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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

OCT 15 2015
SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1646

Kyle Pertuis, Respondent,

v.

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

**MOTION TO FILE APPENDIX
TO THE RECORD ON APPEAL**

Appellants hereby move the Court for leave pursuant to Rule 212(b), SCACR, to file a supplement to the Record on Appeal. After argument commenced, Appellants became aware of the Court's concerns regarding error preservation. Specifically, the Court inquired as to whether Appellants filed a post-judgment motion pursuant to Rule 59, SCRCP, and whether the trial court ruled thereon. Because error preservation was not an issue during briefing, neither party designated post-judgment proceedings. Furthermore, Appellants inadvertently omitted the relevant materials for inclusion and failed to include those proceedings in the Statement of the Case.

Rule 212(b) provides "after argument commences, a party desiring to supplement

the Record on Appeal must move the appellate court for leave to do so.” Although Respondent’s counsel conceded at oral argument that the issues raised and argued were preserved for review, Appellants’ counsel is aware that: (1) Appellants have the burden of providing this Court with an adequate record for this Court’s decision; (2) Respondents are not even required to file a brief with this Court, Rule 208(a)(4), SCACR, and thus need not raise a point in support of affirmance; and (3) this Court may affirm for any reason appearing in the record, Rule 220(c), SCACR, although that authority is tempered by the Supreme Court’s guidance set forth in *I’On, LLC v. Town of Mt. Pleasant*:

While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).¹

To address the Court’s expressed concerns regarding error preservation and to provide the Court with a complete record, Appellants move this Court to supplement the Record on Appeal. The proposed Appendix is conditionally filed with this motion and

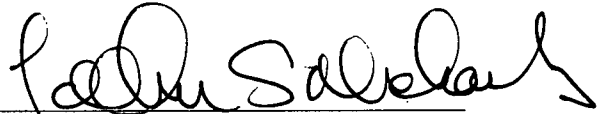
¹ Although the *I’On* Court was addressing “additional sustaining grounds” regarding the trial court’s rulings, the Court has applied this discretion where the record reveals a reason to affirm apart from those reasons proffered by a respondent. *Compare Karriem ex rel. Simmons v. Sumter County Disabilities and Special Needs Bd.*, Op. No. 2015–MO–014 (S.C. Sup. Ct. filed March 25, 2015) (2015 WL 1396438) (this Court affirmed the grant of summary judgment on the basis that the appellant failed to raise an issue by way of Rule 59; supreme court reversed, citing *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (holding issue was preserved when “the trial judge’s order granted respondents’ motion for summary judgment on precisely the grounds argued by respondents at the summary judgment hearing”)).

contains the omitted documents.

Pursuant to Rule 209(c), SCACR, counsel certifies that this proposed Appendix contains no matter which is irrelevant to the appeal. Furthermore, counsel certifies that this proposed Appendix does not include matter that was not presented to or provided by the lower court.

October 15, 2015

Respectfully submitted,



John S. Nichols, SC Bar # 4210

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Attorney for Appellants

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Motion to File Appendix to the Record on Appeal* and conditionally filed *Appendix to the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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

October 15, 2015



Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

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OCT 15 2015

SC Court of Appeals

October 15, 2015

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Kyle Pertuis v. Front Roe Restaurants, Inc.
Case Tracking No.: 2013-002257

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant's Motion to File Appendix to the Record on Appeal along with the conditionally filed original unbound and fifteen (15) copies of the Appendix to the Record on Appeal. I have also enclosed a check in the amount of \$25.00 for filing this motion.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb

Enclsoures

cc: Curtis W. Stodghill, Esquire
Robert C. Wilson, Jr., Esquire