

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

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JUL 25 2018

S.C. SUPREME COURT

2016-UP-091 (S.C. Ct. App. filed Feb. 24, 2016)
Case No. 2010-CP-23-1646

Appellate Case No. 2016-000749

Kyle Pertuis, Respondent,

v.

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

RETURN

This return to the respondent’s petition for rehearing is filed pursuant to the Court’s request.

1. The request for a remand is untimely, as respondent never argued a remand would be required if an appellate court agreed the evidence did not justify amalgamating the three restaurants into a single corporate entity.

At no point prior to the rehearing petition has the respondent ever argued a remand would be required if the Court agreed with petitioners and found the evidence did not justify “amalgamating” the three restaurants into a single entity. Respondent’s briefs to this Court and to the Court of Appeals sought a full affirmation of the circuit court’s decision. (Supreme Court Brief, p.33); (App.pp.119-120). Respondent never asked for a remand if either court disagreed with his argument that the circuit court should be affirmed.

It was, of course, entirely understandable and predictable that the respondent would argue for a full affirmation. Respondent won at the circuit court level. It was natural for him to defend the circuit court's judgment.

But a rehearing petition is not the proper place to argue, for the first time, that the Court should grant the respondent a new trial if the Court reverses the circuit court's judgment. See *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (rehearing is not the forum to raise new arguments or arguments overlooked by the parties). The proper time to raise such an argument was in the briefs on the merits.

2. On the merits, the respondent's arguments that "amalgamation" is a "new remedy" and that the respondent has been denied the chance to develop a record supporting amalgamation are incorrect.

Respondent had a full opportunity to develop the record supporting his claims. Before this case went to trial there was a constellation of South Carolina cases discussing what this Court describes in its decision as "amalgamation" or the "single business enterprise" theory. This Court's decision cites those cases including *Kincaid v. Landing Development Corp.*, *Magnolia North Property Owners' Association v. Heritage Communities*, and *Pope v. Heritage Communities*. Slip op. at 8. Recognizing amalgamation did not break uncharted ground.

There were indications in respondent's own case that he had not met the requirements to justify relief under this theory of liability. The respondent's own expert explained he had to value the three restaurants separately because "they are really different." (R.p.160, line 10). He also explained he did not see any evidence of financial impropriety. (R.p.163, line 23 - p.164, line 5).

Mark Hammond was specifically questioned about facts related to amalgamation, explaining the three restaurants were separate entities and had separate locations, separate employees, separate

loans to third parties, separate bank records, and separate states of incorporation. (R.p.357, line 24 - p.360, line 13).

In petitioners' proposed order to the circuit court they argued the respondent had not met the requirements to establish amalgamation. (Supp.R.pp.64-65). After the circuit court found the three restaurants were amalgamated, the petitioners filed a motion to reconsider and reiterated this same argument. (Supp.R.pp.15-17).

The respondent's answer to these arguments was that the record was sufficient. In his brief to the Court of Appeals, he said the record "reflects a blurring of the legal distinction" between the three restaurants, he called those the three restaurants "the members of Larkins Restaurant Group," and he claimed the record was sufficient to subject the three restaurants to suit under amalgamation as articulated in *Magnolia North*. (App.p.102). Amalgamation is not "new." The parties have argued over its application throughout this case. The respondent was not deprived of the opportunity to make a record. The respondent believed the record was sufficient until now.

3. The respondent's request for 10% ownership in the Greenville restaurant is procedurally barred.

The circuit court said it was equitably imposing a graduated ownership schedule for the Greenville restaurant and awarded respondent a 7.2% ownership interest in that business. (R.pp.7-8). The respondent did not appeal this finding. Indeed, the respondent did not appeal any part of the circuit court's decision. This was understandable. The circuit court's judgment was very much in the respondent's favor.

Respondent does not explain how it would be proper, as a procedural matter, for this Court to grant him a more favorable judgment than the one awarded by the circuit court. Respondent did

not appeal the circuit court's judgment or ask for a partial reversal of that judgment in his briefs. As was already noted above, the respondent's briefs to this Court and to the Court of Appeals sought a full affirmation of the circuit court's decision. (Supreme Court Brief, p.33); (App.pp.119-120). The petitioners are not aware of any authority allowing a party to use a petition for rehearing to switch positions. If the respondent believed he was entitled to 10% instead of the 7.2% fashioned by the trial court, his remedy was to appeal or cross-appeal. He did neither.

4. On the merits, the respondent's argument for 10% ownership in the Greenville restaurant is wrong.

Even if the Court could get past the fact that the respondent did not cross-appeal, the result would still be the same. The evidence shows Mark Hammond and respondent were negotiating the terms of the respondent's future employment and that respondent made a career change while the terms were being finalized. Most importantly, the parties stipulated that the respondent received important tax forms every year from 2007 to 2012 indicating he owned 1% of the Greenville restaurant, not 10% as he claims. (R.p.212, lines 18-24). The parties also stipulated federal law requires an individual to notify the government if the ownership interest shown on these forms is incorrect and that the respondent made no such notification. (R.p.213, line 3 - p.214, line 5).

The Court did not overlook the email exchange the respondent uses to support his argument. The Court specifically referenced the e-mail exchange in its decision. Slip op. at 4, 15-16.

5. There is no constitutional infirmity in denying the respondent a second chance to develop a record on amalgamation.

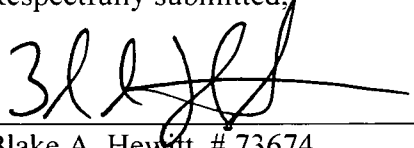
The petition for rehearing cites *Coppedge v. United States*, 369 U.S. 438 (1962), a case about the standard a federal court applies to a criminal defendant's request to proceed *in forma pauperis* in a direct appeal of the defendant's conviction. *Coppedge* construed a statute requiring an IFP

application be taken in good faith and explained that when the claims and issues the defendant seeks to raise “cannot adequately be ascertained from the face of the defendant’s application” the court must appoint counsel and allow the defendant to develop a record “of sufficient completeness.” *Id.* at 446. That case has nothing to do with this case. Here, the respondent is seeking a “do over” after he already had a full and fair opportunity to try his case.

CONCLUSION

For the foregoing reasons this Court should deny the petition for rehearing.

Respectfully submitted,



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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 *Return to Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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July 25, 2018



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