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Mar 22 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

The Honorable Daniel Coble,
Circuit Court Judge

APPELLATE CASE

NO. 2023-000295

Gary L. Park and Cynthia Park..... Appellants,

vs.

Scott Barry Gutovitz and Caron Dawn Gutovitz..... Respondents,

**MOTION AND MEMORANDUM IN SUPPORT
OF REINSTATEMENT OF APPEAL**

Gary L. Park and Cynthia Park respectfully move this Court to Reinstate their Appeal of the Orders of the Honorable Daniel Coble dated February 10 & 24, 2023, where the lower court denied their Motion to Strike a Jury Trial Demand. This Appeal was filed with this Honorable Court on February 24, 2023, and was thereafter dismissed by this Court by way of Order filed and served on March 7, 2023. The one-page Order dismissing this Appeal first cited *Ballenger v. Bowen*, 312 S.C. 476- 477-78, 443 S.E.2d 379, 380 (1994), for the proposition that a motion for summary judgment is not immediately appealable, and thereafter dismissed this appeal based upon the determination that “the underlying order is not immediately appealable.”

Respectfully, the dismissal of this Appeal by the Court is an error of law. Appellants have filed this Appeal on the ground that the underlying order refused to strike Respondents' jury trial demand, and thereby affects the mode of trial in this matter. Inasmuch as Appellants have a substantial right to the proper mode of trial in this action, the underlying order is immediately appealable under S.C. Code § 14-3-330(2) and related case law as cited below. In *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997), the Supreme Court held:

[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. *E.g.*, *Foggie v. CSX Transp.*, 313 S.C. 98, 431 S.E.2d 587 (1993) (“**Issues 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.**”). Moreover, 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 Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury). (*emphasis added*)

In *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 315 (1978), the Court stated, “if the action is in equity, it is to be tried by the court; if at law, it is triable by a jury.” As a result, the *Pelfrey* Court held “It is clear that the order of the lower court denying a compulsory reference of the issues affects the mode of trial and, contrary to the contention of respondent, is appealable.” The court concisely stated the principle: It is settled beyond controversy in this state that it is error, from which an appeal will lie, to deny a party a mode of trial to which he is entitled by law. *Id.* (citing *Alston v. Limehouse*, 61 S.C. 1, 39 S.E. 192; *Williford v. Downs*, 265 S.C. 319, 218 S.E.2d 242).

The *Pelfrey* case involved an action in equity, and the lower court was found to be in error in refusing to strike the phrase “the plaintiff demands a jury trial” from the pleadings. *Id.* At 695, 317, *see also Du Pont v. Du Bos*, 33 S.C. 389, 11 S.E. 1073, 1077 (1890)(the denial of a jury trial

did not deny plaintiff any substantial right to which he was entitled). The Appeal at bar involves the appeal of two actions seeking to enforce restrictive covenants by way of injunction. South Carolina law is clear: an action to enforce restrictive covenants by injunction is an action in equity. *Buffington v. T.O.E. Ent.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009); S.C. Dep't of Nat. Res. v. McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001); *Holling v. Margiotta*, 231 S.C. 676, 680, 100 S.E.2d 397, 399 (1957); *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct.App.1993); *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In this Action, as in Pelfrey, the Appellants are entitled to a trial of this matter by the Court, and not a jury. The underlying orders on appeal refusing to strike the jury trial demand affect Appellants' substantial rights. Therefore, under S.C. Code § 14-3-330(2), Appellants are required to appeal the underlying orders immediately to avoid the waiver of such right.

Appellants respectfully pray for an Order of this Court Reinstating this Appeal.

Respectfully submitted,

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

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The South Carolina Court of Appeals

Gary L. Park and Cynthia C. Park, Appellants,

v.

Scott Barry Gutovitz and Caron Dawn Gutovitz,
Respondents.

Appellate Case No. 2023-000295

ORDER

This appeal arises out of an order of the circuit court denying Appellants' motion for summary judgment and to strike jury demand. Because the underlying order is not immediately appealable, this appeal is dismissed. *See* S.C. Code Ann. § 14-3-330 (2017); *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994) (holding the denial of a motion for summary judgment is not immediately appealable). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.


_____, J.
FOR THE COURT

Columbia, South Carolina

cc:

George W. Redman, III, Esquire
Robert S. Shelton, Esquire
Gene McCain Connell, Jr., Esquire
L. Morgan Martin, Esquire
The Honorable Daniel Coble

FILED
Mar 07 2023

From: [Staley, Denesha](#)
To: ["gconnell@classactlaw.net"](#); ["mmartin@lmorganmartin.com"](#); ["gredman@bellamylaw.com"](#); ["rshelton@bellamylaw.com"](#)
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Subject: Gary Park v. Scott Gutovitz 2023-000295
Date: Tuesday, March 7, 2023 1:52:00 PM
Attachments: [Park v. Gutovitz - Out f.pdf](#)

Good afternoon,

Attached please find correspondence from the South Carolina Court of Appeals. **Please do not respond to this email.** Send all correspondence to ctappfilings@sccourts.org. Any parties not included in this email will receive the attached correspondence via US Mail.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

The Honorable Daniel Coble,
Circuit Court Judge

CONSOLIDATED CASES:
2019-CP-26-02083 & 2019-CP-26-02152

Gary L. Park and Cynthia Park..... Appellants,

vs.

Scott Barry Gutovitz and Caron Dawn Gutovitz..... Respondents,

PROOF OF SERVICE

Pursuant to SCACR Rules 262(a)(3) and (c)(3), 613, 614, and Orders 2022-05-06-03 and 2022-05-06-04 of the Supreme Court of South Carolina, I certify that the Motion for Reinstatement of Appeal in this Action was electronically served upon Counsel for Respondents, Scott Barry Gutovitz and Caron Dawn Gutovitz, by way of the attached email sent to the primary e-mail address listed for each attorney in the Attorney Information System.

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Redman, George W

From: Redman, George W
Sent: Wednesday, March 22, 2023 5:39 PM
To: 'Gene Connell'; 'Morgan Martin'
Cc: Shelton, Robert S.; Richardson, Nicole M.
Subject: RE: Park v. Gutovitz - 2019-CP-26-02083 & 2019-CP-26-02152
Attachments: 2023-03-22 Motion for Reinstatement of Appeal.pdf

Morgan & Gene,

The document attached to this email is the Motion for Reinstatement of Appeal which we are filing with the South Carolina Court of Appeals today, and which we are serving upon you by way of this email pursuant to SCACR Rules 262(a)(3) and (c)(3), 613, 614, and Orders 2022-05-06-03 and 2022-05-06-04 of our Supreme Court.

Respectfully,

George.



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March 22, 2023

Via Email (CTAppFilings@SCCourts.org) & Federal Express

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

RE: MOTION FOR REINSTATEMENT OF APPEAL
Gary L. Park, et al., vs. Scott Barry Gutovitz et al.
Civil Action Numbers: 2020-CP-26-06420 & 2019-CP-26-02152

Dear Ms. Kitchings:

Our firm Represents Gary L. Park and Cynthia Park, as Appellants, in the above-referenced matter, in which a Motion for Reinstatement of Appeal is being filed via email. In this regard, please find enclosed check number 88019 in the amount of \$50.00 for the filing fee. Should you have any questions or require any additional information, please do not hesitate to contact our office.

With kindest regards, we are

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

George W. Redman, III (SC Bar#72365)

GWR

Enclosures, as noted

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