Pleasant at p. 27, ll. 11-25 and p. 28, ll. 1-7).

Mr. Paul testified in his deposition as representative for Ladles West Ashley and Ladles Fort Mill that, upon purchasing the Ladles West Ashley franchise, he continued the same policy of withholding credit card tips that Respondents implemented when they owned the West Ashley location under the Ladlessoups, LLC operating company:

Q: What was the policy when you worked at West Ashley when – before you purchased it?

A: It was, I'm assuming, very similar to what I have now.

Q: Because you didn't change any policies when you purchased it, correct?

A: I did not come up with any new policies.

Q: Okay. So when you worked there, the store kept the credit card tips?

A: Yes.

(R. p. 777, ll. 1-11; Depo. of C. Paul at p. 66, ll. 1-11).

According to the Ladles Franchise Agreement, Respondent Ladles Franchising, Inc. retained an extensive level of control over the individual restaurant locations including, but not limited to:

1. "sole discretion" of employment and evaluation of individual restaurant managers (R. pp. 692-693, Sec. 2; R. pp. 707-708; pp. 8-9, Sec. 2 and pp. 23-24);

2. trademarks (R. p. 695, Sec. 4; p. 11, Sec. 4);

3. the condition, appearance, and operation of individual restaurant locations including, but not limited to condition, appearance, and operation of the restaurant as well as the restaurant menu items, ingredients, and food and beverage distributors and suppliers; and "compliance with laws and good business practices" (R. pp. 703-709; pp. 19-25);

4. marketing (R. pp. 709-712, Sec. 9; pp. 25-28, Sec. 9);

5. reports, financial statements, and financial condition of individual restaurant locations (R. pp. 712-713, Sec. 10; pp. 28-29, Sec. 10);

6. inspections and audits of individual restaurant locations including, but not limited to, the right to inspect restaurant and premises: observe and video tape the operations of the restaurant; interview personnel of the restaurant; interview customers of the restaurant; inspect and copy books, records, and documents relating to the operation of the restaurant (R. pp. 713-715, Sec. 11; pp. 29-31, Sec. 11);

7. termination of the franchise if the individual restaurant: fails to accurately report gross sales or fails to make payments due; fails to "comply with any other provision of this Agreement or any mandatory specification, standard or operating procedure we prescribe . . . .;" "fail to use your reasonable efforts employ (sic) on a full time basis qualified Restaurant Managers with qualifications and experience acceptable to us; etc. (R. pp. 719-722, Sec. 14; pp. 35-38, Sec. 14).

(R. p. 692, Sec. 2; R. p. 695, Sec. 4; R. pp. 703-709, Sec. 8; R. pp. 709-712, Sec. 9; R. pp. 712-713, Sec. 10; R. pp. 713-715, Sec. 11; R. pp. 719-722, Sec. 14; Ladles Franchise Agreement at p. 8, Sec. 2; p. 11, Sec. 4; pp. 19-25, Sec. 8; pp. 25-28, Sec. 9; pp. 28-29, Sec. 10; pp. 29-31, Sec. 11; pp. 35-38, Sec. 14).

The close control of Ladles franchisees by Respondent Ladles Franchisor extended to employee wages, the control of which is fundamentally important to the Ladles franchise design and concept. The importance of Franchisor "control" over employee wages (Appellant contends

that wages include cash and credit card tips under the SCPWA), is manifest in the "design" of the Ladles franchise concept, according to Ladles founder Ms. Allen:

> *The design of the store, the reason we did it the way we did it, is because* ***the only two things that you can really control in money, is food costs and employee wages****, so the way that the store is designed is to have less employees.*

(R. p. 734; Ladles co-founder, Sue Allen, YouTube (2012), https://www.youtube.com/watch?v=UoO8ua34ZnM video at 5:18).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE RESPONDENTS ACTED AS AGENTS OF THE LADLES FRANCHISEES AND THEREFORE, WERE EMPLOYERS LIABLE UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT.

Respondents Ladles Franchising, Inc., Sue Allen, and Tracy Allen are liable under the South Carolina Payment of Wages Act ("SCPWA") because they had an agency relationship with the Ladles operating companies/franchisees. The SCPWA generally requires an employer to pay all wages due. S.C. Code Ann. §41-10-40(A). The SCPWA defines "employer" as "every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, *and any agent* or officer of the above classes employing any person in this State." S.C. Code Ann § 41-10-10(1). (Emphasis added). The South Carolina Court of Appeals held that the South Carolina "legislature intended to impose individual liability on agents or officers of a corporation who knowingly permit their corporation to violate the Act [SCPWA]." *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 645, 320 S.C. 188 (Ct.App. 1995) (emphasis added). In other words, *Dumas* requires the court to determine whether agents or officers "knowingly permitted" the business to violate the Payment of Wages Act. *See also Allen v. Pinnacle Healthcare Sys*., 394 S.C. 268, 276, 715 S.E.2d 362 (Ct.App., 2011).

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject

to the principal's control." *Froneberger v. Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortg. Bankers, Inc.*, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013)(quoting Restatement (Third) of Agency § 1.01 (2006)). An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 239, 638 S.E.2d 685, 693 (2006).

In *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982), the South Carolina Supreme Court explained that, generally, "[q]uestions of agency ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship." See also, *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E. (2d) 24 (1980); *Jamison v. Howard,* 271 S.C. 385, 247 S.E. (2d) 450 (1978).

The Ladles Franchise Agreement is evidence of an agency relationship between Respondents and the franchisees:

> You agree that because of the value of advertising to the goodwill and public image of Ladlessoups' Restaurants, we may maintain and administer a marketing fund (the "Marketing Fund") for the marketing program that we deem necessary or appropriate, in our sole discretion. You agree to contribute to the Marketing Fund three percent (3%) of Gross Sales of the Restaurant calculated in the same manner as, and payable monthly together with, the royalty fees due under this Agreement.
>
> You agree that we will direct all marketing programs financed by the Marketing Fund, and we will have sole discretion over the creative concepts, materials and endorsements used in the programs, and the geographic, market and media placement and allocation of the programs. . . ..
>
> ***. . .. You acknowledge that we have the right and you hereby authorize us, to settle or otherwise compromise all disputes with regard to the Marketing Fund.***

(R. pp. 709-711; Franchise Agreement at pp. 25 – 27). (Emphasis added). Based on the foregoing paragraphs of the Franchise Agreement, a jury could reasonably conclude that Respondents are

taking significant and important actions as agent on behalf of all of the Ladles franchisees, for the benefit both of principals and agents. Moreover, as noted in the last sentence cited above, Respondents clearly have the power to bind the Ladles franchisees with third parties at least in regard to the Marketing Fund. Under the Franchise Agreement, the Ladles franchisees agreed to make Respondents someone responsible for "the management of *some business* to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Colleton County Taxpayers Ass'n,* 371 S.C. at 239, 638 S.E.2d at 693.

The trial court's Order found that no agency relationship existed between Respondents and the other Ladles franchisees because of a paragraph in the Franchise Agreement which purports to make the parties independent contractors. (R. p. 020; Order at p. 6). However, "'[u]nder South Carolina law, the terms of a consignment agreement are not conclusive on the question of independent contractor, where there is evidence [beyond] the contract which establishes a true agency relationship.'" *Fernander*, 278 S.C. at 144 (citing *Burriss v. Texaco, Inc.*, supra, at 172; *Hubbard v. Rowe*, supra.). The Supreme Court in *Fernander* found sufficient evidence in the record to create a jury issue as to whether an agency relationship existed between franchisee and franchisor where the franchise agreement showed that the franchisor retained the right to control the detailed operation of the enterprise including franchisor control over "the trademarks" the restaurant used; the menu; the quality of food and service; and daily operating policies of the restaurant including management of the employees where the franchise agreement gave the franchisor "the right to require all personnel to 'comply with all reasonable requirements . . .' made by them. *Id.*

The language of the Franchise Agreement cited by the trial court provides:

a. Independent Contractors.

> It is understood and agreed that this Agreement does not create a fiduciary relationship between you and us, that we and you are and shall be independent contractors, **and that nothing in this agreement is intended to make either you or us a general or special agent, legal representative, joint venturor, [sic] partner or employee of the other for any purpose or to grant either you or us the right to direct or supervise the daily affairs of the other** . . . (Emphasis added).

The highlighted language above is in complete contradiction with the remainder of the Franchise Agreement. Per the same agreement, Respondents had extensive rights to "direct or supervise the daily affairs" of the franchisees including the power to bind them with agreements between third-parties as indicated by the section noted above pertaining to the Marketing Fund. (R. pp. 709-712, Sec. 9; Franchise Agreement at pp. 25-28, Sec. 9). Not only did Respondents have the power to bind the franchisees with agreements between third-parties, but they also had control over the following per the agreement:

1. "sole discretion" over the employment and evaluation of individual restaurant managers; R. pp. 692-693; R. pp. 707-708; *Id.* at pp. 8-9 and pp. 23-24;

2. trademarks; R. p. 695, Sec. 4; p. 11, Sec. 4;

3. condition, appearance, and operation of the restaurant as well as the restaurant menu items, ingredients, and food and beverage distributors and suppliers; and "compliance with laws and good business practices" R. pp. 703-709; pp. 19-25;

4. inspections and audits of individual restaurant locations including, but not limited to, the right to inspect restaurant and premises: *observe and video tape the operations of the restaurant; interview personnel of the restaurant; interview customers of the restaurant*; inspect and copy books, records, and documents relating to the operation of the restaurant; R. pp. 713-715, Sec. 11; *Id.* at pp. 29-31, Sec. 11; (Emphasis added);

5. format of the financial and operational reporting chart of accounts as prescribed in the franchisor Operations Manual; R. p. 712, Sec. 10; *Id.* at p. 28, Sec. 10;

6. termination of the franchise if the individual restaurant: fails to accurately report gross sales or fails to make payments due; fails to "comply with any

> other provision of this Agreement or any mandatory specification, standard or operating procedure we prescribe . . . .;" *"fail to use your reasonable efforts employ [sic] on a full time basis qualified Restaurant Managers with qualifications and experience acceptable to us*; etc.; R. pp. 719-722, Sec. 14; *Id.* at pp. 35-38, Sec. 14. (Emphasis added).

Quintessential in the "right to direct and supervise the daily affairs" of a restaurant franchise is the "sole discretion" over the employment and evaluation of individual restaurant managers and the in-person and/or videotaped observation and interviews of franchise personnel and customers as well as control of menu items, ingredients, and suppliers and distributors. Based on the forgoing, there is sufficient evidence in the record to create a jury issue as to whether an agency relationship existed between Respondents and the franchisees.

Additionally, as set out below, Respondents had knowledge of the policy of withholding credit card tips; had the power to stop the policy; and knowingly permitted the franchisees to wrongfully withhold credit tips by participating in the decision to do so and benefiting from the policy.

A. Respondents had knowledge of the credit card tip policy.

In creating the Ladles concept, Respondents designed and implemented the tipping policy complained of by Appellant as a way to "control" (i.e., "lower" or "limit") employee wages as part of a fundamental and integral part of the Ladles franchise concept. This policy and tight control over employee wages is manifest in a quote from Ladles founder Sue Allen: "The only two things that you can really control in money, is food costs and employee wages." (R. p. 734; Ladles co-founder, Sue Allen, YouTube (2012), https://www.youtube.com/watch?v=UoO8ua34ZnM video at 5:18).

Respondents "knowingly permitted" the franchisees to deprive Appellant of wages by withholding his credit card tips. Breaking that phrase from *Dumas* into its component parts, the evidence supports a finding that that Respondents "knew" about or were aware of the challenged

policy, and that they "permitted" the policy to occur, meaning that they allowed it to happen, or had the ability to stop the policy and failed to do so.

Respondents originated the policy regarding the payment of credit card tips at issue in this case. Respondent Sue Allen stated in her deposition that the tipping policy challenged by Appellant was created by her at her first location, Ladles West Ashley, and was present in all of her subsequent Ladles locations (Ladles Knightsville and Ladles Freshfields Village). (R. p. 804, ll. 6-25; R. p. 805, ll. 1-2; R. p. 806, ll. 22-25; R. p. 807, l. 1 and ll. 14-21; R. p. 808, ll 6-13; Depo. of S. Allen at p. 21, ll. 6-25; p. 22 at ll. 1-2; p. 33 at ll. 22-25; p. 34 at l. 1 and ll. 14-21; and p. 35 at ll. 6-13). Ms. Allen claimed in her deposition that the policy at all of her locations was that the employees were only paid their hourly wages and that the credit card tips allegedly went to subsidizing the employees' hourly wages. R. p. 804, ll. 6-25; *Id.* at p. 21, ll. 6-25. Appellant contends that this policy is in violation of the SCPWA.[2]

[2] The SCPWA provides that an employer shall not "withhold or divert" any portion of any employee's wages unless required or permitted by federal or state law "or the employer has given written notice of the deductions . . ." S.C. Code Ann. § 41-10-40(C). The issue of whether tips constitute wages has arisen several times recently in the United States District Court for the District of South Carolina. *Carbone v. Zen* 333 Inc., No. 2:16-CV-0108-DCN, 2016 WL 7383920, at *4 (D.S.C. Dec. 21, 2016) (holding that tips constitute wages under the SCPWA); *Degidio v. Crazy Horse Saloon & Rest., Inc.*, No. 4:13-CV-02136-BHH, 2016 WL 3125467, at *5 (D.S.C. June 3, 2016) (same); *Gardner v. Country Club, Inc*., No. 4:13-CV-03399-BHH, 2016 WL 3125469, at *5 (D.S.C. June 3, 2016). S.C. Code Ann. § 41-10-10(2) defines "wages" as:

> all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

The Court in *Sean Bass v. 817 Corp.,* No.: 2:16-cv-1964-RMG (D.S.C. Mar. 3, 2017), found that the literal meaning of "all amounts for which labor rendered is recompensed" suggests that the statute covers just that, all amounts. Moreover, the Court found that the broad language that follows the clause to include amounts "fixed or ascertained" by any "method of calculating the amount" is intended to reinforce the comprehensiveness of "all amounts" rather than limit the term. *Id.* Finally, the statutory text specifically excludes only funds placed in pension plans or profit sharing plans from the definition of wages. *Id.*

There is also evidence that Ms. Allen was aware of and had knowledge of the policies regarding credit card tips at other Ladles locations. First, prior to purchasing their own Ladles franchises, eventual owners of five of the franchises, Teri Owens (Ladles James Island), Carol Ellenburg (Ladles Downtown), Corey Paul (Ladles West Ashley and Ladles Fort Mill), and Julie Dyke (Ladles Mt. Pleasant), all worked at and learned the Ladles concept and business at the original Ladles West Ashley location with Sue Allen. (R. p. 790, ll. 13-25; R. pp. 791-794; R. p. 795, ll. 4-24; Depo. of J. Dyke at p. 9, ll. 13-25; pp. 10-13; p. 20, ll. 4-24). In his deposition, Mr. Paul, who owns two of the franchise locations, agreed that when he worked at the original West Ashley location, "the store kept the credit card tips." (R. p. 777, ll. 1-11; Depo. of C. Paul at p. 66, ll. 1-11). Mr. Paul further testified that when he purchased the West Ashley location he kept the same policy. *Id.* Ms. Owens, who owns Ladles James Island where Appellant worked, also testified that she has the same policy regarding withholding the credit card tips from employees. (R. p. 760, ll. 10-25; R. p. 761, ll. 1-18; Depo. of T. Owens at p. 25, ll. 10-25; p. 27, ll. 1 -18).

Additionally, Ms. Owens specifically testified that Respondents were aware of the credit card tip policy at Ladles James Island. (R. p. 763, l. 23 to R. p. 764, l. 17; Depo. of T. Owens at p. 48, l. 23 – p. 49, l. 17). Further, per the Ladles Franchise Agreement, each franchisee is required each month to send Respondents:

> a report of the Gross Sales of the Restaurant, other revenues generated at the Restaurant and other information which we may reasonably request that may be useful in connection with our marketing and other legitimate functions. This report must also include a statement computing amounts then due for royalty fees and Marketing Fund contributions and be certified by you or your chief executive or financial officer;

(R. pp. 712-713, Sec. 10; Franchise Agreement, p. 28-29, Sec. 10). Mr. Paul testified that the gross sales amount includes the credit card tips. (R. p. 774, l. 16 to R. p. 776, l. 3; Depo. of C. Paul, p. 47, l. 16 – p. 49, l. 3). Furthermore, Ms. Allen testified that if she wanted to find out the amount

of tips a location brought in for the day or for the year she could access this information through her bookkeeper. (R. p. 811, ll. 4-8; Depo. of S. Allen at p. 69, ll. 4-8). Based on this evidence, a jury could either reasonably conclude that Respondents were aware of the tipping policy in place at the Ladles franchise locations.

B. Respondents had the power to stop the credit card tip policy but permitted it to continue.

In addition to having knowledge of the credit card tip policy, Respondents had the "actual power" to stop the Ladles locations from carrying out this policy by mandating that this policy end and that all credit card tips be paid to hourly employees. Per the Franchise Agreement, the license under which the franchises operated, individual Ladles restaurants were required to:

> operate the Restaurant in full compliance with all applicable laws, ordinances and regulations, including, without limitation, all government regulations, relating to health and sanitation, workers' compensation insurance, unemployment insurance and withholding and payment of federal, state and local incomes taxes, social security taxes and sales taxes.

(R. p. 707, subsection E; Franchise Agreement at p. 23, subsection E).

This section of the Franchise Agreement is all inclusive with regards to government laws, ordinances, and regulations and would naturally include compliance with government regulation on employee wages like the SCPWA. Also per the Franchise Agreement, the Respondents had the power to terminate any franchise that failed to "comply with any provision of this Agreement or any mandatory specification, standard, or operating procedure we prescribe . . . ." (R. p. 720, ¶(2); Franchise Agreement at p. 36, paragraph (2)).

Additionally, Mr. Paul testified that if the Franchisor required him to end the tipping policy he would end it. (R. p. 778, ll. 5-13; Depo. of C. Paul at p. 74, ll. 5-13). Likewise, Ms. Owens testified as follows:

Q: Okay. So if, for example, they [Franchisors] told you as a policy you can no longer keep credit card tips or we will terminate, you know, the franchise, that's something that they could do, correct?

A: Yeah, I would guess that it would be something we would change.

Q: Okay. Right. So if this franchise agreement said you can no longer keep the credit card tips, you would change your policy?

A. Uh-huh.

Q: So Ladles Franchising, Inc., they know about your credit card tips policy?

A: Uh-huh.

Q: They have the ability to stop it?

A: I don't – I guess. You know, I …

Q: If they told you that you could no longer do it, then you would stop doing it?

A: I would have to stop doing it. Yeah.

(R. p. 763, l. 23 to R. p. 764, l. 17; Depo. of T. Owens at p. 48, l. 23 – p. 49, l. 17).

The power to terminate a franchise is sufficient evidence from which a jury could reasonably conclude that Respondents could (being aware of the challenged policy) compel the franchisees to cease the policy and pay the credit card tips to their employees. A jury could conclude that Respondents thus "permitted" the challenged policy to occur by having knowledge of it and failing to end it.

C. Respondents benefited from the credit card tip policy.

Finally, in addition to originating and "knowingly permitting" the credit card tip policy, Respondents benefited from the policy. Respondents received royalty payments each month from each Ladles location. The royalty fee is a percentage of gross sales for each month. The monthly

gross sales includes sales of services performed at the restaurants whether for cash or credit which, by definition, would include credit card tips. Per the Ladles Franchise Agreement:

> **B. Royalty Fee**
>
> You agree to pay to us a royalty fee equal to four percent (4%) of the Gross Sales (as defined in Subsection C of this Section) of the Restaurant. ….
>
> **C. Definition of Gross Sales**
>
> As used in this Agreement, the term "Gross Sales" shall mean gross sales of all food, beverage, other menu items, merchandise, and goods ***and other services sold or performed by or for you or the Restaurant, in, upon, or from the Premises, or through or by means of the business conducted at the Restaurant or the Premises, whether for cash or credit.*** Sales and service taxes collected from customers and paid to the appropriate taxing authority, all management or employee meals, and sale of cigars, cigarettes and newspapers as well as income from pay telephones shall not be included in Gross Sales. The discounted portion of menu prices whether by way of coupons, promotions or otherwise shall not be included in Gross Sales.

(R. pp. 701-702; Ladles Franchise Agreement at pp. 17-18). (Emphasis added).

The trial court's order granting summary judgment to Respondents states that "there is no evidence in the record that any of the moving Defendants ever came into possession of credit card tips that Plaintiff claims." (R. p. 020; Order at p. 6). The order also states that "[i]t was suggested that Ladles Franchising, Inc. [Respondent] may have charged its percentage royalty fee on gross receipts including credit card tips. The evidence demonstrates otherwise." *Id.* Then, the order goes on to list cherry-picked testimony from witnesses Mr. Paul, Ms. Owens, and Ms. Allen purporting to be evidence supporting Respondents' claim that credit card tips are not included in the royalty fee. (R. pp. 020-021; Order at p. 6-7). This may very well be evidence to support Respondents' claim, however, it is not dispositive of the matter and that certainly is not the standard for summary judgment. *See Sauner v. Public Serv. Auth.,* 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.,* 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355

S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party); *See also Baril v. Aiken Reg'l Med. Ctrs.,* 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002) (stating that if triable issues exist, those issues must go to the jury); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

First, a jury could find, based on the language cited above in the Franchise Agreement alone, that Respondents "came into possession of credit card tips." (R. pp. 701-702; Ladles Franchise Agreement at pp. 17-18). Despite the language in the Franchise Agreement, at the hearing, Respondents argued that it was settled that that there was nothing in the record that says the franchise company [Respondent] gets tips:

> MR. KOON: The record has – there's nothing at all in the record that says the franchise company gets tips. In fact, it says just the opposite. And I would just ask counsel to be constrained by what is in the record.
>
> THE COURT: Well, that's why I asked him; he was assuming a lot of facts in his argument that are very contentious I would assume. Well, actually not contentious. For the record –
>
> MR. KOON: They're settled.
>
> MR. LE CLERCQ: To the contrary, Judge. I'm holding the franchise agreement, which is part of the record. And at paragraph – on page 18, and it's – paragraph 7(C) says, in this agreement termed gross sales shall mean gross sales of all food, beverage, other menu items, merchandise and goods and other services sold or performed by or for you at the restaurant.
>
> THE COURT: Does it say tips?
>
> MR. LE CLERCQ: It says all goods and other services. And so the fact is, is that the – we've asked for information in discovery that would help us answer these questions which has not been provided, but there is evidence in the record that tips are part of the gross –
>
> THE COURT: You're assuming that other services is also tips. That's your reading or interpretation of that.

> MR. LE CLERCQ: The principal service that's provided at a Ladles – in Ladles West Ashley, for example, where Ms. Charpia works, is her service in providing food to the customers that come in. And that is the principal service that's provided.
>
> There are amounts that are paid by customers for that service, and then there are gratuities. And so those are the services provided. And it says that the percentage is payable on the gross.
>
> And so they can't on the one hand stand up and say, we don't take any of the tips, without allowing us discovery that we need to be able to find that out, particularly when there are documents in the record that directly contradict what was just said.

(R. p. 852, ll. 18-25; R. p. 853; R. p. 854, ll. 1-12; Hr'g. Tr. at p. 25, ll. 18-25; p. 26; and p. 27, ll. 1-12).

For the reasons cited above at the hearing by Appellant, the language of the Franchise Agreement is evidence that would allow a jury to reach the conclusion that Respondents "came into possession of credit card tips." Appellant contends that the terms of the agreement are clear and unambiguous that gross sales include credit card tips for services provided at the restaurants. However, to the extent that they are not, "the intention of the parties becomes a question of fact to be determined by the jury." *Traynham v. Yeargin Enterprises, Inc.*, 403 S.E.2d 329, 304 S.C. 188 (S.C. App. 1991) (citing *Holcombe v. Orkin Exterminating Co., Inc.,* 282 S.C. 104, 317 S.E.2d 458 (Ct.App.1984)).

The Order only cites selective, self-serving testimony from the Respondent and franchisee witnesses to counter the language from the Franchise Agreement. The Order cites Ms. Allen's testimony that the royalty percentage is calculated on "… their sales of their product, less any discounts that they wouldn't have received money for, less taxes, and less tips." (R. p. 021; Order, p. 7). Nowhere in the Franchise Agreement are tips excluded. Notably, the language in the Franchise Agreement does include a long list of items that actually are excluded from the gross sales:

> sales and services taxes; management or employee meals; sale of cigars, cigarettes, newspapers; income from pay phones; and discounted portions of menu prices by

way of coupons and promotions. (R. p. 702, subsection C; Franchise Agreement at p. 18, subsection C).

Again, despite this long list of exclusions, nowhere in this language are tips excluded. Based on this evidence, a jury could reasonably conclude that if the language of the agreement provides a list of items not included in gross sales but excludes tips from that list then tips are reasonably part of the gross sales that each franchisee pays a percentage of to the franchisor per the agreement[3].

Second, Mr. Paul provided contradictory testimony to that cited in the Order because he also testified as follows:

Q: Okay. And so with the credit card tips, where do those go?

A: The credit card tips go into the – into the daily sales transaction.

Q: So that's, you know, whatever amount that comes in on credit card tips, that just gets added to the gross sales?

A: Uh-huh.

Q: And whose tips are they, though, the credit card tips?

A: Those would be the store's tips.

(R. p. 771, l. 20 to R. p. 772, l. 5; Depo. of C. Paul at p. 36, l. 20 – p. 37, l. 5).

[3] As discussed further in Section II below, Appellant requested information in his May 24, 2019 Requests for Production regarding amounts paid by the franchisees to the franchisor. In their August 21, 2019 responses to these requests, Respondents objected to providing this information. One week prior to the January 6, 2020 hearing on Appellant's Motion to Compel, Respondents supplemented their initial response stating that they were not in possession of this information. At the January 6, 2020 on Appellant's Motion to Compel (and Respondents' Motion for Summary Judgment), prior to taking Respondents' Motion for Summary Judgment under advisement, the trial court ordered Respondents to provide this information to Appellants (R. p. 859, ll. 7-23; Hr'g. Tr. at p. 32, ll. 7-23). Not long after the hearing, on or about January 16, 2020, Respondents provided seven pages of documents that purported to be responsive to Appellant's request regarding amounts paid by the Ladles franchisees to the franchisor. (R. pp. 581-587; Respondents' Supp. Resp. to RFP). However, the documents provided appear to simply be an annual comparison of sales numbers (unclear as to whether they refer to gross sales, net sales, etc.) for each Ladles location from 2015 to 2019 with no indication whatsoever as to any amounts paid by the Ladles franchisees to the franchisor per the trial court's order. In reference to this discovery request, the trial court's Order granting summary judgment states that "[a]lthough I ordered this interrogatory [sic] be answered, the issue could have no bearing upon this motion." (R. p. 025; Order at p. 11).

Despite the Order conclusively stating that Mr. Paul testified that the franchisor did not collect royalties based on credit card tips, it appears from his testimony that he has no idea what the royalty payment is based on but he does confirm that credit card tips are included in the gross sales:

Q: Okay. And with -- and do you have -- is there a royalty fee that you pay to Ladles Franchising, Inc.?

A: Yeah.

Q: And how does that work?

A: It's based off of a percentage, and every month we get a bill sent to us, and we send it off to the Ladles Franchising.

Q: Okay. And percentage of what?

A: The net sales or the gross sales, one of them. I'm not 100 percent sure. I'd have to look at the bill. It's based off of your total sales.

Q: Total sales, okay. So would that include the amount from the credit cards?

A: Just depends what number they're going off of. I don't believe it's off of the amount from the credit cards, but I'd have to double check that. I'd have to see what number was on the bill.

Q: I mean, do you think that it is the gross sales? Would the credit card tips be included in the net sales?

A: The credit card tips would not be included in the net sales. **The credit card tips are included in the gross sales.** Which one is on the percentage bill for the royalties, I am not sure. I'd have to look. (emphasis added).

Q: What would you have to look at?

A: The bill that I received, to know which number.

Q: And you haven't – have you given those to your attorney?

A: The royalty bills?

Q: Yes.

A: No.

Q: Would it be in the franchise agreement?

A: It should be. Yes.

(R. p. 774, l. 16 to R. p. 776, l. 3; Depo. of C. Paul, p. 47, l. 16 – p. 49, l. 3).

Later in his deposition, Mr. Paul was asked to review a copy of the franchise agreement and the definition of gross sales from the agreement which he then read into the record. Mr. Paul then testified as follows:

Q: Okay. So in that list of things that are **not** included in the gross sales, credit card tips are **not** listed, correct? (emphasis added).

A: Correct.

(R. p. 780, ll. 16-25 to R. p. 781, ll. 1-3; Depo. of C. Paul, p. 90, ll. 16-25 – p. 91, ll. 1-3). (Emphasis added).

It is uncontroverted that the Franchise Agreement states that the royalty payments are based on a percentage of the gross sales and that Mr. Paul testified that credit card tips are included in the restaurants' gross sales. There is documentary as well as testimonial evidence that would allow a jury to reasonably conclude that Respondents receive a portion of the credit card tips from each Ladles location, including Ladles James Island.

Based on the foregoing and construing all ambiguities, conclusions, and inferences arising from the evidence in a light most favorable to Appellants, the trial court erred in granting summary judgment to Respondents and should have found that a jury could reasonably conclude that Respondents were liable under the SCPWA because they served as agents of the Ladles franchisees; originated the credit card tip policy and had knowledge of and benefited from the credit card tip policy; and despite having the power to end the policy per the Franchise Agreement, permitted it to continue causing damage to Appellant.

II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE IT WAS PREMATURE DUE TO APPELLANT

NOT HAVING A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY.

Summary Judgment was not appropriate in this case because Appellant's Motion to Compel discovery from all Ladles defendants, including Respondents, was still pending (and eventually granted) at the time of the hearing and their full responses to Appellant's requests would likely have uncovered additional relevant information. Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is `not merely engaged in a "fishing expedition."" *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (internal citation omitted).

In *Baughman*, the South Carolina Supreme Court ruled summary judgment was premature in that case because (1) plaintiffs demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. Although three years had elapsed between filing the action and summary judgment, the delay could not fairly be attributed solely to plaintiffs' inaction, and the delay was tempered by the complexity of the case. *Id*. at 112-114, 410 S.E.2d at 544.

A. Appellant's Written Discovery

After a lengthy process in getting all 21 parties served and after motions to dismiss brought by 16 of the Ladles defendants were denied, Appellant served Interrogatories and Requests for Production on all of the Ladles defendants on May 24, 2019 (R. pp. 080-092; R. pp. 093-100; Pl.'s INT and RFP). Almost three months later, Respondents served answers and responses to Appellant's written discovery on August 21, 2019. (R. pp. 101-115; R. pp. 116-124; Resp. to INT and RFP). In their initial responses, Respondents objected to Interrogatories Nos. 13, 19, and 22

and objected to Requests for Production Nos. 10, 11, 12, 16, 19, and 27. *Id*. Respondents objected to Appellant's RFP No. 11 as follows:

> 11. Produce a complete, itemized accounting and financial summary of all amounts paid and/or owed to you by any other party to this action for the period January 1, 2015 to present.
>
> RESPONSE: Respondents object to this Interrogatory as overly broad and not designed to lead to admissible or discoverable evidence. Should Respondents be ordered to produce this information, it shall only be pursuant to a protective order.

(R. p. 119, No. 11; Respondents' First Resp. to RFP No. 11).

On August 22, 2019, Appellant filed a Motion to Compel discovery responses from 16 of the Ladles franchisee defendants. Appellant inadvertently did not include Respondents and Ladles Mt. Pleasant in his Motion to Compel and amended his motion on October 4, 2019 to include those parties. (R. pp. 311-389; Amended Mot. to Compel.). A hearing on several motions including Respondents' Motion for Summary Judgment and Appellant's Motion to Compel discovery responses from all parties was scheduled for January 6, 2020.

After an exchange of correspondence between the parties, Respondents provided supplemental responses to Appellant's Interrogatories and Requests for Production on December 31, 2019. (R. pp. 553-557; R. pp. 558-563; 1st Supp. Resp. to INT and RFP). Notably however, Respondents still did not provide any materials or information in response to Appellant's Request for Production No. 11. Respondents responded as follows:

> 11. Produce a complete, itemized accounting and financial summary of all amounts paid and/or owed to you by any other party to this action for the period January 1, 2015 to present.
>
> RESPONSE: No such itemized accountings or financial summaries of the type requested are in existence.

(R. p. 559, No. 11; Respondents' Supp. Resp. to RFP No. 11).

Appellant's RFP No. 11 was not part of a "fishing expedition" and was in part designed to uncover information directly relevant to whether Respondents came into possession of any portion of Appellant's credit card tips and/or benefited from the Ladles policy of withholding credit card tips from employees through the royalty fees paid by the Ladles franchisees to Respondents. This discovery request was indispensable to Appellant's claims against Respondents for violations of the SCPWA as well as his causes of action for conversion and breach of contract. Conversion is the illegal use, misuse, or detention of another's chattel. *American Credit v. Nationwide Mutual*, 378 S.C. 623, 663 S.E.2nd 492, 495 (2008). "Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even through the specific coins and bills are not identified." *SSI Medical Services, Inc. v. Cox,* 301 S.C. 493, 498, S.E.2d 789, 793 (S.C. 1990)(citing *Owens v. Andrews Bank & Trust Co.,* 265 S.C. 490, 220 S.E.2d 116 (1975) and 89 C.J.S. Trover and Conversion § 23 (1955)).

As noted in Section I above, Appellant contends that Respondents were employers under the SCPWA because they acted as agents of the Ladles franchisees and had knowledge of the Ladles credit card tip policy and benefited from the policy. One way that Respondents benefited from the credit card tip policy was by receiving a monthly royalty fee on the gross sales from each Ladles franchise location. As noted previously, in addition to food and beverages, specifically included in the Franchise Agreement's definition of "gross sales" is: "*other services sold or performed by or for you or the Restaurant*, in, upon, or from the Premises, or through or by means of the business conducted at the Restaurant or the Premises, whether for cash or credit." (R. pp. 701-702; Ladles Franchise Agreement at pp. 17-18) (Emphasis added). Appellant contends that this language is evidence that credit card tips are included in the gross sales amount that Respondents receive a portion of from each Ladles location. Likewise, if Respondents are coming

into possession of and retaining portions of the credit card tips through the royalty fee, this would also be evidence in support of Appellant's conversion cause of action.

At the January 6, 2020 hearing on Respondents' Motion for Summary Judgment where Appellant's Motion to Compel was also heard, Respondents repeated their claim that the information requested in Appellant's RFP No. 11 did not exist. (R. p. 858, ll 16-25; R. p. 859, ll. 1-3; Hr'g Tr at p. 31, ll. 16-25; p. 32, ll. 1-3). Appellant went on to explain why this information was being requested and the trial court granted Appellant's Motion to Compel for his RFP No. 11:

> THE COURT: So what you want what the franchisee pays to Mr. and Mrs. Allen.
>
> MR. ASHLEY: Right. Because they're claiming that they aren't receiving a part of the tip. And when – they say that Corey Paul provided that at his deposition. He didn't provide that in his deposition. He looked on his phone and said, this is what we get. Nothing has been provided.
>
> THE COURT: He testified to it.
>
> MR. ASHLEY: Well, he testified to it. We requested the documents and have not received them.
>
> THE COURT: Do you have any objection to providing what a franchisee pays to the franchisor?
>
> MR. LACKE: Your Honor, we do not.
>
> THE COURT: You will get it.

(R. p. 859, ll 7-23; Hr'g. Tr. at p. 32, ll. 7-23)(R. pp. 004-006; Order granting Mot. to Comp.).

Not long after the hearing, on or about January 16, 2020, Respondents provided seven pages of documents that purported to be responsive to Appellant's request regarding amounts paid by the Ladles franchisees to the franchisor. (R. pp. 581-587; Respondents' 2nd Supp. Resp. to RFP). However, the documents provided appeared to simply be an annual comparison of sales numbers (unclear as to whether they refer to gross sales, net sales, etc.) for each Ladles location from 2015 to 2019 with no indication whatsoever as to any amounts paid by the Ladles franchisees

to the franchisor per the trial court's order. *Id*. Again, this information was requested to determine whether Respondents received a portion of the credit card tips including tips owed to Appellant. This information was initially requested by Appellant on May 24, 2019. (R. pp. 080-092; R. pp. 093-100; Pl.'s INT and RFP). Almost three months later, on August 21, 2019, Respondents objected to providing this information. (R. pp. 101-115; R. pp. 116-124; Resp. to INT and RFP). On August 22, 2019, Appellant filed his Motion to Compel discovery from several Ladles defendants. (R. pp. 125-154; Mot. to Comp.). On October 4, 2019, Appellant amended its Motion to Compel to include Respondents. (R. pp. 311-389; Amended Mot. to Comp.). On December 31, 2019, Respondents responded that they did not have this information. (R. p. 559, No. 11; Respondents' Supp. Resp. to RFP No. 11) At the hearing on January 6, 2020, Respondents agreed to provide this information and the trial court ordered that it be provided. (R. p. 859, ll. 7-23; Hr'g. Tr. at p. 32, ll. 7-23).

The trial court ordered that Respondents provide information relevant to whether the royalty fee based on gross receipts paid by Ladles franchisees to the franchisor included a percentage of credit card tips and this information would certainly "uncover additional relevant evidence" as to whether Respondents ever came into possession of credit card tips owed to Appellant. However, despite this, the January 30, 2020 Order granting summary judgment for Respondents states that "[a]s to Plaintiff's Third Cause of Action for Conversion, there is no evidence in the record that any of the moving Defendants [Respondents] ever came into possession of credit card tips that Plaintiff claims." (R. p. 020; Order at p. 6). Also despite the trial court ordering that Respondents provide the information requested in Appellant's RFP No. 11, the Order further states that although the trial court "ordered that this interrogatory [sic] be answered, the issue could have no bearing upon this motion." (R. p. 025; Order at p. 11). The Order then cites *Guinan v. Tenet Health Systems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2nd 32 (Ct. App.

2009) for the proposition in *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2nd 433, 439-40 (2003) that "[a] party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." (R. p. 025; Order at p. 11).

Appellant was not provided a "full and fair" opportunity to conduct discovery. First, as noted above, Appellant had already timely served his written discovery on Respondents in May 2019, over eight months prior to the January 6, 2020 hearing and subsequent orders granting Appellant's Motion to Compel (R. pp. 004-006; January 7, 2020 Order) and Respondents' Motion for Summary Judgment. (R. pp. 015-026; January 30, 2020 Order). Respondents were almost two months late in providing responses to Appellant's requests. (R. pp. 116-124; Respondents' First Resp to RFP). After receiving their late responses, Appellant had to file a Motion to Compel responses for information that Respondents initially objected to and then asserted that they were not in possession of. (R. pp. 311-389; Amended Mot. to Compel). Significantly, Appellant was *not* requesting additional time for discovery. Appellant was only requesting that the written discovery he timely served on Respondents be responded to. Moreover, despite being served written discovery on May 24, 2019, the documents that Respondents finally produced on January 30, 2020, per instruction from the trial court, did not come until over four months after Respondents' September 18, 2019 deposition had already taken place. As noted already, these documents do not appear in any way responsive to Appellant's RFP No. 11, and furthermore, Appellant did not have an opportunity to question Respondents regarding their meaning, relevancy, or accuracy at their deposition.

Second, the information regarding payments made by the Ladles franchisees to the franchisor Respondents requested in Appellant's RFP No. 11 goes directly to the issue of whether

Respondents benefited from the Ladles policy of withholding credit card tips from employees and whether Respondents came into possession of at least a portion of the credit card tips that were withheld from Appellant through the royalty fees paid to Respondents by the franchisees, including Ladles James Island where Appellant worked.

Evidence that Respondents received any portion of the credit tips that were withheld from Ladles employees, especially Appellant, is essential for Appellant to prove his SCPWA claim, conversion claim, breach of contract claim, and also has bearing on the overall standing of Appellant to bring these claims against Respondents. Appellant asserts that Respondents were employers under the SCPWA pursuant to *Dumas* because they had an agency relationship with the Ladles franchisees and knew about the credit card tip policy, benefited from the policy, and had the ability to end it. (R. pp. 442-552; Memo in Opp to SMJ; R. pp. 588-684; Mot to Recon). Appellant also asserts with his conversion claim that Respondents improperly came into possession of and retained a portion of the credit card tips owed to Appellant because the royalty fee paid by Ladles franchisees (including Ladles James Island) is based on a percentage of gross sales which includes credit card tips according to the Franchise Agreement as well as testimony from Mr. Paul who owns Ladles West Ashley and Ladles Fort Mill. (R. p. 042; Compl. at p. 16). Finally, to the extent that Respondents received and retained any portion of Appellant's credit tips, that is a direct injury by Respondents to Appellant and provides Appellant standing against Respondents. (SCRCP Rule 17).

B. Written and Deposition Discovery of Ladles Franchisees

Appellant was not given a "full and fair" opportunity to engage in written and deposition discovery with the Ladles franchise defendants. At the time of the hearing, despite repeated requests for dates of availability and subsequent service of notices of deposition on all of the franchisee defendants, only three (T. Owens, C. Paul, J. Dyke) were made available to be deposed.

(R. p. 449; Pl.'s Memo in Opp to SMJ at p. 8). Respondents were deposed and cannot be faulted for the refusal of other parties to participate in discovery. Nonetheless, Appellant alleges and testified that there was a company-wide Ladles policy of withholding credit card tips from employees. (R. p. 034 ¶13; R. p. 035 ¶16; Compl. at ¶13 and ¶16; R. p. 756, ll. 18-25 to R. p. 757, ll. 1-9; Depo. of Craig Chappell at p. 129, ll. 18-25 – p. 130, ll. 1-9). By no fault of Appellant, he was stonewalled on deposition and written discovery into these issues. (R. pp. 125-154; Mot. to Compel; R. pp. 413-441; Mot to Deem RTA Admitted). Respondents argued in their Motion for Summary Judgment that Mr. Chappell has no knowledge of Respondents having any policy about handling tips. (R. p. 164; Mot. for SMJ at p. 3). In their supplemental memo in support, Respondents also argued that no such policy exists. (R. p. 396; Memo in Supp. at p. 4). However, owners of Ladles West Ashley, Ladles Fort Mill, and Ladles James Island all testified that they had the same policy of withholding credit card tips that Respondents originated[4]. (R. p. 760, ll. 10-25; R. p. 761, ll. 1-18; Depo. of T. Owens for Ladles James Island at p. 25, ll. 10-25; p. 27, ll.

[4] The trial court erred when it found in its Order granting summary judgment to Respondents that the court previously granted summary judgment in favor of Ladles Mt. Pleasant, "in part because it has a practice of paying out credit cards tips to the hourly employees on a monthly basis (R. p. 796, line 23 to R. p. 797, line 13; Dyke deposition, page 24, line 23 – page 25, line 13)" and that "[t]his fact alone negates the Plaintiff's claim of a group wide policy of retaining credit card tips." (R. p. 024; Order at p. 10). Respectfully, this is a complete mischaracterization of the trial court's January 7, 2020 Order granting summary judgment to Ladles Mt. Pleasant. The trial court granted summary judgment to Ladles Mt. Pleasant because it found that Mr. Chappell lacked standing to bring the action until a class action was certified. (R. pp. 007-014; January 7, 2020 Order granting SMJ; R. p. 825, ll. 20-25 to R. p. 826, ll. 1-2; October 29, 2019 Hr'g. Tr. at p. 13, ll. 20-25 – p. 14, ll. 1-2). That Order made no finding whatsoever that Ladles Mt. Pleasant "has a practice of paying out credit card tips to the hourly employees on a monthly basis" and no testimony from Ms. Dyke was even presented to the trial court. Not only was no finding made that Ladles Mt. Pleasant paid out credit card tips to its employees, but its counsel actually confirmed at the October 29, 2019 hearing that Ladles Mt. Pleasant only "turn over the tips, the credit card tips, through a bonus program to the employees." (R. p. 823, ll. 19-24; October 29, 2019, Hr'g. Tr., at p. 11, ll. 19-24). Appellant contends that withholding credit card tips even if they are later selectively distributed to certain employees as part of a bonus program is still a violation of the SCPWA. *See* S.C. Code Ann. § 41-10-40(C); *See also Carbone v. Zen* 333 Inc., No. 2:16-CV-0108-DCN, 2016 WL 7383920, at *4 (D.S.C. Dec. 21, 2016) (holding that tips constitute wages under the SCPWA); *Degidio v. Crazy Horse Saloon & Rest., Inc.*, No. 4:13-CV-02136-BHH, 2016 WL 3125467, at *5 (D.S.C. June 3, 2016) (same); *Gardner v. Country Club, Inc*., No. 4:13-CV-03399-BHH, 2016 WL 3125469, at *5 (D.S.C. June 3, 2016). The January 7, 2020 Order granting SMJ to Ladles Mt. Pleasant is currently being appealed in part because Mr. Chappell was not provided a "full and fair" opportunity to complete discovery because despite having timely requested in written discovery, documentation regarding Ladles Mt. Pleasant's credit card tip payment policy, summary judgment was granted prematurely without this information ever being produced. (Craig Chappell v. Ladlessoups Mount Pleasant, LLC, et al., Case No. 2020-000201).

1 -18 and R. p. 770, ll. 1-16; R. p. 772, ll. 3-5; Depo. of C. Paul for Ladles West Ashley and Ladles Fort Mill at p 32, ll. 1-16; p. 37, ll. 3-5). Appellant contends that if all of the Ladles franchises have a policy of withholding credit card tips then a jury could reasonably conclude that this was a company-wide policy. Because Appellant was not provided a "full and fair" opportunity to engage in written and deposition discovery of the Ladles franchisees, summary judgment was premature and the trial court erred in finding that "the evidence shows that compensation of employees and tipping procedures are exclusively a matter for the individual franchisees, without control by [Respondents]." (R. p. 023; Order at p. 9).

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RESPONDENTS CAME INTO POSSESSION OF CREDIT CARD TIPS CLAIMED BY APPELLANT.

The trial court found that "[a]s to Plaintiff's Third Cause of Action for Conversion, there is no evidence in the record that any of the moving Defendants ever came into possession of credit card tips that Plaintiff claims." (R. p. 020; Order at p. 6). This finding also goes to Appellant's cause of action against Respondents' for violations of the SCPWA because Appellant contends that Respondents were employers under the statute in that they were agents that knowingly permitted the Ladles franchisees to violate the SCPWA and benefited from the same. However, even based on the evidence that is currently in the record and without further discovery, there is a genuine issue of material fact as to whether Respondents came into possession of credit card tips claimed by Appellant. Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.,* 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and

inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

First, as already noted in Section I above, based on the language of the Franchise Agreement, a jury could reasonably conclude that credit card tips are counted as part of the gross sales for purposes of determining the royalty fee Ladles franchisees pay to the franchisor. Pursuant to the Franchise Agreement, Respondents required royalty payments each month from each Ladles location. (R. pp. 701-702; Franchise Agreement at pp. 17-18). The royalty fee is a percentage of gross sales for each month. *Id.* The monthly gross sales include sales of services performed at the restaurants whether for cash or credit. *Id.* Accordingly, based on the language of the Franchise Agreement alone, a jury could reasonably conclude that Respondents came into possession of the credit card tips that Appellant alleges were improperly withheld from him.

Second, as already noted in Section I above, based on a combination of the language of the Franchise Agreement and the testimony from owner of Ladles West Ashley and Ladles Fort Mill, Mr. Paul, a jury could reasonably conclude that Respondents came into possession of the credit card tips that Appellant alleges were improperly withheld from him. Mr. Paul repeatedly testified that the credit card tips were calculated as part of the gross sales. (R. p. 771, ll. 20 to R. p. 772, ll. 5; R. p. 774, ll. 16 to R. p. 776. ll. 3; Depo. of C. Paul, p. 36, l. 20 – p. 37, l. 5; p. 47, l. 16 – p. 49, l. 3). The Franchise Agreement specifically states that the royalty fee that Respondents were to receive each month from each Ladles location is a percentage of the gross sales. (R. pp. 701-702; Franchise Agreement at pp. 17-18). Despite Appellant's timely requests for this information, at

no time did Respondents (or any other party) produce any written materials such as franchisor invoices for royalty fees, franchisee payment info, etc. that counters the language of the Franchise Agreement or Mr. Paul's deposition testimony that credit card tips are included in the gross sales receipts for each location. Respondents and the trial court's Order rely solely on selective, self-serving testimony of Respondents and other Ladles witnesses. Not only is there evidence in the record that could support a jury finding that Respondents came into possession of a portion of Appellant's credit card tips, the evidence likely outweighs the evidence that that they did not.

Based on the foregoing, the trial court erred in granting summary judgment for Respondents because there is a genuine issue of material fact as to whether Respondents came into possession of credit card tips claimed by Appellant through their royalty fees from Ladles franchisees, including Ladles James Island.

IV. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT HAD NO STANDING TO BRING AN ACTION AGAINST RESPONDENTS.

The trial court found that "[a]bsent an employer/employee relationship or other contractual relationship, Plaintiff has no standing to bring an action against these Defendants." (R. p. 021; Order at p. 7). Pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure ("SCRCP"), "[e]very action shall be prosecuted in the name of the real party in interest." To have standing, one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). A real party in interest is one with a real, material, or substantial interest. *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992).

In *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008), the Supreme Court explained that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."

In *Youngblood v. S.C. Dep't of Soc. Servs.,* 402 S.C. 311, 741 S.E.2d 515 (2013), the Supreme Court explained that "[t]o possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Second, a causal connection must exist between the injury and the challenged conduct. *Id*. Finally, it must be likely that a favorable decision will redress the injury. *Id*." *Youngblood,* 402 S.C. at 317, 741 S.E.2d at 518.

Additionally, "[s]tatutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood,* 402 S.C. at 317, 741 S.E.2d at 518. "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012); *See also Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 64, 737 S.E.2d 863, 867 (Ct. App. 2013) (holding it is unnecessary to address constitutional standing or the public importance exception when the basis for the independent concept of statutory standing exists).

A. Appellant has constitutional standing against Respondents for his claim for conversion.

The trial court's order makes a broad finding that Appellant lacks standing to bring an action against Respondents based on lack of employer/employee relationship or other contractual relationship but fails to address Appellant's standing regarding his cause of action for conversion (R. p. 042; Compl. at p. 16). Conversion is the illegal use, misuse, or detention of another's chattel.

American Credit v. Nationwide Mutual, 378 S.C. 623, 663 S.E.2nd 492, 495 (2008). "Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even through the specific coins and bills are not identified." *SSI Medical Services, Inc. v. Cox,* 301 S.C. 493, 498, S.E.2d 789, 793 (S.C. 1990)(citing *Owens v. Andrews Bank & Trust Co.,* 265 S.C. 490, 220 S.E.2d 116 (1975) and 89 C.J.S. Trover and Conversion § 23 (1955)).

As noted in Sections I, II, and III above, Appellant contends that Respondents improperly came into possession and retained a portion of credit card tips he claims are owed to him. Appellant contends that Respondents came into possession of these credit card tips through the royalty fee paid to Respondents by each Ladles franchisee, including Ladles James Island, where Appellant was employed. These allegations are supported by the language of the Franchise Agreement stating that the royalty fee is a percentage of the gross sales of the Ladles franchise and that gross sales includes services performed at the restaurant. (R. pp. 701-702; Franchise Agreement at pp. 17-18). These allegations are also supported by the deposition testimony of Ladles West Ashley and Ladles Fort Mill franchise owner, Mr. Paul, stating that credit card tips are included in the gross sales. (R. p. 771, ll. 20 to R. p. 772, ll. 5; R. p. 774, ll. 16 to R. p. 776. ll. 3; R. p. 780, ll. 16-25 to R. p. 781, ll. 1-3; Depo. of C. Paul at p. 36, l. 20 – p. 37. l. 5; p. 47, 1. 16 – p. 49, l. 3; and p. 90, ll. 16-25 – p. 91, ll. 1-3).

Appellant alleges, and evidence supports, that Appellant personally suffered an injury by Respondents when they came into possession of Appellant's own credit card tips and retained them for Respondents' own benefit without permission from Appellant. Appellant has a cause of action for conversion against Respondents for his own credit card tips and is a claim for his own property that he brings in his own name as the real party in interest. Based on the foregoing, the trial court erred in finding that Appellant had no standing to bring an action against Respondents.

B. Appellant has constitutional standing against Respondents for his claim for breach of contract.

The trial court also erred in finding that Appellant did not have standing to bring an action against Respondents because of lack of an employee/employer or other contractual relationship (R. p. 021; Order at p. 7). Appellant has standing to bring his claim for breach of contract against Respondents. *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) ("Standing refers to '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" (alteration in original) (quoting Black's Law Dictionary 1413 (7th ed.1999))); *id*. ("It concerns an individual's 'sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.'" (alteration in original) (quoting 1A C.J.S. Actions § 101 (2005))); *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 412 (Ct. App. 1994) ("Standing is a fundamental requirement for instituting an action."); *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006) ("Generally, a party must be a real party in interest to the litigation to have standing."); *id*. ("A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation."); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) ("It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property." (quoting 4 S.C. Jur. Action § 23 (1991)).

C. Appellant has statutory standing against Respondents for his claim for violation of the SCPWA.

The trial court also erred in finding that Appellant did not have standing to bring his cause of action for violation of the SCPWA against Respondents. For the reasons cited in Section I above, Appellant has standing against Respondents under the SCPWA because evidence in the record would support a jury finding that Respondents are an employer under the statute because of the agency relationship between Respondents and franchisees and their right to control daily

operations of the franchisees including, Ladles James Island (R. pp. 692-693, Sec 2; R pp. 707-708; R. p. 695, Sec. 4; R. pp. 703-709; R. pp. 709-712, Sec. 9; R. pp. 712-713, Sec 10; R. pp. 713-715, Sec. 11; R. pp. 719-722, Sec. 14; Franchise Agreement at pp. 8-9, Sec. 2 and pp. 23-24; p. 11, Sec. 4; pp. 19-25; pp. 25-28, Sec. 9; pp. 28-29, Sec. 10; pp. 29-31, Sec. 11; pp. 35-38, Sec. 14); S.C. Code Ann § 41-10-10(1); *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 645, 320 S.C. 188 (Ct.App. 1995); *Allen v. Pinnacle Healthcare Sys*., 394 S.C. 268, 276, 715 S.E.2d 362 (S.C. App., 2011); *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982); *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E. (2d) 24 (1980); *Jamison v. Howard,* 271 S.C. 385, 247 S.E. (2d) 450 (1978). Additionally, Respondents knowingly permitted and benefited from the policy of withholding credit card tips from employees like Appellant and had the power to stop it bud did not. *Id;* (720; Franchise Agreement p. 36); (R. p. 811, ll. 4-8; Depo. of S. Allen at p. 69, ll. 4-8); (R. p. 778, ll. 5-13; Depo. of C. Paul at p. 74, l. 5-13); (R. p. 760, ll. 10-25; R. p. 761, ll. 1-18; R. p. 763, ll. 23 to R. p. 764, ll. 1-11; Depo. of T. Owens at p. 25, ll. 10-25; p. 27, ll. 1-18; p. 48, ll. 23 – p. 49, ll. 1-11).

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment. Respondents had an agency relationship with the Ladles franchisees and knowingly permitted and benefited from the credit card tip policy challenged by Appellant making them employers under the SCPWA. Additionally, the trial court's grant of summary judgment was premature because Appellant did not have a full and fair opportunity to complete discovery. Further, there is a genuine issue of material fact as to whether Respondents came in possession of credit card tips claimed by Appellant. Finally, the trial court erred in finding that Appellant had no standing to bring an action against Respondents.

January 7, 2021

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The undersigned hereby certifies that this *Final Brief of Appellant* complies with Rule 211(b), SCRAP.

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