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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas for the First Circuit

The Honorable Diane S. Goodstein

Case No.: 2022-CP-18-00295
Appellate Case No.: 2023-000655

LAURA ABERNATHYPlaintiff /*Appellant*,

v.

ERVIN W. LAMBERT, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF ERVIN
E. LAMBERT, JR., DECEASED.,Defendant/*Respondent*.

APPELLANT’S INITIAL BRIEF

EPTING & RANNIK, LLC

This 15th day of September, 2023
Charleston, South Carolina

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court's refusal to allow Appellant's claims against Respondent to proceed in a single action, which meant equitable claims would be tried first and common factual and legal issues would be determined by the court, constitute the denial of a jury trial on those issues?
2. Did the trial court abuse its discretion in denying Appellant's Motion to Consolidate when numerous factual and legal issues were shared between the suits?
3. Did the trial court abuse its discretion in denying Appellant's Motion to Amend to add additional claims and parties when those additional claims shared a factual predicate with Appellant's original declaratory judgment claim?

STATEMENT OF THE CASE

I. Factual Background

Ms. Laura Abernathy (hereinafter, "Ms. Abernathy" or "Appellant") was the longtime, right-hand employee of the late Ervin W. Lambert, Jr. ("the Decedent") at his company L&L Contractors ("L&L"). (Hrg. Tr. (Apr. 6, 2023), Complaint; Abernathy Tr., Kolpack Aff., Memo in Support of Motion to Consolidate). After Decedent was killed in a plane crash in October 2018, Decedent's father—Respondent Ervin W. Lambert Sr. ("Lambert Sr.")—took over L&L. (Lambert Tr., Memo in Support MSJ, Order Denying Motion to Amend). The business suffered as a consequence, as did Appellant's position there. (Am. Complaint generally in Case No. 2022-CP-18-01582).

Ms. Abernathy alleges that, prior to the Decedent's death, he made certain promises to her in recognition of her importance to L&L. First, he promised her a house in lieu of a cash bonus, 106 Sarmiento Lane, which is the subject of this action ("the Property"). (4-6-23 Hrg Tr., Complaint, Abernathy Tr., Kolpack Tr., Kolpack Aff). Around the same time, a lawsuit had been filed by L&L Contractors relating to monies owed to L&L Contractors for shoring work it performed ("the Lawsuit"). (Abernathy Tr. 18:9-13, Amd. Complaint). Ms. Abernathy being central to the project at issue in that suit, and central to the operations of L&L Contractors generally, it was agreed between her and Decedent that, in exchange for a cash bonus, she would

be entrusted with being the point of contact for the Lawsuit, gathering the relevant materials and working with counsel to prosecute the action. (Abernathy Tr., Kolpack Tr., Hrg. Tr. (Apr. 6, 2023)). Ms. Abernathy did so, performing these functions in addition to her other responsibilities at L&L. (Memo in Opp to Motion to Dismiss, Memo in Opp. to Motion for Summary Judgment).

Ms. Abernathy found the Property, and she and Decedent co-signed the contract for its purchase. (Abernathy Tr., Kolpack Tr., Kolpack Aff). However, at closing, Decedent had a change of heart and made the agreement regarding the Property contingent upon her assistance with the Lawsuit. (Abernathy Tr., Kolpack Aff., closing docs, Memo in Opp. To Motion for Summary Judgment). Accordingly, Decedent's name was the only name on the deed for the Property, and he promised to transfer it to her upon resolution of the Lawsuit. (Abernathy Tr., Kolpack Aff., Ex. 3 to Abernathy Tr., Memo in Opp. To Motion for Summary Judgment).

After Defendant Lambert Sr. assumed control of the company in the autumn of 2018, Appellant continued to assist with the Lawsuit in addition to her other responsibilities, and Defendant Lambert Sr. appeared to honor her agreements with the Decedent, including her ownership of 106 Sarmiento Lane. (Abernathy Tr.) The Lawsuit was favorably resolved in or around November 2019. (Abernathy Tr.).

Shortly thereafter, in February 2020, Appellant alleges she discovered that Defendant Lambert Sr. had charged the SC Department of Transportation ("SCDOT") \$1.2m for material that was never delivered to SCDOT but was instead sold to others, creating a double-payment for the same materials. (Hrg. Tr. (Oct. 4, 2022), Order Denying Motion to Amend). Appellant brought the issue to Defendant Lambert Sr.'s attention, and refused to certify documents or payments relating to the project from that point onward. (Order Denying Motion to Amend).

Appellant alleges Lambert Sr. and L&L retaliated against for her refusal to participate in the wrongdoing, and that the retaliation took three forms:

- (i) termination of her employment at L&L by Lambert Sr.

- (ii) institution of criminal proceedings by Lambert Sr. for purportedly “stealing” company property by using her work laptop in order to work from home (charges that were dropped by the investigating authorities) dismissed; and
- (iii) institution of eviction proceedings by Lambert Sr. to remove her from her home in 106 Sarmiento Lane.

II. Procedural History

On June 4, 2020, Respondent instituted eviction proceedings in the Dorchester County Magistrate’s office. (Hrg Tr. (Apr. 6, 2023), Lambert Tr., Memo in Opp to Motion to Dismiss). Lambert Sr. alleged a landlord-tenant relationship existed with respect to Appellant’s residence at 106 Sarmiento Lane and attempted to evict Appellant from the Property.

On June 12, 2020, Appellant filed a declaratory judgment action in circuit court (Case No. 2022-CP-18-01482, the “Declaratory Judgment Action”) seeking to quiet title to 106 Sarmiento Lane and for a declaration of her rights in the property. (Complaint). Lambert Sr. was named as the Defendant in his capacity as the personal representative of Decedent, who due to his untimely demise, remained the record owner of 106 Sarmiento Lane. On September 30, 2021, the parties agreed to strike the matter from the docket pursuant to Rule 40(j), S.C.R.C.P. (Consent Order of Dismissal). It was reinstated on February 15, 2022 with the undersigned substituted as new counsel for Ms. Abernathy. (Consent Order to Restore).

Discovery revealed that the intentional and targeted acts of Lambert Sr. provided a viable, cognizable claim beyond what was pled in Appellant’s complaint. On August 12, 2022, seven months after the case was reinstated, it was added on the nonjury trial roster for the term of court beginning September 19, 2022. The case was continued by agreement of counsel. On September 20, 2022, Ms. Abernathy moved to amend her complaint and assert the additional, related causes of action (Motion to Amend), and the motion was heard on October 4, 2022. (Hrg Tr. (Oct. 4, 2022)). The Trial Court entered an order on December 19, 2022 denying Appellant’s Motion to Amend, finding it untimely (though it was filed only seven months after the matter had been

reinstated to the docket by substitute counsel) because it was filed after the case was added to the nonjury trial roster. (Order Denying Motion to Amend).

To ensure the statute of limitations did not expire on the additional claims, Ms. Abernathy filed a separate action asserting on the related claims (Case No. 2022-CP-18-01582, the “Wrongful Termination Action”). (Wrongful Termination Summons and Complaint). On March 17, 2023,¹ Appellant moved for consolidation of the Declaratory Judgment Action and the Wrongful Termination Action and trial by jury, noting that substantial overlap between the parties and factual allegations underlying both suits. (Motion to Consolidate). The Trial Court denied Appellant’s Motion to Consolidate and request for a jury trial on April 12, 2023.² (Form 4 Denying Motion to Consolidate). Appellant served and filed her timely notice of appeal on April 21, 2023.³

STANDARD OF REVIEW

While a trial court’s ruling on a motion to consolidate or a motion to amend will not be overturned absent an abuse of discretion,⁴ a litigant’s entitlement to a jury trial is question of law. *Verenes v. Alamos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010) (“Whether a party is entitled to a jury trial is a question of law.”). This Court reviews questions of law *de novo*. *E.g.*, *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm’n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019).

“An abuse of discretion can arise when either an order based on factual conclusions is without evidentiary support or the judge issuing an order was controlled by an error of law.” *Em-*

¹ At which point the Declaratory Judgment Action had still not been called for trial, belying the argument that the September 20, 2022 Motion to Amend was made at a time when trial was imminent.

² *See supra*, note 1.

³ *See supra*, notes 1 and 2.

⁴ *E.g.*, *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct. App. 1993); *Winchester v. United Insurance Co.*, 231 S.C. 288, 98 S.E.2d 530 (1957).

Co Metal Prod., Inc. v. Great Atl. & Pac. Tea Co., 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App. 1984).

This Court may review an otherwise unappealable order when a separate appealable order is before it. *Cox v. Woodman of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001).

ARGUMENT

A litigant's right to a trial by jury is fiercely protected by the courts and Constitution of the State of South Carolina. Here, Ms. Abernathy was denied that right. She filed a Declaratory Judgment action against Respondent to be tried nonjury, and later learned she had additional claims, claims that were legal in nature, against the Respondent. When her motion to amend to assert the additional claims was denied, she filed the separate Wrongful Termination action to preserve the claims from the statute of limitations, and moved to consolidate the two cases for a trial by jury of the legal causes of action. After that motion was denied, she filed this appeal.

Because the two cases have the parties in common and there is substantial factual overlap underlying the claims in the two cases, were the Declaratory Judgment action to be tried nonjury, it would resolve common factual issues. Because the resolution would be binding on the parties in all future actions between them, it would prevent Ms. Abernathy from being able to have a jury decide those issues, thereby denying her a jury trial.

I. The Claims and Factual Allegations in the Declaratory Judgment Action and Wrongful Termination Action Are Inextricably Intertwined.

Material common issues of fact exist between the two actions. For example, in both cases, Ms. Abernathy alleges that her unwillingness to perform illegal actions on behalf of L&L Contractors led to her being retaliated against. In the Declaratory Judgment action, this is a basis for the equitable argument that she should be declared the equitable titleholder of the property. In

the Wrongful termination action, it is a basis for her claims that she was wrongfully fired and maliciously arrested.

As another example, Ms. Abernathy alleges in each case that an agreement she made with Decedent (the former president of L&L Contractors) was breached by Defendant Ervin W. Lambert, Sr. after he took over the company. In the Declaratory Judgment action, Ms. Abernathy has alleged:

8. Plaintiff was at all times relevant herein a key employee of L&L [Contractors] holding the position of General Superintendent and Project Manager.

9. Decedent and Plaintiff worked closely together at L&L for many years.

10. Plaintiff was at all times relevant herein a valued, loyal and trusted employee of L&L and integral in and to its operations and management.

11. With respect to the Subject [Property], Decedent made specific and unambiguous representations, assurances, guarantees and promises to Plaintiff prior to and after the closing on the Subject in October 2015; that because Plaintiff had earned and was due a significant bonus from L&L, in lieu of a cash bonus for extraordinary and financially significant services to and for the benefit of Decedent and L&L, Plaintiff would become a fifty percent (50%) owner in the Subject at or around closing and thereafter a sole and absolute owner of the Subject.

[. . .]

13. Decedent tragically and unexpectedly perished before the documents were executed accomplishing of record the arrangement made and contemplated as between Decedent and Plaintiff with respect to the Subject.

14. On June 4, 2020, Plaintiff was served with certain pleadings and papers originating from the Dorchester County Magistrate's Office in which Defendant alleges a landlord-tenant relationship with respect to the Subject, which Plaintiff expressly denies, and that Plaintiff should be evicted from the Subject.

15. The service of eviction papers is the first time Plaintiff became aware that Defendant or anyone else denied that Plaintiff is the equitable owner of the Subject, which denial is contrary to the knowledge, awareness, acquiescence and recognition of the arrangement between Decedent and Plaintiff with respect to the Subject.

16. For the reasons set forth herein and such other proofs to be presented at trial, Plaintiff asserts that she is the equitable owner of the Subject.

Compl. (Declaratory Judgment action) at ¶¶ 8–11, 13–16.

In the Wrongful Termination action, Ms. Abernathy alleged:

7. Plaintiff was at all times relevant herein a key employee of L&L [Contractors] holding the position of General Superintendent and Project Manager.

8. Decedent and Plaintiff worked closely together at L&L for many years.

9. Plaintiff was at all times relevant herein a valued, loyal and trusted employee of L&L and integral in and to its operations and management.

[. . .]

39. Given her central role at L&L, Ms. Abernathy was tasked with coordinating with counsel and providing substantial assistance in the prosecution of a lawsuit L&L filed to recover monies owed to it (“the Lawsuit”).

40. As her work assisting with the Lawsuit would be in addition to her existing workload, Decedent (then-President of L&L) promised, in writing, that she would be entitled to a bonus related to any recovery obtained in the [Lawsuit].

41. She was instrumental in achieving a substantial recovery for L&L in the [Lawsuit].

42. Prior to the [Lawsuit] being resolved, Decedent was killed in a plane crash.

43. Ms. Abernathy was terminated in 2020, never having received the bonus she was promised relating to the [Lawsuit].

44. Ms. Abernathy is entitled to payment of the bonus promised to her relating to the [Lawsuit].

Amended Complaint (Wrongful Termination action) at ¶¶ 7–9, 39–44.

As such, both cases involve the enforceability of the same agreement made between Plaintiff and Decedent. Both cases will require the same testimony and documentary evidence regarding: (i) the relationship of the parties, (ii) the nature of Plaintiff’s work for Decedent and then for Defendant Lambert at L&L Contractors, (iii) the relationship of Plaintiff and Decedent, (iv) the agreement made by Decedent and Plaintiff and not honored by Defendant Lambert, and (v) Ms. Abernathy’s work relating to the Lawsuit.

II. Ms. Abernathy Is Entitled to Have the Factual Allegations underlying her Claims in the Wrongful Termination Action Resolved by a Jury.

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Any party may demand a jury trial on all issues triable as of right by a jury. Rule 38(b), S.C.R.C.P. “Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997).

The Wrongful Termination seeks monetary damages relating to claims for wrongful termination, malicious prosecution, and breach of agreement. (Amended Complaint, Case No. 2022-CP-18-01582). Accordingly, the claims sound in law. *See Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 246, 422 S.E.2d 91, 93 (1992) (“Here Culler testified that he was seeking money damages and not reinstatement. Thus, Culler was seeking legal damages making his action entirely an action at law.”) Accordingly, Ms. Abernathy is entitled to a jury trial on those causes of action unless she voluntarily and knowingly waived that right. *See, e.g., Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 324, 755 S.E.2d 437, 439 (2014), *abrogated on other grounds by Deutsche Bank Nat’l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar*

Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck, No. 2021-001292, 2023 WL 5075037 (S.C. Aug. 9, 2023) (finding a knowing and voluntary waiver of a jury right by contract); 47 Am. Jur. 2d *Jury* § 81 at 696 (1969) (waiver of a jury trial must be the result of an intentional act and the intention to waive the right must plainly appear); 50 C.J.S. *Juries* § 90 at 797 (1947) (“Waiver of a jury trial, however, will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary; further, it has been held that the waiver must of necessity be an intentional act. In other words, a party will not be concluded by conduct which is not inconsistent with an intention to preserve his right to a jury trial.”). She did not.

Ms. Abernathy sought to amend her complaint in the Declaratory Judgment suit to include the causes of action ultimately filed in the Wrongful Termination suit and requested a jury trial. The motion to amend was denied. She then filed a separate lawsuit, requesting a jury trial, asserting her additional causes of action to prevent the statute of limitations from expiring while the denial of the motion to amend was on appeal. After denial of her motion to consolidate the two actions, she has appealed both the denial of that motion and the denial of the motion to amend on the basis of her right to a jury trial. There has been no waiver.

III. **If the Common Factual Issues Underlying the Declaratory Judgment and Wrongful Termination Actions Are Decided Nonjury, Ms. Abernathy Would Be Denied her Entitlement to a Jury Trial on Those Issues.**

“Under the doctrine of *res judicata*, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.’” *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm’n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Additionally, collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the

claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009).

Accordingly, any of the facts noted above (*supra* Argument Part I) that are, *or even could be*, determined in one action would be binding on the parties in the other action. This means that the resolution of those issues in the Declaratory Judgment action tried nonjury would preclude those issues being tried to and decided by a jury, as is Ms. Abernathy's right.

Therefore, in order that Ms. Abernathy's right to a jury trial not be vitiated, she must be permitted to have a jury determine the factual issues underlying her claims. And, for the sake of judicial economy, the matters should be tried together in a single action.⁵

IV. **The Trial Court Abused its Discretion.**

"An abuse of discretion can arise when either an order based on factual conclusions is without evidentiary support or the judge issuing an order was controlled by an error of law." *Em-Co Metal Prod., Inc. v. Great Atl. & Pac. Tea Co.*, 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App.

⁵ Equitable claims would still be resolved by the Court; however, the legal issues would be tried first, and the parties and the Court would be bound by the findings of fact as determined by the jury. See *Johnson v. S.C. Nat. Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) ("[W]hen issues common to both legal and equitable claims are to be tried in a single proceeding, legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims.").

If separate trials were ordered, the legal claims would still have to be tried first so as not to constitute a denial of the jury trial right. See *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014), *abrogated on other grounds by Deutsche Bank Nat'l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck*, No. 2021-001292, 2023 WL 5075037 (S.C. Aug. 9, 2023) ("If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.")

1984). The trial court abused its discretion in denying Ms. Abernathy's efforts to combine the claims into a single action.

A. The Denial of a Jury Trial, in Addition to Being a Reversible Error of Law, Also Constituted an Abuse of Discretion.

Ms. Abernathy had a right to a jury trial. The trial court's decision denied her that right, and was therefore controlled by an error of law regarding that entitlement. In the circumstances of this matter, and in light of the courts' and state Constitution's protection of the right to a jury trial, the trial court's rulings constitute an abuse of discretion and should be reversed.

B. Respondent Would Not Be Prejudiced by Consolidation or Amendment.

Where an amendment would prejudice a defendant in his defense of the claims against him, a motion to amend may be denied. Rule 15(a), S.C.R.C.P. Otherwise, amendments should be freely granted as justice requires. *Id.* The type of prejudice envisioned by Rule 15 is a lack of notice to a defendant of a new claim or theory and the defendant's lack of opportunity to refute it. *See Lee v. Bunch*, 373 S.C. 654, 661, 647 S.E.2d 197, 201 (2007) ("The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it." (citing *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005))).

Here, no such prejudice existed. The amended or consolidated action would be added to the jury roster and the parties would have ample time for discovery before the matter came up for trial. Nor would combining the claims into a single action increase the cost for any party relative to trying the actions separately. To the extent the factual issues overlap, the discovery would not need to be duplicated. To the extent the issues are separate, there would be additional discovery whether or not the cases are tried together. Accordingly, the consolidation would not operate to

meaningfully increase the cost of defending all of the claims.⁶ Accordingly, it was an abuse of discretion to deny Ms. Abernathy's efforts to combine the claims into a single action.

C. Combining the Claims Into a Single Action Would Not Create Juror Confusion.

The trial court abused its discretion in keeping the claims separate on the grounds that trying them together would create juror confusion.

When legal and equitable claims are tried together to a jury, the legal claims are determined first by the jury; thereafter, the court, bound by the jury's factual findings, decides the equitable issues. *Johnson v. S.C. Nat. Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). The claims relating to the agreement for the Property (in the Declaratory Judgment action) and to the agreement for a cash bonus (in the Wrongful Termination action) will be the same, as it was really one agreement that morphed over time. The agreement was originally for a house to be titled in Ms. Abernathy's name; it became an agreement for a house titled in Ms. Abernathy's name *and* as cash bonus if she assisted with the lawsuit. If the cases were tried separately, the same evidence of the history of that agreement would be adduced twice. Tried together, the evidence of the history of the agreement would not be confusing to the jury, and it would decide the claims within its ambit and leave the equitable causes of action in the Declaratory Judgment action for the trial court's decision.

Accordingly, the court abused its discretion by keeping the claims separate on the basis of juror confusion.

⁶ Appellant acknowledges that the amendment would entitle defendant to take her deposition for a second time, and that would constitute additional cost in defending the claim. However, weighed against Appellant's right to a jury trial, this is insufficient to constitute prejudice, and the trial court's finding of prejudice should be reversed.

CONCLUSION

For the reasons above, Ms. Abernathy requests this Court reverse the trial court's orders and remand the case to be tried to a jury in a single action.

Respectfully submitted:

EPTING & RANNIK, LLC

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