

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2009-CP-08-3652

First National Bank of  
Spartanburg, Div. of First  
National Bank of the South,

Respondent,

v.

Liberty Village, LLC,

Appellant.

INITIAL BRIEF OF APPELLANT

August 1, 2013



Aaron E. Edwards  
The Richter Firm, LLC  
622 Johnnie Dodds Blvd.  
Mt. Pleasant, SC 29464  
(843) 849-6000

Attorney for Appellant

Other Counsel of Record:  
Robert A. Kerr  
Moore & Van Allen, PLLC  
40 Calhoun Street, Suite 300  
Charleston, SC 29401-3535

Attorney for Respondent

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SC Court of Appeals

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**STATEMENT OF ISSUES ON APPEAL**

- I. DOES SCRPC RULE 38(D) VIOLATE THE SOUTH CAROLINA CONSTITUTION, ARTICLE I, §14 BY DEPRIVING APPELLANT OF ITS RIGHT TO A JURY TRIAL?
- II. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DEPRIVING APPELLANT THE RIGHT TO A JURY TRIAL WHEN ITS COUNTERCLAIMS ARE LEGAL IN NATURE AND NO PREJUDICE WOULD BE SUFFERED BY RESPONDENT?
- III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT LEAVE TO AMEND ITS PLEADINGS IN ORDER TO DEMAND A JURY TRIAL?

## STATEMENT OF THE CASE

This action was initiated by Respondent with the filing of a Lis Pendens, Summons, and Complaint on November 3, 2009. Respondent amended its pleadings on November 24, 2009. Thereafter, on January 7, 2010, Appellant filed its Answer and Counterclaim. Plaintiff served and filed its reply to Counterclaims on February 9, 2010. Appellant amended its Answer and Counterclaim on January 27, 2010, and Respondent filed its Reply on March 1, 2010. No specific request for a jury trial was noted on the pleadings, although it is undisputed that the Appellant at all times intended for a jury trial on all legal matters.

Respondent filed its Motion for Summary Judgment on October 29, 2010. A hearing on the motion was held on August 31, 2011. The court took the motion under advisement.

The court entered a Consent Scheduling Order on November 14, 2011, which included, among other dates, a statement that the case was not for trial before March 1, 2012. Throughout the course of discovery, counsel for Appellant referred, in deposition questioning, to matters arising in the case being determined by a jury. On March 22, 2012, after receiving notice for the first time that the matter was on the non-jury trial docket rather than the jury trial docket, counsel for Appellant notified the Administrative Judge that the Appellant sought a jury trial on all legal matters.

On May 9, 2012, Appellant filed and served its Motion to Transfer the Case to the Jury Trial Roster or, in the alternative, for leave to amend its pleadings to specifically demand a jury trial. A hearing was held on June 5, 2012 on the matter. On June 6, 2012, the court entered its Order denying the motion to transfer, denying leave to amend the

pleadings, granting the Respondent's motion for summary judgment as to the claim for Unfair Trade Practices violations, and denying the Respondent's motion as to all other counterclaims.

Appellant timely filed a motion to alter or amend the Order on June 18, 2012. A hearing on the motion to alter or amend was held on December 13, 2012. By Order entered May 8, 2013, the court denied Appellant's motion to alter or amend. Appellant timely filed its notice of appeal on May 30, 2013. Given the decisions rendered in Warrington v. Bank of South Carolina and Carolina Federal Savings Bank v. Campbell, Appellant appeals only the denial of its motion to transfer to the jury trial roster and the denial of leave to amend its pleadings in order to specifically demand a trial by jury.

## ARGUMENT

### I. APPELLANT LIBERTY VILLAGE HAS AN INVIOABLE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The right to a fair and impartial jury trial is guaranteed in both civil and criminal cases. U.S.C.A. Const. amend. VII. The Seventh Amendment to the United States Constitution does not apply to state courts. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978). However, "the right of trial by jury shall be preserved inviolable" in South Carolina under the state constitution. S.C. Const. art. I, § 14 (emphasis added).<sup>1</sup>

A jury trial is preserved in those cases in which the parties were entitled to it under the law or practice existing at the time of the constitution's adoption. Pelfrey v. Bank of Greer, 244 S.E.2d 315, 316 (S.C. 1978). Under the common law, legal actions for the recovery of money were triable by a jury; thus, under the South Carolina Constitution

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<sup>1</sup> Appellant notes that the S.C. Constitutional language is much stronger than language of the 7<sup>th</sup> amendment to the U.S. Constitution which simply states "the right of trial by jury shall be preserved."

such legal actions are entitled to a jury trial today. See, Cooper v. Poston, 483 S.E.2d 750, 751 (S.C. 1997); Collier v. Green, 137 S.E.2d 277 (S.C. 1964). A party is entitled to a jury trial if the main purpose of their claim is to secure monetary damages. See Baughman v. Am. Tel. & Tel. Co., 298 S.C. 127, 129 (S.C. 1989).

Jury trial waivers are a substantial right and must be strictly construed. Beach Co. v. Twillman, Ltd., 566 S.E.2d 863, 866 (S.C. Ct. App. 2002). Moreover, the right to a jury trial is a fundamental right. Lane v. Gilbert Construction Co., 681 S.E.2d 879, 884 (S.C. 2009) (citations omitted). Consequently, any abridgement of that right is subject to strict scrutiny. Id. (citations omitted).

a. **The right to a trial by jury is a fundamental right; thus, any abridgement of that right is subject to strict scrutiny.**

The right to a jury trial is a fundamental right. Lane v. Gilbert Construction Co., 681 S.E.2d 879, 884 (S.C. 2009) (citations omitted). Consequently, any abridgement of that right is subject to strict scrutiny. Id. (citations omitted). To survive a strict scrutiny analysis, a law “must meet a compelling state interest and be narrowly tailored to effectuate that interest.” Id.; In re Treatment & Care of Luckabaugh, 568 S.E.2d 338, 347 (S.C. 2002) (citations omitted). “In the absence of strong and compelling reasons to the contrary, untimely jury demands should be granted.” Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983) (citations and footnote omitted). The mere fact that a plaintiff’s motion for a jury trial is “too late” is neither a strong nor a compelling reason to deny the fundamental right to a trial by jury. Id.

Moreover, the substantive due process guarantee allows a court to examine the constitutionality of the underlying statute rather than just the process by which it is applied to each individual. See, 19 S.C. Juris. Constitutional Law § 71 (1993). The

substantive due process clause aims to “prohibit government from engaging in arbitrary or wrongful acts ‘regardless of the fairness of the procedures used to implement them.’” In re Treatment & Care of Luckabaugh, 568 S.E.2d 338, 347 (S.C. 2002) (internal citations omitted).

In Lane, the defendant argued that the Thirteenth Juror Doctrine was unconstitutional under the South Carolina Constitution because it essentially denied the defendant its constitutional right to a jury trial. 681 S.E.2d 879, 884 (S.C. 2009). The Supreme Court of South Carolina held that the Thirteenth Juror Doctrine did not abridge the right to a trial by jury because “the effect of the trial judge’s decision to grant a new trial is to allow another jury trial[;]” thus, the parties are not deprived of a jury trial. Id. The Court did, however, recognize that the right to a jury trial is a fundamental right, and as such, any abridgement of that right is subject to strict scrutiny. Id.

**b. Depriving Appellant of a jury trial violates the Appellant of its Constitutional Rights**

“No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. “The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. Const. art. I, § 3. Any abridgement of a fundamental right is subject to strict scrutiny. Bibco Corp. v. City of Sumter, 504 S.E.2d 112 (S.C. 1998); Lane, 681 S.E.2d at 884. Even if a state law is facially neutral, it may favor one class of persons and disfavor

another if its administration or enforcement is applied unequally. Singletary v. City of North Charleston, 2012 U.S. Dist. LEXIS 52723 (D.S.C. Apr. 16, 2012).

In Patterson v. McNeill-Patterson & Assocs., McNeill-Patterson made no demand for a jury trial either by endorsing the demand upon the pleading or by serving the demand in writing within ten days after service of the last pleading in accordance with Rule 38(b), SCRPC. 312 S.C. 471, 472 441 S.E.2d 328 (S.C. Ct. App. 1994). Over a year later the McNeill-Patterson, like Appellant in this case, moved for a jury trial asserting it did not make the demand “through inadvertence.” McNeill-Patterson, like Appellant in this case, also argued a jury trial would neither prejudice Patterson nor delay the case. The court agreed and ordered the case placed on the jury roster. While the Court of Appeals declined to determine whether mere “inadvertence” is sufficient to warrant an order granting a jury trial under all circumstances, it found no reversible error because the court found Patterson would suffer no prejudice.

In Wachovia Bank v. Blackburn, the mortgagee, Wachovia, filed a foreclosure action against the mortgagor, the Blackburns. 716 S.E.2d 454, 457 (S.C. Ct. App. 2011). The Blackburns filed a second amended answer, counterclaim, cross-claim, and third-party complaint in which they asserted various claims against Wachovia and several third-party defendants. Id. The Blackburns filed counterclaims against Wachovia similar to those filed by Appellant in this case including the following: (1) negligent misrepresentation, (2) unfair trade practices, (3) promissory estoppel, (4) breach of contract/breach of contract accompanied by a fraudulent act, (5) breach of fiduciary duty, (6) fraud/fraud in the inducement, (7) breach of contract/negligence, (8) breach of contract, (9) civil conspiracy, and (10) illegality of contract. Id.

An explicit waiver of a jury trial was contained in the note and each of the guaranties. Id. The court found that the jury trial waivers in the note and guaranty did not apply to the Blackburns' counterclaims because the counterclaims were not based on the note or the loan documents and did not arise out of the note or the loan documents. Id. at 458. Consequently, the court held that the jury trial waivers were unenforceable as to the Blackburns' counterclaims because the allegations of sales misrepresentations and pre-purchase fraud were not within the scope of the waivers. Id. The rationale supporting this holding, of course, was that "jury trial waivers are a substantial right and must be strictly construed." Id. at 460.

Here, Appellant Liberty Village answered and counterclaimed legal causes of action such as fraud, negligent misrepresentation, breach of contract, breach of contract accompanied by fraudulent act and constructive fraud, among other things, against the Respondent. All are legal causes of action which seek monetary damages. Thus, all are entitled to be heard by a jury under the South Carolina Constitution.

Like Wachovia v. Blackburn, the counterclaims arise out of the alleged misrepresentations and fraud of Respondent, and not out of the note or mortgage. Thus, a waiver of a jury trial must be strictly construed and the right to a jury trial must be preserved in the absence of a knowing and intentional relinquishment of that right.

Like Patterson, there is no prejudice to the Respondent by placing the matter on the jury trial roster. Here, there is no affirmative conduct, no deliberate action, or any other conduct indicating a knowing and intentional waiver of Appellant's right to a jury trial. Nor is there any showing of prejudice by the Respondent or articulated by the trial court that would justify a refusal to transfer the matter to the jury trial roster.

However, because Rule 38(d) is an automatic waiver and requires no showing of any intent to waive the right to a jury trial, the trial court denied the Appellant's motion. A waiver is an intentional relinquishment of a known right. *See, e.g. Lyles v. BMI, Inc.*, 292 S.C 153, 355 S.E.2d 282 (Ct. App. 1987).

The right to jury trial is at the foundation of our legal system and should not be treated flippantly. It is a fundamental right; therefore, any abridgement of that right is subject to strict scrutiny. There is no compelling interest sufficient to support such an automatic waiver of the fundamental right to a jury trial. The standard articulated in Rule 38, rather than operating to ensure all litigants receive a jury trial unless specifically articulated otherwise, permits the denial of a jury trial through mere oversight without any knowing or intentional relinquishment of a fundamental right.<sup>2</sup> The right to of jury trial is so fundamental that the South Carolina constitutional mandates that it cannot be violated. Rule 38(a) reinforces this inviolability – “the right of a trial by jury as declared by the Constitution...shall be preserved to the parties inviolate.” The waiver provision in Rule 38(d), however, conflicts with the constitution and the general state of the law of waiver and the rule deprives the Appellant of its right to a jury trial. Depriving the Appellant of this right is unconstitutional and amounts to an error of law and, thus, an abuse of discretion by the trial court. Accordingly, the trial court's decision must be reversed.

**II. THE COURT ABUSED ITS DISCRETION BY DENYING APPELLANT A TRIAL BY JURY UNDER RULE 39(b).**

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<sup>2</sup> Appellant notes that if the rule were to require a litigant to demand any type of trial *other* than a jury trial, it would preserve not only the constitutional right to a jury trial, but also would avoid unintentional deprivation of this right by requiring a deliberate and affirmative act or statement in the pleadings in order to *waive* the right to a jury, rather than automatically doing so by mere inadvertance. As it operated in this case, however, Rule 38(d) effectively deprived Appellant of a fundamental constitutional right as a matter of course rather than upholding the Constitution and all of its protections.

“Notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.”<sup>3</sup> SCRCP Rule 39(b). “[A] party’s failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial.” Patterson at 472; *citing* Hannah v. United Refrigeration Servs., 305 S.C. 394 (S.C. 1991). The exercise of judicial discretion must be disturbed if it deprives a party of a substantial right to which the party is entitled under the law. Alcorn v. Ford Motor Co., 276 S.C. 180, 276 S.E.2d 925 (1981).

Many courts hold that a motion under Rule 39(b) should be granted in the absence of strong and compelling reasons to the contrary. 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2334 at 113 (1971). Moreover, as several courts have contended, technical insistence upon imposing a penalty for failing to follow the demand procedure by denying a jury trial is not in the spirit of the rules of procedure. *See, e.g.* Swofford v. B&W Incorporated, C.A.5<sup>th</sup>, 1964, 336 F.2d 406, certiorari denied 85 S.Ct. 653, 379 U.S. 962, 13 L.Ed.2d 557 (“the right to jury trial in federal court is a ‘basic and fundamental feature’ of the jurisprudence system.”); *see also* Wachovia Bank v. Blackburn, *supra*.

The existence of prejudice to the other party is a critical factor in determining whether to grant a jury trial under Rule 39(b). *See* Patterson at 472. Here, even though the timing of the jury demand was outside the 10 day period prescribed in Rule 38, there is absolutely no prejudice to the Respondent, nor was any prejudice articulated or

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<sup>3</sup> This provision seems to be the safeguard against the unknowing and unintentional waivers made possible by Rule 38(d). Given the inviolability of the right to a trial by jury under the Constitution and Rule 38(a), the trial court’s decision regarding a Rule 39 motion seems more like a duty to uphold such rights than a discretionary function of the court.

considered by the trial court in its denial of the Appellant's motion.<sup>4</sup> No additional discovery would be required nor would any legal strategy would need to be altered. As illustrated by the letters from counsel and deposition questioning of witnesses, the Appellant's belief and intent to conduct a jury trial was known early on in the discovery phase. *See, e.g.* letter to Judge Harrington March 22, 2012; deposition transcript of Robert "Cedar" Hintelmann on December 13, 2011; deposition transcript of Amy Pearson Moyer on June 23, 2011; deposition of Marvin Jenkins on June 27, 2011. "The mere difference between having a judge and a jury try the case is not sufficient to constitute prejudice in terms of this analysis." 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2334 at 113 (1971).

The other factors which courts have weighed when deciding whether to grant a jury trial under Rule 39(b) include (1) whether the issues are more appropriate for determination by a judge or jury (i.e. factual versus legal, legal versus equitable, simple versus complex); (2) the timing of the motion (early or late in the proceedings); (3) any effect a jury trial would have on the court's docket and the orderly administration of justice. Malbon v. Pennsylvania Millers Mut. Ins. Co., 636 F.2d 936, 940 (4th Cir.1980)(internal citations omitted).

The issues to be determined in the counterclaims – i.e. fraud, misrepresentation, and breach of contract, among others - are fact inquiries that are not complex and

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<sup>4</sup> Appellant also notes that this is a similar analysis when determining a motion to amend the pleadings. A party may amend its pleading by leave of court and leave "shall be freely given when justice so requires and does not prejudice any other party." SCRCP Rule 15(a). Appellant moved to amend in order to specifically demand a jury trial in the pleadings. The trial court denied this motion and refused to alter or amend the judgment to permit such an amendment to the pleadings. Respondent presented no evidence of prejudice and it was Respondent's burden to establish prejudice. *See Foggie v. CSX Transp.* 315 S.C. 17, 431 S.E.2d 587 (1993). This denial by the trial court affects the mode of trial, amounts to an error of law, and is thus also an abuse of discretion requiring reversal of the trial court's order. *See* 24 S.C. Jur. Rules of Civil Procedure § 15.2

properly reserved for a jury. The principal question will be whether or not the Respondent misled the Appellant into executing the documents at issue. Jurors are often asked to tackle much more difficult questions on a routine basis. “Where issues are predominantly factual rather than legal there is more reason for the liberal exercise of the discretion to grant a jury trial.” Washington County Ins. Co. v. Wilkinson, 19 F.R.D. 177 (D.Md 1956).

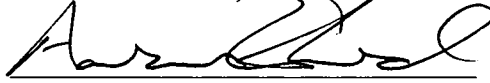
While the timing of the motion to transfer the matter to the jury trial roster occurred after the 10 day deadline espoused in Rule 38, the intent and belief that Appellant would have a jury trial was clear throughout discovery. Moreover, there is no evidence to suggest that a jury trial would have any effect on the court’s docket, much less any negative effect. The case was not subject to be called to trial prior to March 2012 in any event and no undue delay would have resulted from placing the matter on the jury docket, nor was Appellant seeking any delay in trying the matter. *See, e.g.* letter to Judge Harrington March 22, 2012.

The Respondent is *not* entitled, as a matter of law, to a non-jury proceeding. Hannah, *supra*. However, denial of Liberty Village’s right to a jury trial resulted in violation of the fundamental right to a trial by jury that the South Carolina Constitution requires to be preserved without any violation. *See S.C. Const. art. I, § 14*. Depriving Appellant of this constitutional right amounts to an error of law and thus an abuse of discretion by the trial court. Accordingly, the trial court’s decision must be reversed.

## CONCLUSION

For the foregoing reasons, the Order denying Appellant the right to a jury trial and denying Appellant leave to amend its pleadings should be reversed and the case set for a jury trial.

The Richter Firm, LLC



Lawrence E. Richter, Jr., Esq.

Aaron E. Edwards, Esq.

622 Johnnie Dodds Blvd

Mt. Pleasant, SC 29464

843.849.6000 phone

843.8881.1400 fax

aaron@richterfirm.com

ATTORNEY FOR THE APPELLANT

8/1, 2013  
Mt. Pleasant, South Carolina

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Appellant.

DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL

**RECEIVED**

AUG 05 2013

Appellant proposes the following be included in the Record on Appeal:

**SC Court of Appeals**

1. Summons and Complaint
2. Amended Complaint 11/24/09
3. Amended Lis Pendens 11/24/09
4. Answer of Liberty Village, LLC and Counterclaim 1/6/10
5. Amended Answer and Counterclaim of Defendant Liberty Village 1/27/10
6. Plaintiff's Reply to Counterclaim of Defendant 2/9/10
7. Plaintiff's Second Amended Reply to Counterclaim 11/30/11
8. Notice of Motion and Motion to Transfer to Jury Trial Roster 5/9/12
9. Memorandum in Opposition to Defendant's Motion to Transfer Case to the Jury Trial Roster 6/4/12
10. Defendant Liberty Village's Memorandum in Support of Motion for Jury Trial 6/5/12
11. Order denying Defendant's Motion to Transfer to Jury Trial Roster 6/6/12
12. Defendant Liberty Village's Motion to Alter or Amend 6/18/12
13. Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment 12/7/12
14. Memorandum in Support of Defendant's Motion to Alter or Amend Order Denying Defendant's Motion for a Jury Trial 12/7/12

15. Correspondence between The Richter Firm and The Honorable Kristi Lea Harrington 3/22/12
16. Transcript of Record 6/5/12 (ordered but not yet received)
17. Transcript of Record 12/13/12 (ordered but not yet received)
18. Deposition of Robert "Cedar" Hintelman 12/13/11
19. Deposition of Marvin Jenkins 6/27/11
20. Deposition of Amy Pearson Moyer 6/23/11

I certify that this designation contains no matter which is irrelevant to this appeal.

August 1, 2013



Aaron E. Edwards  
The Richter Firm, LLC  
622 Johnnie Dodds Blvd.  
Mt. Pleasant, SC 29464  
(843) 849-6000

Attorney for Appellant

Other Counsel of Record:  
Robert A. Kerr  
Moore & Van Allen, PLLC  
40 Calhoun Street, Suite 300  
Charleston, SC 29401-3535

Attorney for Respondent

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v.

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Proof of Service

I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included on the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on August 1, 2013, addressed to the attorney of record, Robert A. Kerr at Moore & Van Allen, PLLC, Suite 300, 40 Calhoun Street, Charleston, SC 29401-3535.

August 1, 2013



Aaron E. Edwards  
The Richter Firm, LLC  
622 Johnnie Dodds Blvd.  
Mt. Pleasant, SC 29464  
(843) 849-6000

Attorney for Appellant

Other Counsel of Record:  
Robert A. Kerr  
Moore & Van Allen, PLLC  
40 Calhoun Street, Suite 300  
Charleston, SC 29401-3535

Attorney for Respondent

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