

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 19 2018

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1346

Appellate Case No. 2016-000749

Opinion No. 27823

Heard November 14, 2017 – Filed July 5, 2018

Kyle Pertuis,.....Respondent,

v.

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

PETITION FOR REHEARING

Other Counsel:

Blake A. Hewitt, Esq.
1614 Taylor Street
Columbia, SC 29201
(843) 665-9779

Curtis W. Stodghill, Esq.
725 Lowndes Hill Road
Greenville, SC 29607
(864) 968-4125

Counsel for Petitioners

Robert C. Wilson, Jr.,
SC Bar No. 6178
201 Whitsett Street
Greenville, SC 29601
(864) 242-9488
Email: *rcwjrlaw@gmail.com*

Counsel for Respondent Kyle Pertuis

INDEX

Table of Authorities.....jj

Overview.....1

Argument.....3

1. **New remedy, established by judicial decision, is subject to retroactive application..3**

2. **Email exchange between Hammond/Pertuis established enforceable, dispositive contract to give Pertuis 10% shares of Front Roe stock.....4**

3. **Appellate Court dismissal of Pertuis' claims against NC corporations without giving Pertuis a chance to build a factual record to support the application of SET to his case, may be constitutionally infirm.....5**

Conclusion.....6

TABLE OF AUTHORITIES

South Carolina Authorities:

<i>Bartlett v. Nationwide Mutual Fire Ins. Co.</i> , 290 SC 154, 348 SE 2 nd 530, (S.C. Ct.App 1986).....	3
<i>Douglass v. Florence General Hospital</i> , 273 SC 716, 259 SE 2 nd 117 (1979).....	3
<i>Marcum v Bowden</i> , 372 SC 452, 643 SE 2 nd 85, (S.C.S.Ct. 2007).....	3
<i>oth v. Square D Co.</i> , 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989).....	3
SC Constitution Art 1, Section 3.....	2, 5

Federal Authorities:

<i>Coppedge v. United States</i> , 369 U.S 438 (1962).....	5
US Constitution, 5 th Amendment.....	2, 5
US Constitution, 14 th Amendment.....	2, 5

Respondent Kyle Pertuis (“Pertuis”), pursuant to Rule 221(a) SCACR hereby respectfully petitions this Court for a rehearing in his case on the grounds that the Court misapprehended or overlooked the following points:

OVERVIEW

First, in its Opinion in this case, this Court established new law which opened the door to SC courts entertaining shareholder actions against multiple, related corporations by treatment of the related multi-corporate entities as a single corporate entity, (“Single Entity Treatment,” or “SET”). To allow a litigant to seek SC adjudication of claim(s) under SET, this Court established a set of standards by which a SC trial court, as gatekeeper, could allow multi-corporate claims to proceed in one action. Pertuis asserts that the establishment of SET, and its gatekeeper’s set of rules for application, constitute a new remedy. Pertuis believes that his case, in light of applicable precedents, under equitable principles, and under constitutional principles, should be reheard and remanded for further adjudication, consistent with retroactive application of newly-established remedies. In short, Pertuis believes that he should be allowed to utilize SET as a new remedy to achieve a full hearing, if the Trial Court has determined that Pertuis meets the SET requirements, on all of his claims against all Petitioners.

Second, Pertuis suggests that the Opinion overlooked the dispositive import of the email exchange between Pertuis and Mark Hammond in which Hammond conceded that Pertuis should thereafter receive 10% distributions from Front Roe Restaurants, Inc. (“Front Roe”). For Pertuis to have thereafter received 10% distributions from Front Roe, necessarily means that Pertuis would become a 10% shareholder in Front Roe. The record of this case shows that Pertuis

thereafter relied in good faith on Hammond's email concession. The parties' fallout took place as a result of Hammond's failure to comply with his promise.

Since this case was an equitable case, this Court could reconsider the facts in the record and fashion its own judgment thereon, holding that Pertuis is a 10% shareholder in Front Roe. In short, Pertuis asks this Court to apply the time-honored adage that "a deal is a deal," and award Pertuis the 10% shareholder interest that Pertuis and Hammond confirmed by email.

Third, the Opinion in this case dismissed Pertuis' claims against the N.C. entities because Pertuis ostensibly did not meet the gatekeeper's criteria for application of SET, based on the record of the case already before the Court. Pertuis respectfully suggests that it is fundamentally unfair to dismiss his claims under SET without giving him a chance to litigate on the applicability of SET to his case, since SET was only recognized *after* the trial of Pertuis' case. Pertuis believes that the Court's dismissal of Pertuis' claims as non-SETworthy, without a chance to develop a record to support the application of SET, does not allow Pertuis the same chance to employ SET as other litigants. Pertuis further submits that there may well be further evidence which can be adduced in support of the application of SET to his case. Because the Opinion does not afford Pertuis his chance to supplement the record to achieve the application of SET for his claims, Pertuis suggests that the failure to remand his case to the Trial Court, to determine if his claims warrant treatment under the newly-minted SET criteria, could be constitutionally infirm under SC Constitution Art 1, Section 3 , and the US Constitution, 5th and 14th Amendments. Pertuis suggests that constitutional due process and equal protection requirements should militate in favor of remand.

ARGUMENT

1. **New remedy, established by judicial decision, is subject to retroactive application.**

In SC, it is the general rule, regarding retroactive application of judicial decisions, that decisions which create a new, substantive right have prospective effect only. Decisions, however, which create remedies to vindicate pre-existing rights are applied retrospectively.

Justice Total stated in her concurring/dissenting opinion in *Marcum v Bowden*, 372 SC 452, 643 SE 2nd 85, (S.C.S.Ct. 2007):

judicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Stated otherwise, prospective application is required when liability is created where formerly none existed. **Citing:**
Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989).
Marcum v Bowden, 372 SC 452, 643 SE 2nd 85, (S.C.S.Ct. 2007):

cf: *Bartlett v. Nationwide Mutual Fire Ins. Co.*, 290 SC 154, 348 SE 2nd 530, (S.C. Ct.App 1986); *Douglass v. Florence General Hospital*, 273 SC 716, 259 SE 2nd 117 (1979)(opinion creating liability where formerly there was none must be applied prospectively only).

Pertuis believes that the newly-created SET remedy vindicates Pertuis' pre-existing right to bring an action against all Petitioners named in this case, under various other theories. The Opinion in this case, however, dismissed Pertuis' claims against the NC corporations which are named parties to this action, shutting the S.C. courthouse door to Pertuis' claims against the NC corporations in this suit, without a chance to go forward under SET. Pertuis suggests, though, that, had his case received treatment under SET, and if he had a fair opportunity to develop a factual record in the trial court which could satisfy the gatekeeper rules prerequisite to application of SET, then Pertuis could have earned judgment against the NC corporations. Pertuis respectfully

urges this Court to grant him the benefit of SET, by remanding this case to the Trial Court to develop a record on Pertuis' using SET to proceed against the NC corporations.

2. Email exchange between Hammond/Pertuis established enforceable, dispositive contract to give Pertuis 10% shares of Front Roe stock.

In late 2008, Pertuis became alarmed about his then-undocumented ownership in Front Roe (R.p.m. 263, l. 1 10). Pertuis was concerned that the Front Roe stock vesting schedule was unavailable to him, and it appeared that the threshold figure for Pertuis to become a 10% shareholder was protean, subject to change at the whim of Hammond. (R.p.m. 311, l. 2-p. 313, l. 1). An exchange of emails ensued. (Pltfs. Exhs. 5,6,7, R. pp.451-456). Pertuis submitted a proposed shareholder/compensation agreement for consideration by Hammond. (Pltf. Exh. 4, R. p. pp. 447-450). Hammond proposed a new compensation package with various options, including 10% ownership in Front Roe for Pertuis. (Pltf. Exh.5, R. p. 509; Deft. Exh .12, R. pp. 540-542). Pertuis counter-proposed, accepting one of the options, which provided for compensation and 10% distributions in 2009 and thereafter. (Pltf.Exh. 6, R. p. 454-455). Hammond accepted Pertuis' counter-proposal which included 10% distributions from the corporations, meaning that Pertuis would become a 10% shareholder in Front Roe in 2009 and thereafter. (Plt. Exh. 7, R. p. 456). Pertuis had written confirmation of his across-the-board ownership of 10% stock of **all** members of Larkins Restaurant Group, in 2009, which, according to Hammond, had a street value of \$250,000. (Pltf. Exh. 1, R. p. 424).

From this email exchange, Hammond agreed to Pertuis' demand that he receive 10% distributions thereafter from Front Roe. The Opinion of this Court, however, set Pertuis'

ownership interest in Front Roe at 1%. Pertuis suggests that this Court may have overlooked the dispositive import of the Hammond/Pertuis email exchange.

This case arose as an equitable, intra-corporate shareholder dispute. Pertuis observes that this Court may review and determine facts and conclusions of law anew, from the record of an equitable case, with its own, perhaps different, perspective on the facts in the record from the Trial Court. Pertuis, therefore, respectfully asks this Court to remand his case for rehearing in the Trial Court, to adjust the judgment to reflect the Hammond/Pertuis 10% deal, so there will be no judicial impairment of the contract between Hammond/Pertuis.

3. Appellate Court dismissal of Pertuis' claims against NC corporations without giving Pertuis a chance to build a factual record to support the application of SET to his case, may be constitutionally infirm.

Pertuis respectfully asserts that whether he should be granted a remand of his case to the Trial Court to apply SET and whether the Hammond/Pertuis email exchange received due weight, may not have been fully considered by this Court in this case. To deprive Pertuis of his chance to have his case fully adjudicated retroactively, under the newly-announced SET remedy, invites query into the constitutionality of such deprivation. Indeed, it would appear that the dismissal of Pertuis' claims as non-SETworthy, without affording Pertuis a chance to develop a record in the Trial Court to support the application of SET, might be an arbitrary dismissal. *cf.*: *Coppedge v. United States*, 369 U.S. 438 (1962) (arbitrary dismissal of appeal by Federal Court of Appeals without full record reversed, remanded by US Supreme Court). Pertuis respectfully submits that Article 1, Section 3 of the SC Constitution and the 5th and 14th Amendments of the US Constitution, and the line of cases represented by *Coppedge, supra*, militate in favor of

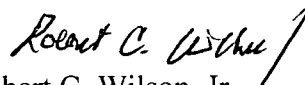
remanding Pertuis' case for him to litigate the application of SET to his case.

CONCLUSION

Based on the foregoing, Pertuis asks this Court to grant him a rehearing and to remand this case to the Trial Court with instructions consistent with taking further evidence and testimony to establish whether or not retroactive application of the newly-created judicial remedy, SET, is warranted. Pertuis further asks this Court to honor the email contract between him and Hammond which awarded Pertuis 10% ownership in Front Roe.

Dated: 7/16/18

Respectfully Submitted:



Robert C. Wilson, Jr.
201 Whitsett Street
Greenville, SC 29601
SC Bar No. 6178
(864) 242-9488
Email: rcwjrlaw@gmail.com

Attorney for Respondent,
Kyle Pertuis

RECEIVED
JUL 19 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-23-1346

Appellate Case No. 2016-000749

Opinion No. 27823

Heard November 14, 2017 – Filed July 5, 2018

Kyle Pertuis,.....Respondent,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served, on the date set forth below, a true copy of Respondent’s Petition for Rehearing, in the above-referenced case, upon opposing counsel by US Mail and by email transmission at the following addresses:

Blake A. Hewitt, Esq.
1614 Taylor Street
Columbia, SC 29201

and to:

P.O. Box 7965
Columbia, SC 29202

and by email to:

blake@bluesteinattorneys.com

Curtis Stodghill, Esq.
725 Lowndes Hill Road
Greenville, SC 29607

and to:

P.O. Box 2431
Greenville, SC 29602

and by email to:

curt@stodghilllaw.com

Dated:

7/16/18
RB

Robert C. Wilson, Jr.

Robert C. Wilson, Jr., SC Bar No. 6178
201 Whitsett Street
Greenville, SC 29601
(864) 242-9488
(864) 242-6251 (fax)
Email: rcwjrlaw@gmail.com

Attorney for Respondent Kyle Pertuis