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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

The Honorable Daniel Coble, Circuit Court Judge

Consolidated Case Nos. 2019-CP-26-02083 and 2019-CP-26-02152

Appellate Case No. 2023-000295

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

vs.

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

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RESPONDENTS' RETURN IN OPPOSITION TO APPELLANTS' MOTION FOR REINSTATEMENT OF APPEAL

The Respondents offer the following argument in support of this Court's Order filed March 7, 2023 which dismissed the appeal filed by Gary L. and Cynthia C. Park.

I. WAIVER OF MODE OF TRIAL

When this litigation was started, the Respondents in their original Answer filed on April 18, 2019 requested a jury trial. The Appellants proceeded to litigate this case for years and made no mention of Respondents' request for a jury trial until filing a motion for summary judgment November 18, 2022. Significantly the motion was filed after the Court set the case for trial.

It was almost four years after Respondents filed their Answer that the jury trial demand issue was raised for the first time. During the course of these last four years, Appellants have

litigated this case to death. Multiple depositions have been taken, numerous motions have been filed and Respondents have been forced to answer voluminous discovery requests. During that time period Appellants never made known that this case should be heard non-jury. Respondents note the case law in South Carolina requires that issues regarding the mode of trial must be raised in the trial court at the first opportunity. See *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). Obviously Appellants have not abided by that maxim and thus this Court should refuse to reinstate their appeal.

II. APPELLANTS' REQUEST IS INTERLOCUTORY.

The refusal to strike a jury trial demand from a Respondents' Answer is not appealable immediately as it does not affect the mode of trial requested by Respondents. The jury in this case could make the same decision that a judge sitting without a jury could based on the facts presented to it. A proper verdict forms could be formulated and presented to the jury easily.

Further, and more importantly, the request to strike a jury trial demand which was made a part of Appellants' motion for summary judgment makes it interlocutory. This Court has correctly stated the law in its original Order on this matter finding that the denial of a motion for summary judgment is never immediately appealable. The failure to strike a jury trial request which is made as a portion of a motion for summary judgment nearly four years after that request has been made is likewise not immediately appealable. In fact, the contra is true in this case. If Respondents' request for a jury trial had been stricken, Respondents would have been able to immediately appeal that order. See *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (An order referring case to master-in-equity affects the mode of trial, a substantial right, and party waiving his objection to the reference and his right to jury trial by failing to immediately appeal the order); See also *Bateman v. Rouse*, 358 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (The purpose of immediate

appeal on a right to particular mode of trial is to preserve party's constitutional right to a trial by a jury which would otherwise be lost). See also *Thornton v. S.C. Elec. &Gas Corp.* 391 S.C. 297, 705 S.E.2d 475 (2011) (An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories in S. C. Code Ann. § 14-3-330). Thus, the striking of a jury trial demand by Appellants four years after it was requested by Respondents does not fit into any of the listed categories in S.C. Code § 14-3-330 and accordingly it is not immediately appealable to this Court.

III. SOUTH CAROLINA LAW REQUIRES A JURY TO DETERMINE FACTUAL ISSUES.

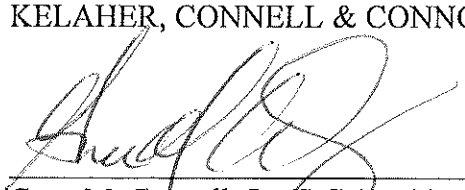
South Carolina has long allowed a jury to determine facts in a declaratory judgment action. See S.C. Code § 15-53-90 which provides in pertinent part: "All existing rights to jury trial are hereby preserved."

In this case, factual disputes surround a scenic easement. The jury or a judge would have to decide those same factual issues and a jury could easily do the same thing that a judge could do. Further, allowing the jury to perform this function preserves Respondents' constitutional right to a jury trial.

Also of importance to this case is that the circuit court consolidated this trial with Gutovitz's pending lawsuit against the Parks for malicious prosecution and slander of title which are claims that must be tried before a jury. This is yet another reason why this Court should deny Appellants' request to reinstate their appeal.

It is for these reasons this Court should deny Appellants' motion for reinstatement of appeal and return this case to the Circuit Court for a jury trial.

KELAHER, CONNELL & CONNOR, P.C.



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