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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 OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

EPTING & RANNIK, LLC

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ATTORNEYS FOR PLAINTIFF/APPELLANT

RESPONDENT’S MOTION

Respondent Ervin W. Lambert, Sr. (“Mr. Lambert”) has moved to dismiss this appeal, contending (i) that Appellant Laura Abernathy (“Ms. Abernathy”) waived her right to a jury trial, (ii) is therefore not entitled to a jury trial as of right, and therefore (iii) this Court is without jurisdiction to consider this appeal. For the reasons that follow, this argument fails, and the motion to dismiss should be denied.

RELEVANT PROCEDURAL HISTORY

Ms. Abernathy filed a declaratory judgment action on June 12, 2020, seeking a declaration that she was the rightful owner of a residential property in Summerville, South Carolina (“the DJ Action”). The matter was stayed pursuant to Rule 40(j) on September 30, 2021, and was reinstated to the docket on February 15, 2022.

On September 20, 2022, Ms. Abernathy moved to amend her complaint in the DJ Action to add new parties and additional causes for (i) wrongful termination and (ii) malicious prosecution by Mr. Lambert and his company, L&L Contractors. Ms. Abernathy requested a jury trial on the new claims. The trial court denied the motion to amend on December 16, 2022, finding that the wrongful termination and malicious prosecution claims should be filed in a separate action. Thus, at this time, Ms. Abernathy had not been denied a jury trial on her new causes of action; rather, she was required to file them in a separate action that could be tried to a jury. On October 14, 2022, Ms. Abernathy filed a separate action as directed by the Court and requested a jury trial (“the Wrongful Termination Action”)

On March 16, 2023, Ms. Abernathy amended her pleading in the Wrongful Termination Action to add a third cause of action for breach of agreement. The factual basis of the breach of agreement claim directly overlaps with the factual basis of the DJ Action — both center upon the

same oral agreement allegedly made between Mr. Abernathy and Mr. Lambert’s late son, Ervin W. Lambert, Jr. (“the Decedent”). Ms. Abernathy alleges that agreement provided that, in exchange for her past good performance at her job with Decedent’s company, L&L Contractors, and for continued and future assistance to be given to the Decedent and his company with regard to a lawsuit they had filed, she would receive (i) the property that is the subject of the DJ Action *and* (ii) a cash bonus in the event the lawsuit settled favorably, the breach of which is the subject of the breach of agreement claim in the amended Wrongful Termination Action.

Accordingly, on March 17, 2023, Ms. Abernathy moved to consolidate the two cases, contending that the factual basis of the two actions overlapped to such that the factual determinations in one would be binding in the other suit, and so both should be tried to a jury. Hrg. Tr. (Apr. 6, 2023) 3:25-4:14. The trial court denied the motion on April 12, 2023.

ARGUMENT

I. Legal Standards

Interlocutory orders that “affect a substantial right” are subject to immediate appeal. S.C. Code Ann. § 14-3-330. Orders affecting the “mode of trial,” including orders that deny or limit a party’s right to a jury trial, have been held to affect a substantial right such that they are immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (collecting cases). An order denying a jury trial to a party who, as of right, is entitled to one *must* be immediately appealed, or the right is deemed waived. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). When a jury trial was not demanded as provided by Rule 38, S.C.R.C.P., the denial of a request for a jury trial is *not* immediately appealable. *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002).

II. Ms. Abernathy Did Not Waive Her Right to a Jury Trial.

The trial court's December 19, 2022 order denying Ms. Abernathy's motion to amend her complaint and add new claims in the DJ Action did not deny her a jury trial on those new claims. It simply required that she file them in a separate action, at which time Ms. Abernathy could (and did) request a jury trial on those claims.

After the new claims were filed in a separate action (the Wrongful Termination Action), an additional claim came to light for breach of agreement, a claim that alleged a breach of another aspect of the very same oral agreement underlying Ms. Abernathy's claim in the DJ Action. The Wrongful Termination Action was amended to include this new breach of agreement claim. As relates to the *DJ Action*, Ms. Abernathy alleges she was promised the property at 106 Sarmiento Lane, Summerville in exchange for her continued assistance with a lawsuit filed by L&L Contractors. As relates to the additional breach of agreement claim in the *Wrongful Termination Action*, she was also promised a cash bonus at the end of the lawsuit filed by L&L Contractors should it resolve successfully. The claim *was* resolved successfully, but Ms. Abernathy received neither title to the house nor the cash bonus. The former is the basis for her claim to equitable title in the property at 106 Sarmiento Drive that underlies the DJ Action; the latter is the basis for her beach of agreement claim in the Wrongful Termination Action.

The breach of agreement claim relating to the cash bonus was not presented in the proposed amended complaint in the DJ Action, but it was timely added by amendment in the Wrongful Termination Action on March 16, 2023. Then, because the factual basis of that additional claim

in particular overlapped to such a degree with those underlying the DJ Action, Ms. Abernathy moved (on March 17, 2023) for consolidation of the two cases for trial to a jury.¹

Her concern was that, were the DJ Action tried non-jury *before* the Wrongful Termination Action was tried to a jury, the trial court would necessarily decide factual issues common to both actions that would be binding, denying her the right to have a jury decide those issues. Specifically, if the court in the DJ Action were to find, for example, that there was no oral agreement between Ms. Abernathy and the Decedent at all, that finding would bind her with regard to her breach of agreement claim in the Wrongful Termination Action, would be fatal to that claim, and would not have been decided by the jury in that case. As she is entitled as of right to a jury trial with regard to the claims in the Wrongful Termination Action, she is entitled to have all of the factual bases of those claims in that action decided by a jury.

Thus, when the trial court denied the motion to consolidate, it effectively — and for the first time — denied her a jury trial with regard to her amended claims in the Wrongful Termination Action, and the factual bases underlying those claims, particularly as to the newly raised breach of

¹ Of course, the equitable claim in the DJ Action would still be decided by the trial court, not a jury. However, the jury would decide the factual issues, including those common to the legal and equitable claims, and the trial court would apply the law to those findings in deciding the equitable claims. *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.”)

agreement claim. Ms. Abernathy timely appealed that order on that basis.² Accordingly, she did not waive her right to a jury trial by not immediately appealing the December 19, 2022 order, as that order in that context did *not* deny her a jury trial.³ Ms. Abernathy *did*, however, immediately and timely appeal the April 12, 2023 order. This Court therefore has jurisdiction to decide this appeal.

CONCLUSION

Because Ms. Abernathy did not waive her right to a jury trial, she respectfully requests this Court deny Respondent's Motion to Dismiss.

Respectfully submitted:

EPTING & RANNIK, LLC

This 28th day of November, 2023
Charleston, South Carolina

/s/ Jaan Rannik
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² So as not to waive any argument raised in connection with the original motion to amend the DJ Action regarding the relatedness of the claims or factual bases between the DJ Action and the original claims in the Wrongful Termination Action, Ms. Abernathy has also appealed the order denying the motion to amend in the DJ Action, as a non-appealable order may be appealed in conjunction with an appealable order from the same case. *Cox v. Woodman of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001).

³ In addition, because Ms. Abernathy did not demand a jury trial in her filed pleading in the DJ Action pursuant to Rule 38, S.C.R.C.P., the order was not immediately appealable. *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002).

EXHIBIT A

Angela Gross

To: lynn@loftonandlofton.com; lionel@loftonandlofton.com
Cc: Jaan Rannik
Subject: RE: Abernathy v. Lambert / Appellate Case No.: 2023-000655



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From: Angela Gross
Sent: Tuesday, November 28, 2023 11:56 AM
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Cc: Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Subject: Abernathy v. Lambert / Appellate Case No.: 2023-000655

Dear Counsel,

Attached for service please find Appellant's Opposition to Respondent's Motion to Dismiss in the above referenced matter. A proof of service will follow under separate email.

With kindest regards,



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PROOF OF SERVICE

I certify that I have served Appellant’s Opposition to Respondent’s Motion to Dismiss on opposing counsel via e-mail this 28th day of September, 2023, addressed to Respondents’ attorneys of record as follows:

Lionel S. Lofton, Esq. – lionel@loftonandlofton.com

V. Lynn Lofton, Esq. – lynn@loftonandlofton.com

A copy of the e-mail is attached to this Proof of Service as Exhibit A.

By s/Angela

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