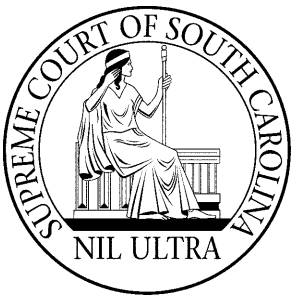

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 5, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Government Employees Insurance Company, Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative of the Estate of Jennifer Knight Poole, Defendant.

Appellate Case No. 2017-001540

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Joseph F. Anderson, Jr., United States District Judge

Opinion No. 27821
Heard February 15, 2018 – Filed July 5, 2018

CERTIFIED QUESTION ANSWERED

J.R. Murphy and Wesley B. Sawyer, both of Murphy & Grantland, P.A., of Columbia, for Plaintiff.

Angela Christy Tyner and Ronald A. Maxwell, Sr., both of Maxwell Law Firm, P.C., of Aiken, for Defendant.

Bert Glenn Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Samuel R. Clawson, Jr., and Christy Fargnoli, both of Clawson Fargnoli, L.L.C., of Charleston; and Frank L. Eppes, of Eppes & Plumblee, P.A., of Greenville; and Kathleen Chewning Barnes, of Barnes Law Firm, L.L.C., of Hampton, all for Amicus Curiae, South Carolina Association for Justice.

Carmelo Barnes Sammataro, of Turner Padget Graham & Laney, P.A., of Charleston, for Amicus Curiae, Property Casualty Insurers Association of America and the South Carolina Insurance Association.

JUSTICE HEARN: We accepted a certified question from the United States District Court for the District of South Carolina, asking whether South Carolina law requires that punitive damages be apportioned pro rata between those sustained for bodily injury and property damage, respectively, under an automobile insurance policy. We answer the question, "No."

FACTUAL BACKGROUND

Jack Poole and his wife, Jennifer, were riding in a vehicle owned by Doris Knight, Jennifer's mother, when a drunk driver crossed the center line and struck them. The Pooles were both seriously injured in the collision; although Jack survived, Jennifer's catastrophic injuries resulted in her death several days later. In contrast with the substantial bodily injuries, the Pooles sustained minimal property damage because they did not own the vehicle. The total value of the Pooles' property damaged in the collision was approximately $1,250.

The at-fault driver's liability carrier tendered its policy limits. Farm Bureau, the insurer on Knight's vehicle, then tendered its underinsured motorist (UIM) policy limits for bodily injury—$25,000 to Jack individually and $25,000 to Jack as the representative of Jennifer's estate. The Pooles then sought recovery from their own insurer, Government Employees Insurance Company (GEICO), which provided them a split limits UIM policy with bodily injury coverage of up to $100,000 per person and $50,000 for property damage. GEICO tendered the UIM bodily injury limits of $100,000 each for Jack and Jennifer's estate. The Pooles requested another

$50,000 from the UIM policy's property damage coverage in anticipation of a large punitive damages award, but GEICO refused. GEICO then initiated a declaratory judgment action in the District of South Carolina to establish that it was not liable to pay any amounts for punitive damages under the property damage provision of the UIM policy because the source of the Pooles' UIM damages was traceable only to bodily injury.[1]

After the parties filed cross-motions for summary judgment, the district court determined the parties presented a novel issue of law[2] and certified the following question to this Court.

CERTIFIED QUESTION PRESENTED

Under South Carolina law, when an insured seeks coverage under an automobile insurance policy, must punitive damages be apportioned pro rata between those sustained for bodily injury and those sustained for property damage where the insurance policy is a split limits policy?

DISCUSSION

GEICO raises four grounds to support its claim that South Carolina law requires the pro rata apportionment of punitive damages in this case. We address each in turn and answer the certified question in the negative.

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[1] For the purposes of the declaratory judgment action the parties stipulated that an award of punitive damages in this case would exceed all available property damage coverage.

[2] Though not binding precedent, we note a 1971 case from the District of South Carolina addressed a similar situation involving the allocation of punitive damages in automobile insurance policies. *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F.Supp. 931 (D.S.C. 1971). The insurer for the at-fault motorist argued any punitive damages awarded to the victim should be allocated pro rata according to his actual property damages. *Id.* at 935. Finding the statutory definition of "damages" included both actual and punitive damages, and given the insurer's failure to cite any authority for prorating punitive damages, the court concluded punitive damages were not allocable, and the victim could recover his award of punitive damages from the at-fault motorist's property damage liability coverage. *Id.* at 935–36.

I. STATUTORY SCHEME

GEICO argues allocation is required by the plain language of the statutory scheme because the insurance code allows for split limits policies. According to GEICO, failure to allocate punitive damages would result in transforming the Pooles' split limits policy into a combined single limit policy. While GEICO acknowledges the statutory definition of "damages" includes punitive damages, it contends this requirement must be applied in the split limits context. Therefore, one can collect actual and punitive damages traceable to bodily injury, and likewise for property damage. Under GEICO's theory, if an insurer must pay for punitive damages, those punitive damages are "because of" bodily injury or property damages, respectively.

Mindful of the purpose and enforceability of split limits policies,[3] we nevertheless reject GEICO's statutory argument. South Carolina law requires that carriers offer UIM coverage "up to the limits of the insured liability coverage to provide coverage in the event that **damages** are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist . . . ." S.C. Code Ann. § 38-77-160 (2015) (emphasis added). "Damages" are defined by statute to include both actual and punitive damages. S.C. Code Ann. § 38-77-30(4). Beyond that, the statutes are silent with regard to the apportionment of punitive damages. Thus, by the plain language of the statute, the trigger for UIM coverage is an event that causes damages—actual and punitive—which exceed the liability limits of the at-fault motorist. Even when viewed in the split limits context, the UIM statute makes no mention of allocation nor does it indicate that bodily injury and property damage must be analyzed separately before determining whether UIM coverage is triggered.

Moreover, the rationale behind punitive damages is not to compensate an aggrieved party for his or her underlying injuries to body and property; rather, "punitive damages, in addition to punishing the defendant and deterring similar

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[3] We note that punitive damage awards are rare in the context of automobile collisions and our holding today does not eliminate the viability of split limits policies. In most cases, plaintiffs are entitled only to recovering their actual damages, and state law has limited the instances in which punitive damages may be awarded. *See* S.C. Code Ann. § 15-32-520(D) (Supp. 2017) ("Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct.").

conduct by the defendant and others, serve to vindicate the private rights of the plaintiff and they provide some measure of compensation to plaintiffs for the intentional violation of those rights *that is separate and distinct* from the usual measure of compensatory damages[] . . . ." *O'Neill v. Smith*, 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010) (emphasis added). Thus, while actual damages may be traceable directly to bodily injury and property damage, punitive damages are not so easily divisible. Reading the statutes to require allocation of punitive damages would result in adding language to the statutes, rather than merely interpreting them. *See Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) ("Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."). If the General Assembly intended to require the allocation of punitive damages, it could have done so with clear, express language. Accordingly, because we find the statutory scheme is silent on the issue of allocation, we decline to reach the result urged by GEICO.

II. DUE PROCESS

GEICO argues a failure to allocate punitive damages would result in a violation of constitutional due process. Citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), GEICO contends a constitutional ratio of punitive damages to actual damages requires allocation.

We believe GEICO's reliance on *Gore* is misplaced, in part, because the issue in this case is not whether punitive damages should be awarded and in what amount; rather, the issue is GEICO's contractual responsibility to pay those punitive damages to which its insureds are entitled. More importantly, unlike the tortfeasor in *Gore*, GEICO's exposure to punitive damages is limited by the terms of the policy. In no event would GEICO be liable for punitive damages beyond the policy limits. From the time GEICO entered into the contract to provide UIM coverage, it was on notice that it may have to pay actual and punitive damages up to the policy limits upon an event triggering coverage. *See Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). Having accepted payments from the Pooles for UIM coverage up to the agreed upon policy limits, GEICO cannot persuade us that fulfilling its contractual duty to pay those policy limits would somehow result in a violation of due process. *See O'Neill*, 388 S.C. at 255, 695 S.E.2d at 535–36 ("Plaintiffs accepted [UIM coverage] and paid the corresponding

premiums for coverage and are entitled to this contractual benefit. State Farm set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy.").

Additionally, the *Gore* court was largely concerned with the rationale behind punitive damages and the connection to the tortfeasor's conduct. 517 U.S. at 575–80. That issue is not present in this case because the insurance code and the policy itself make clear that the coverage includes punitive damages. The allocation question does not concern the propriety of awarding punitive damages or the foreseeability of those damages because GEICO has already contracted to pay those sums. Moreover, GEICO's proposed application of *Gore* is based on the premise that the ratio of punitive damages to actual damages must be bifurcated and analyzed separately for bodily injury and property damage. However, the conduct giving rise to the punitive damages—here, the at-fault motorist's recklessness—is a single, indivisible act. Therefore, the potential award for punitive damages in this case would not be divided based on two separate occurrences or acts.

GEICO's liability for punitive damages is contingent upon the contract, and it arises from the at-fault motorist's conduct. The at-fault motorist committed a single negligent act giving rise to the Poole's damages. GEICO has not produced any authority to suggest that punitive damages must be bifurcated according to each type of damages. To the contrary, the constitutionality of a punitive damages award is simply measured against (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the *harm* to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434–35 (2001). Therefore, we conclude due process limitations do not require the pro rata apportionment of punitive damages in this case.

III. CONTRACTUAL LANGUAGE

GEICO next argues faithful adherence to the contract requires pro rata apportionment of punitive damages. However, given our limited capacity in answering a certified question, we abstain from ruling on the construction and interpretation of the contractual terms at this juncture. We believe such a determination is properly reserved for the district court, where the presiding judge has the ability to review the contract in its entirety and is privy to any testimony or

other documents which may be admissible in interpreting the contract. Therefore, we do not address GEICO's argument that the insurance agreement must be construed to require apportionment of punitive damages.

IV. PUBLIC POLICY

Lastly, GEICO argues public policy is served by finding South Carolina law requires the apportionment of punitive damages in the UIM context. We, however, find this concern is best addressed by the General Assembly, which is in the proper position to make such policy determinations given its ability to conduct studies, collect information about insurance rates, and weigh the various courses of action. Accordingly, we decline to find that public policy, as a matter of law, requires the pro rata apportionment of punitive damages.

CONCLUSION

Based on the foregoing, we answer the certified question in the negative and hold that South Carolina law does not require punitive damages be apportioned pro rata between bodily injury and property damage in a split limits automobile insurance policy.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Roy Lee Jones, Petitioner.

Appellate Case No. 2016-001933

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 27822
Heard May 3, 2018 – Filed July 5, 2018

AFFIRMED AS MODIFIED

Appellate Defender David Alexander and Appellate Defender Lara M. Caudy, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, and Solicitor W. Walter Wilkins, III, of Greenville, for Respondent.

JUSTICE HEARN: Petitioner Roy Lee Jones appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor, second-degree CSC with a minor, and two counts of committing a lewd act on a minor. The issues Jones raises on appeal all concern the admission of testimony from an expert witness qualified in child sexual abuse dynamics. The court of appeals affirmed Jones's convictions. *State v. Jones*, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016). Finding no reversible error, we affirm the court of appeals, but we take the opportunity to clarify the proper inquiry for determining whether a particular subject area falls outside the realm of lay knowledge, thus requiring expert testimony.

FACTUAL BACKGROUND

Jones was charged with numerous offenses for the ongoing sexual abuse of his then-girlfriend's two daughters. Testifying at trial, the older daughter (Daughter 1) stated the abuse began sometime in 2003 as she was entering the tenth grade. While Jones's behavior was initially limited to sexual comments about her body, Daughter 1 stated it progressed to groping and eventually to sexual intercourse. In total, Daughter 1 estimated Jones sexually abused her over a hundred times until it came to a halt in 2009 when Jones was imprisoned for assault and battery of a high and aggravated nature.

The younger daughter (Daughter 2) testified Jones began molesting her when she was around ten years old, also beginning as touching and groping before escalating into forced sexual intercourse. Daughter 2 claimed she told Mother about the abuse, but Mother did not take any steps to stop it. When called to testify, Mother admitted Daughter 2 told her about the abuse, but explained she did not immediately notify the authorities after learning of the allegations because she feared they would take her children from her.

The State then presented expert testimony from Shauna Galloway-Williams, who was qualified as an expert in child sexual abuse dynamics. Jones objected to the admission of Galloway-Williams' testimony, arguing the basis for her opinions was not reliable and that the subject matter of her testimony was not beyond the ordinary knowledge of the jury. After the State proffered Galloway-Williams' testimony, the trial judge concluded the subject matter of her testimony was not common knowledge and determined she established sufficient reliability for her testimony. Thus qualified, Galloway-Williams testified generally about delayed disclosure in sexual abuse cases and the response of nonoffending caregivers. Galloway-Williams did not reference the victims in this case, and after being

questioned on cross-examination, stated she had never met with any of the other witnesses, including the victims and Mother.

Testifying in his own defense, Jones denied ever sexually abusing the victims and claimed the charges were brought against him in retaliation after he caught Daughter 1 stealing money from him. Jones was found guilty of first-degree CSC with a minor, second-degree CSC with a minor, and two counts of lewd act upon a child, and was sentenced to life without parole for first- and second-degree CSC and fifteen years' imprisonment for each count of lewd act. After his convictions were affirmed by the court of appeals, Jones petitioned this Court for certiorari.

ISSUES

I. Did the court of appeals err by holding the trial court did not abuse its discretion when it qualified Galloway-Williams as an expert in child sex abuse dynamics when the subject matter of her testimony was well within the realm of lay knowledge, was highly prejudicial to Jones, and improperly bolstered the complainants' credibility?

II. Did the court of appeals err by holding the trial court did not abuse its discretion when it qualified Galloway-Williams as an expert in child sex abuse dynamics where there was insufficient evidence of the reliability of her testimony and whether those matters had ever been subjected to peer review?

DISCUSSION

I. SUBJECT MATTER OF EXPERT TESTIMONY

Jones argues the trial judge erred in qualifying Galloway-Williams as an expert because the subject matter of her testimony was not beyond the ordinary knowledge of the jury. According to Jones, there is no field of study regarding "child sex abuse dynamics," and the State used that term to mask her actual role as a forensic interviewer.

The admissibility of an expert's testimony is a matter within the trial court's sound discretion and the determination will not be reversed on appeal absent an abuse of discretion. *State v. Cope*, 405 S.C. 317, 344–45, 748 S.E.2d 194, 208 (2013). A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law. *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016). Rule 702, SCRE, states, "If scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In determining whether to admit expert testimony, the trial court must make three inquiries: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

Though she was admitted generally as an expert in child sex abuse dynamics, Galloway-Williams' testimony concerned two distinct concepts: delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers. As to the first area, the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized. *See State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims."). Her testimony about delayed disclosure from sex abuse victims fits squarely within this commonly recognized category. However, the behavior of nonoffending caregivers presents a less settled question. Nevertheless, our review of the record indicates the trial judge did not abuse his discretion in finding the subject appropriate for expert testimony.[1] The State explained it was offering Galloway-Williams' testimony to educate the jurors on why a nonoffending caregiver may fail to act after learning sexual abuse was occurring, contrary to what a reasonable person would expect. Finding this testimony to be in a similar category as other behavioral testimony

[1] We caution this holding does not create a categorical rule establishing this as a recognized area of expertise in every case. If such an expert is challenged, the proper course of action for the trial court remains to hear a proffer of the proposed expert's testimony and determine whether the all of the requirements of Rule 702, SCRE, have been satisfied.

admissible in sexual abuse cases, the trial judge concluded it fell outside the scope of lay knowledge and was therefore admissible.[2]

Although we find ample support for the trial judge's determination that the subject matter of Galloway-Williams' testimony was beyond the ken of lay knowledge, we wish to reiterate the proper test for this determination. In affirming the trial judge, the court of appeals took into consideration whether the jurors' responses during *voir dire* indicated any prior knowledge or experience with sexual abuse. As support for this holding, the court of appeals cited to *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), which similarly considered jurors' *voir dire* responses an appropriate factor in determining whether a particular subject area is beyond the ken of lay knowledge. Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror. The purpose of *voir dire* is to assess a juror's individual biases and overall fitness to serve on the jury—not to probe the need for expert testimony. *See, e.g., Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("*Voir dire* examination serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); *State v. Clark*, 981 S.W.2d 143, 146 (Mo. 1998) ("The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury."); *State v.*

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[2] Furthermore, although Galloway-Williams may conduct forensic interviews in her professional capacity, that fact does not bar her from qualifying as an expert witness in another area. As the trial judge properly noted, *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), restricted the expert qualification of forensic interviewers who evaluated the victim and would then testify as to the veracity of the victim's claims. In contrast, Galloway-Williams did not evaluate or interview the victims. Staying within the confines of *Kromah* and its progeny, we find Galloway-Williams' generalized testimony did not result in improper bolstering on behalf of the victims. Likewise, we find no error in the trial judge's prejudice analysis under Rule 403, SCRE. *See State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (noting a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence is given great deference and only reversed in exceptional circumstances).

Green, 301 S.C. 347, 354, 392 S.E.2d 157, 161 (1990) ("The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as it is explained to him."). Accordingly, we overturn that portion of the court of appeals' opinion and *Brown* to the extent they indicate it is appropriate to evaluate the need for expert testimony based on *voir dire* responses.

II. RELIABILITY OF TESTIMONY

Next, Jones argues it was error to admit Galloway-Williams' testimony because there was no evidence demonstrating her opinions were accurate or reliable. Specifically, Jones alleges Galloway-Williams failed to identify or name any studies supporting her opinions, nor did she state whether any of the literature she relied on had been peer reviewed. With no evidence to demonstrate her reliability, Jones argues the trial judge failed to act as a gatekeeper. We disagree.

In assessing the admissibility of expert testimony, the trial court must make a threshold determination of reliability. *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). While both scientific and nonscientific expert testimony require the trial court make a finding of reliability, there is no formulaic approach for determining the reliability of nonscientific testimony. *Id.* at 274, 676 S.E.2d at 688. As the court of appeals noted, Jones relies primarily on this Court's opinion in *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015), to support his contention that Galloway-Williams' testimony was unreliable.

In *Chavis*, the trial court qualified the same forensic interviewer who evaluated the victim as an expert in the field of child abuse assessment. On appeal, the Court found the qualification was error because, although the forensic interviewer had extensive experience and training using the RATAC protocol, there was insufficient evidence demonstrating her individual reliability. The Court explained, "[T]here is simply no evidence that her conclusions or impressions taken from these interviews were accurate." *Id.* at 108, 771 S.E.2d at 339. While the Court acknowledged there is no "formulaic approach for determining . . . reliability" in nonscientific areas, "evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." *Id.*

Unlike the proposed expert in *Chavis*, Galloway-Williams did not testify about forensic interviewing methods nor the use of the RATAC protocol. Instead, her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse. Although Galloway-Williams did not identify by name the articles serving as the basis for her opinions, she indicated she could provide citations if given an opportunity to gather them. Additionally, she explained her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by child sexual abuse experts and professionals. Galloway-Williams also testified she participates in the peer review process and has given numerous presentations on the subject. When questioned on cross, she testified she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations.

We find Jones's argument conflates reliability with perfection. There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence. Here, Galloway-Williams met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field. Accordingly, we affirm the trial judge's finding.

CONCLUSION

Based on the foregoing, the court of appeals' opinion is **AFFIRMED AS MODIFIED**.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

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

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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

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

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.

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.[1] 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

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[1] 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.

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 shares by Petitioners.[2] 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

[2]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).

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.[3] However, 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

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[3] 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 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.").

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.

"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 Cyclopedia 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 Cyclopedia 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).[4]

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,[5] where multiple corporations have

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[4] 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).

[5] *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-subsidiary 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

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.[6]

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

[6] *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

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 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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> . . . .
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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).

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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).

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.
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> 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.[7] 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.[8] *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 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.[9]

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[7] 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.

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

[9] 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).

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.[10] 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%.[11] It is further undisputed that Pertuis's claim to a 10% ownership interest in 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:

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[10] 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.

[11] 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.

> 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.[12]

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.

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[12] 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 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,[13] 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 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

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[13] *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.").

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.