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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INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT PARKS' MOTION TO STRIKE JURY DEMAND WHEN RESPONDENTS GUTOVITZ DEMANDED A JURY TRIAL.

STATEMENT OF THE CASE

Scott and Caron Gutovitz (hereinafter "Gutovitz") purchased an ocean front lot adjoining Gary L. Park and Cynthia C. Park (hereinafter "Park"). The lot the Gutovitzes purchased had previously been owned by Park's sister through a company known as Paanaples, LLC. Paanaples, LLC had placed a Scenic Easement Agreement in the records of the Horry County RMC Office, at Deed Book 4025, page 2283. The Parks asserted the Scenic Easement Agreement gave them control over the construction on the lot owned by the Gutovitzes.

After the Gutovitzes purchased the lot they made plans to build their home and pursuant to the Scenic Easement Agreement obtained permission from Mrs. Park to build the house with a deck in the scenic easement area. After the Gutovitzes started construction, a dispute arose between the parties over whether the deck was built in the scenic easement area. The Parks filed suit against the Gutovitzes on April 5, 2019 and unbeknownst to the Parks, the Gutovitzes filed suit against the Parks on April 8, 2019. Once the lawsuits were served, the Court allowed the Gutovitzes to amend their Summons and Complaint on March 16, 2020. On December 17, 2021, the Gutovitzes moved to consolidate the two cases for trial. Judge Sprouse heard the motion to consolidate on March 3, 2022 and issued a form Order granting the motion to consolidate and directing Gutovitz's counsel to prepare a formal order. A proposed order was sent to Parks' counsel on March 8, 2022. Judge Sprouse did not sign the formal Order of Consolidation until April 3, 2023. Meanwhile, Judge Coble heard Parks' Motion to Strike Jury Demand and Summary

Judgment and denied those motions by Form 4 Orders filed February 10 and February 24, 2023.[1] The Gutovitzes in their original Complaint, in their Amended Complaint and in their Answer to the Parks' lawsuit had always requested a jury trial on their causes of action against Park. After Judge Coble's Form Orders were filed, the Parks did not file a motion for reconsideration, but filed an appeal with this Court. This Court originally dismissed the appeal as interlocutory but in a later Order reinstated it. The sole issue before this Court is: Did the trial court properly deny the Parks' motion to strike the Gutovitzes' jury trial demand in the consolidated cases? Significantly, the Parks have never filed, nor can they now file an appeal of Judge Sprouse's order consolidating the two cases together for trial.

STANDARD OF REVIEW

The only question before this Court is whether the trial court erred in failing to grant Appellants' motion to strike jury trial demand. The standard of review is found in *Townes Assoc., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). In that case, the Supreme Court set forth the scope of appellate review in civil cases. In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law. Here because the question of whether the trial judge denied the motion to strike jury trial demand is a question of law, this court's scope of review requires that it decide as a matter of law whether or not the trial judge erred in his ruling.

[1] The parties engaged in extensive motion practice and discovery over four years and Appellants filed this appeal days before a day certain trial.

ARGUMENT

I. EVEN IF THIS CASE INVOLVES A COMBINATION OF LEGAL AND EQUITABLE CLAIMS, THE TRIAL COURT WAS CORRECT IN ITS RULING.

Appellants argue that the trial court should not have granted a jury trial to the Gutovitzes. However, Appellants' argument is incorrect since it is settled law that the Gutovitzes are entitled to a jury trial on their malicious prosecution, breach of contract, slander of title claims and declaratory judgment causes of action. In this case, even if the Parks are correct and their complaint is equitable and the Gutovitzes' complaint is legal and compulsory, either party has a right to a jury trial. See *Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). In *Johnson*, the Court stated that if a jury trial has been timely demanded, the trial judge has two options: (1) order separate trials of the equitable and legal issues, or (2) order a joint trial with the legal issues to be tried first by a jury and the equitable issues to be tried subsequently by the court. The jury's factual findings would be binding on the Court in regard to the equitable issues.

While no case law exists on this exact factual pattern, presumably the same basic logic applies when a defendant has filed a jury trial demand in his complaint which has been consolidated with a case which arises out of the same transaction.

In sum, the trial court committed no reversible error by denying the Parks' motion for a non-jury trial. The case law, specifically *Johnson*, clearly allows for a trial to be conducted in which the counterclaim is a jury trial issue, and the complaint is a non-jury issue. While the Gutovitzes deny this situation exists, even if it did the trial court was correct in its ruling and properly exercised its discretion. As a result this Court should affirm the trial court's decision denying the Parks' motion.

II. THE PARKS DID NOT APPEAL JURY TRIAL DEMAND AT THEIR FIRST OPPORTUNITY.

It is well settled in South Carolina that a party who is appealing the mode of trial must do so at their first opportunity and that failure to timely appeal an order affecting mode of trial affects their waiver of the right to appeal that issue. See *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1998) (Appellant must immediately appeal an order referring case to master that she was deprived to right of jury trial.)

In this case, the Gutovitzes filed a jury demand in their Complaint which was consolidated with the Parks' case by Judge Sprouse on March 3, 2022 by Form Order. At no time after the cases were consolidated did the Parks appeal or complain of this action. Clearly the Parks understood on March 3, 2022 that their lawsuit would be tried and/or consolidated with the Gutovitzes lawsuit for slander of title, breach of contract, declaratory judgment and malicious prosecution. As a result and because the Parks did not timely appeal after Judge Sprouse issued his order consolidating the case for trial they waived the mode of the trial.

Further, the trial judge, if he determined it to be appropriate in this case, could try the Parks' claim concurrently with the Gutovitzes' jury claims. While the Gutovitzes believes that the Parks' claims are also jury trial claims, the current posture of the case, i.e., the consolidation Order clearly was not appealed and is the law of the case. *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003); *In re Morrison*, 321 S.E. 370 n. 2, 468 S.E.2d 651 n. 2 (1996).

The trial Court recognized this exact issue at the hearing when it stated:

> THE COURT: But before that, Mr. Redman, let me just, procedurally -- I understand the motion for summary judgment, but to strike a right to a jury trial, since these cases have been consolidated, I understand, in your case, you want a bench trial. If they're consolidated, what about the causes of action even if I were to get rid of the slander of title, malicious prosecution? Haven't they filed a breach of contract and declaratory judgment that they would have a right to a jury trial as well, or are you saying that they don't have a right to a jury trial in their case either?

MR. REDMAN: They don't have a right to either because if you put aside the slander to title, malicious prosecution, their claims are the exact same as ours.

Clearly Judge Coble understood that Judge Sprouse had consolidated the cases and that the Gutovitzes had requested a jury trial. Also as has been stated above, the Parks waived any right to this mode of trial when they failed to timely appeal the Order of Consolidation issued by Judge Sprouse.

III. A DECLARATORY JUDGMENT ACTION ALLOWS A JURY TRIAL.

It is well settled in South Carolina that either a jury or a court may decide factual issues in a declaratory judgment case. The meaning of the First Amendment to Scenic Easement Agreement which is the central issue in this case is a factual matter. The Scenic Easement has words which are not defined including deck, porch and balcony. Also the Parks and Gutovitzes disagree over whether the Parks consented to the deck prior to its construction. When there are factual matters and a declaratory judgment action has been filed, any party is free to request a jury trial as a matter of right. The Gutovitzes clearly asserted their right to a jury trial when they asked for one in their Complaint.

South Carolina Code Ann. § 15-53-90 entitled "Determination of Facts; jury trial" provides in pertinent part:

> When a proceeding under this chapter involves a determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trial are hereby preserved.

In this case, the jury will be called upon to make certain factual determinations. They are as follows:

1. The latent ambiguity of the First Amendment to Scenic Easement Agreement.

2. The definition of deck, porch and balcony in regard to what the Gutovitz built.

3. The dispute over whether Gutovitz obtained consent from Park to build the deck?

4. The dispute over whether Park gave permission to Gutovitz to build a pool and gazebo in the easement area.

All of these issues are factual issues that must be decided by a jury in a declaratory judgment action after listening to the testimony. See *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 155 S.E.2d 618 (1967) (the right to jury trial is preserved) *Legette v. Smith*, 226 S.C. 403, 85 S.E.2d 576 (S.C. 1955).

IV. THE PARKS ARE NOT AS A MATTER OF RIGHT ENTITLED TO A NONJURY TRIAL.

As has been seen in this brief, the Parks' claim for declaratory judgment action, the Gutovitzes' claim for declaratory judgment action, the consolidation Order of Judge Sprouse and the fact that the Gutovitzes' claims for slander of title, breach of contract and malicious prosecution are jury issues and require a jury trial if requested. In *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 292 S.C. 575, 357 S.E.2d 725 (S.C. App. 1987), this Court held that the denial of a jury trial is not immediately appealable unless it deprives a party of a mode of trial to which he is entitled to as a matter of right. Here, the Parks had no right to a nonjury trial based on the South Carolina Declaratory Judgment Act and the Gutovitzes clearly had demanded a jury trial on their legal claims. Finally the Order of consolidation was not appealed. The trial judge in this case made the correct decision since either party may demand a trial by jury of any issue triable by jury. See *Bateman v. Rouse,* 358 S.C. 667, 596 S.E.2d 386 (S.C. App. 2004).

V. APPELLANTS DID NOT FILE A MOTION TO RECONSIDER.

It is well settled in South Carolina that a motion to reconsider or alter a judgment is required when the court has not addressed an issue which appellant believes is appropriate for review. South Carolina recognizes the rule that when a trial court does not explicitly rule on an argument

raised, and the appellant makes no motion to obtain a ruling, the appellate court may not address the issue. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (S.C. App. 2006), rehearing denied.

In this case, the Parks raise numerous issues in their brief which were not ruled on or addressed by the court. The order appealed from is a form order and provides no reasoning for the denial of the motion to strike jury trial. This is problematic in that Appellants raise numerous issues which the form order does not address. Those issues are:

1. An action to enforce a restrictive covenant is an action in equity. -- Not addressed in the Form 4 Order signed by the trial court.
2. The Gutovitz factual arguments regarding enforcement of the scenic easement are subsumed within their equitable defenses. -- Not addressed in the Form 4 Order by the trial court.
3. The declaratory judgment statute does not change the equitable nature of the case seeking to interpret restrictive covenant -- Not addressed in the Form 4 Order by the trial court.
4. The Gutovitz claims for slander of title and malicious prosecution do not change the nature of this action. -- Not addressed by the circuit court in the Form 4 Order.
5. The failure of Park to appeal the Order of Consolidation of Judge Sprouse.

In sum, each and every legal argument Appellants advance in their brief was not addressed by the circuit court in its Form 4 Order. It was incumbent upon the Parks if they wanted these issues addressed to file a motion for reconsideration and list those issues which had not been addressed in order to preserve those errors for this court. The proper procedure is for a party to raise issues which are not addressed in an order by a Rule 59(e), SCRCP motion, otherwise those issues are lost and considered abandoned. See *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621

(S.C. App. 2009). Here, the Parks raise issues for the first time and those issues were not raised or addressed in the Form Order filed by the court. Thus the Parks cannot now raise those issues which have not been addressed by the trial court. See *Patterson v. Reed*, 318 S.C. 183, 456 S.E.2d 436 (S.C. App. 1995) and *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (S.C. App. 1997).

VI. ISSUES IN THE BRIEF REGARDING THE DENIAL OF THE MOTION FOR SUMMARY JUDGMENT ARE NOT IMMEDIATELY APPEALABLE.

The Parks in their brief essentially reargue their motion for summary judgment. On pages 13, 14 and 15 of Appellants' Brief the denial of the motion for summary judgment is argued again.[2] These issues are interlocutory in that the denial of a motion for summary judgment is never immediately appealable. *Olsen v. Faculty House of Carolina,* 354 S.C. 161, 580 S.E.2d 440 (2003). Despite this black letter law, the Parks argue the elements of the malicious prosecution and slander of title causes of action Also, the Gutovitzes never waived a jury trial demand for those causes of action and clearly demanded it in their original and amended Complaint. (_____) Thus, the Parks' arguments about the malicious prosecution claim, the Lis pendens and the filing a Lis pendens are not properly before this court since the sole issue is whether or not the trial court properly denied the motion to strike the Gutovitzes' jury trial demand. Under those circumstances, this Court cannot consider or revisit the motion for summary judgment since the denial by the trial court is interlocutory. See *Ex Parte Capital U-Drive-It*, 369 S.C. 1, 6, 630 S.E.2d 464 (2006) (An interlocutory order not governed by a specialized appealability statute is not appealable unless it fits into one of the categories listed in Section 14-3-330 of the South Carolina Code). *Ballenger v. Bowen*, 443 S.E.2d 379 (S.C. 1994) (Order denying summary judgment not immediately appealable).

[2] Park has filed two motions for summary judgment in this case which have been denied.

VII. THE LAW OF THE CASE DOCTRINE IS APPLICABLE.

The Parks have appealed the Order of Judge Coble refusing their request for a nonjury trial. Appellants should have appealed the Order of Judge Sprouse on March 3, 2022 consolidating the cases for trial. The consolidation Order of Judge Sprouse affected the mode of trial. The law of the case doctrine precludes Appellants from relitigating those matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.

In this case, Judge Coble was prohibited from overruling the prior unappealed Order of Judge Sprouse. See *In re Morrison*, 321 S.E. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issues on appeal). *Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case.) *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become the law of the case.

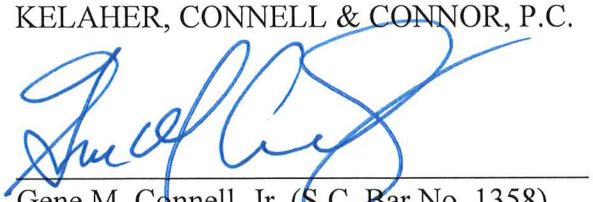
The same logic applies here. Judge Sprouse consolidated the cases for trial on March 3, 2022 by Form Order and formal Order on April 3, 2023. Appellants should have filed an appeal contesting the Order of Consolidation because it affected the mode of trial. They failed to do so and accordingly they are prohibited from doing so under the law of the case doctrine.

CONCLUSION

The Gutovitzes request this Court affirm the ruling of the trial court and remand it for trial. This case is four years old, and closure is needed by the Gutovitzes who have waited way too long to have a jury hear their case.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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August 15, 2023