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Oct 31 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2022-001470
Case No. 2019-CP-40-05221

Alicia Pearson, Respondent,

v.

Richland County, Appellant.

**RETURN IN OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS APPEAL**

The Respondent Alicia Pearson has filed a Motion to Dismiss Appeal for Lack of Jurisdiction. In her motion, the Respondent incorrectly assumes that the Appellant Richland County is appealing from the denial of its Motion for Summary Judgment. That is not correct.¹ On September 28, 2022, the trial court also issued an order granting in part and denying in part the Appellant's Motion to Transfer Case to Non-Jury Docket, and as the Notice of Appeal make clear, that order is being appealed.

By way of background, in her Complaint, the Respondent alleged causes of action for

¹ The Appellant is not appealing the denial of its Motion for Summary Judgment, as is claimed in the Respondent's motion. Nonetheless, until initial briefs are filed, neither the Court nor the parties are advised of the issues on appeal, and hence, any argument that an appeal is raising issues that are not immediately appealable is actually premature.

breach of contract, for promissory estoppel, and for a violation of the South Carolina Whistleblower Act, S.C. Code Ann. § 8-27-10, *et seq.* The Appellant filed a Motion to Transfer Case to Non-Jury Docket contending that it is entitled to a non-jury trial on each of those three causes of action.

As the First Cause of Action, the Respondent alleges a breach of contract cause of action and makes a request for a trial by jury. There is, however, no right to a jury trial for the breach of contract action under the holding of the South Carolina Supreme Court in *Unisys Corp. v. South Carolina Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). In the *Unisys* case, our Supreme Court held that there is no constitutional right to a jury trial in an action against the sovereign not recognized at the time the 1868 constitution was adopted. Specifically, the Supreme Court explained that “art. I, § 14 secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868.” 551 S.E.2d at 271. The Supreme Court expressly recognized that “at the time our constitution was adopted in 1868, the State was immune from suit on a contract.” *Id.* The Supreme Court thus concluded that the South Carolina Constitution “does not guarantee the right to a jury trial on a contract with the State.” *Id.* It is the Appellant’s position that the breach of contract cause of action asserted by the Respondent in this action was not recognized and could not be pursued against the State or any governmental parties at the time of the adoption of the constitution in 1868. Accordingly, as dictated by the *Unisys* decision, the Respondent’s breach of contract claim should be tried non-jury. The trial court, however, did not agree with that analysis. The Appellant contends on appeal that the trial court erred in ruling that the breach of contract cause of action should be tried by a jury. As to the other two causes of action, the trial court agreed that those sound in equity and must be tried non-jury.²

² It is well settled that there is no right to a trial by jury in an action sounding in equity. *See, Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994). Specifically, the Plaintiff’s Second Cause of Action for promissory estoppel sounds in equity. In *Thomerson v. DeVito*, 430 S.C. 246, 844 S.E.2d 378 (2020), the Supreme Court confirmed that “South Carolina courts have consistently characterized promissory estoppel as an equitable claim.” 844 S.E.2d at

South Carolina law is clear that “[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). Most importantly, “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Id.* See also, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) (“[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable”).

The *Frampton* decision demonstrates that the Order on Defendant’s Motion to Transfer to a Non-Jury Docket as issued in the case at bar is not only immediately appealable, *but the Appellant is required to appeal that decision at this stage of the litigation or forever waive any objection it has to the mode of trial.* In *Frampton*, the Department of Transportation (“DOT”) filed a motion to transfer the case to the non-jury docket, which was denied. Instead of filing an immediate appeal, DOT raised the mode of trial issue again at trial, at which time the motion was again denied. DOT then attempted to raise the mode of trial issue on appeal following the trial. This Court found, however, that was too late. This Court, in fact, ruled that “DOT did not preserve this issue for our review because it did not immediately appeal the trial court’s order affecting the mode of trial which is a substantial right.” 752 S.E.2d at 274.

The same analysis applies in this case. If the Appellant did not immediately appeal the trial court’s order affecting the mode of trial, that would have resulted in a waiver of any future right to

384. Accordingly, the Plaintiff is not entitled to a trial by jury on her promissory estoppel claim. Lastly, the Plaintiff’s Third Cause of Action is brought pursuant to the South Carolina Whistleblower Act. By statute, any civil action brought under the Whistleblower Act is to be tried non-jury. See, S.C. Code Ann. § 8-27-30(A).

appeal that issue. As *Frampton* and the other cited cases make clear, the Order on Defendant's Motion to Transfer to a Non-Jury Docket issued in the case at bar is immediately appealable.

By way of further explanation, in its Notice of Appeal, the Appellant does also reserve the right to appeal the trial court's Order Denying Defendant's Motion for Summary Judgment filed September 28, 2022. That is done purely for precautionary reasons. As this Court should come to understand, in denying the non-jury mode of trial on the breach of contract claim, the trial court unnecessarily makes substantive rulings on the Appellant's sovereign immunity defense which should have no bearing on the mode of trial question. This same erroneous analysis is also included in the Order Denying Defendant's Motion for Summary Judgment. In other words, there is an overlap between the two orders, and the Appellant, as a precautionary measure, chose to appeal both orders so as not to risk opening the door to an argument that a challenge to the trial court's sovereign immunity analysis was waived because both orders had not been appealed.

Based on the foregoing arguments, the Appellant Richland County submits that established precedent from the Supreme Court and from this Court dictate that the Order on Defendant's Motion to Transfer to a Non-Jury Docket is immediately appealable and must be appealed at this stage. The Respondent's Motion to Dismiss Appeal should therefore be denied.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

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L. Casey Manning, Circuit Court Judge

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Case No. 2019-CP-40-05221

Alicia Pearson, Respondent,

v.

Richland County, Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court’s Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant Richland County, does hereby certify that service of the **Return in Opposition to Respondent’s Motion to Dismiss Appeal** was made upon all counsel of record by email only at the below email addresses this the 31st day of October 2022, as follows:

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SC Court of Appeals

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Alicia Pearson v. Richland County, South Carolina
Appellate Case Number: 2022-001470
Civil Action Number: 2019-CP-40-5221
Claim Number: 2020G00141
Our File Number: 314.20233

Dear Ms. Kitchings:

In accordance with Section (b)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Return in Opposition to Respondent's Motion to Dismiss Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving a copy on opposing counsel by email only.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Donald Gist, Esquire (w/ Enclosure, Via Email Only)
Erica K. McCrea, Esquire (w/ Enclosure, Via Email Only)