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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin Penland, Appellant,

v.

Key Largo Mobile Home Park, Respondent.

Appellate Case No. 2022-000513

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit County Judge

Appellant's
Petition for Rehearing
(Rule 221, S.C.A.C.R.)

Tucker S. Player, of Player Law Firm, LLC, of Chapin; for Appellant.

Jason Preston Boan, of Boan Law Firm, LLC of Surfside Beach; and Marissa Noelle Drost, of the Floyd Law Firm, PC, of Surfside Beach, both for Respondent.

Appellant petitions this Honorable Court for a rehearing of its Order filed herein on May 29, 2024, by Unpublished Opinion No. 2024-UP-200. Pursuant to Rule 221, SCACR, Appellant respectfully submits that this Court rehear this mater for the following reasons.

1. **The Magistrate's violation of Appellant's right to a jury trial was preserved for appellate review.**

   In addition to the facts and law provided by Appellant's "Final Reply Brief" and "Appellant's Final Brief," Appellant offers the following: The only issue raised and argued to Judge Culbertson by Appellant for reversal of the Magistrate's Order, was the violation and denial of his jury trial right. There can be no question, therefore, that Appellant argued extensively before Judge Culbertson that he had requested a jury trial, that he was entitled to a jury trial, and that he had been wrongfully denied a jury trial by Magistrate Guiles' issuance of his Writ of Ejectment without conducting a hearing. In fact, the very last argument of Appellant's counsel was that the case was required to remand for a jury trial. R.95. Immediately following this argument, Judge Culbertson confirmed the eviction. Appellant submits that it would have been patently futile for him to have filed a Rule 59(e) motion, inasmuch as this issue was fully and fairly argued before Judge Culbertson, and was rejected by him in his decision to affirm Judge Guiles' ejectment order. Despite Respondent's counsel argument that Appellant waived his right to a jury trial there is not evidence in the Record to support that argument. It is well established that: "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik v Fairway Oaks Villas HPR, 307 S.C. 339, 415 S.E.2d 384,*

387-388 S.C. 1991). In this case, there was no voluntary or intentional abandonment by Appellant of his jury trial right. Appellant was denied any opportunity to voluntarily waive his jury trial right by virtue of magistrate Guiles' *sua sponte* ruling.

As noted by Appellant in his Final Reply Brief: "It is well established in this State that the right to a civil jury trial is a substantial right, which is immediately appealable, and must be appealed immediately in order… 'to preserve [a] party's constitutional right to trial by jury which would otherwise be lost." *Hagood v Sommerville,* 362 S.C. 191, 607, S.E.2d 707 (2005). This issue was unambiguously raised and ruled upon by Judge Culbertson. In *Wilder Corp. v Wilke*, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998), the Court recognized that… "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court, but not ruled upon. also: *Hubbard v Rowe*, 192 S.C. 12, 19, 5 S.E. 2d 187, 189 (1939), In matters of appeal, all that is required is that the questions presented for decision must first have been fairly and properly raised in the trial court and passed upon by that court. In *Lindsay v. Lindsay*, 491 S.E. 2d 583, 589, 328 S.C. 329 (S.C. App. 1997), this Court recognized that an appellate court may consider exceptions where the appealing party's position is "reasonably clear" from his arguments. Discussing the basis for the issue preservation requirement, this Court recently held that:

> "[I]mposing preservation requirements on an appellant prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case". *Muhammad v S.C.Educ. Lottery Comm.,* &# 39;n, 6012, App. Case 2019-000501(S.C. App August 9, 2023)

Appellant made his position on the Magistrate's denial of his jury trial right completely clear during his arguments before Judge Culbertson, and it cannot reasonably be asserted that

Appellant was attempting to "keep this ace card up his sleeve." This was the primary ground argued by Appellant for reversal. Judge Culbertson implicitly, and inescapably, held that Appellant was not entitled to a jury trial on Respondents' ejectment claim.

Specifically addressing the Rule 59(e) motion requirement, in *Staubes v City of Folly Beach*, 339 S.C. 406, 415, 529 S.E. 2d 543 (S.C. 2000), the South Carolina Supreme Court excused appellant Staubes' failure to file a Rule 59(e), SCRCP, motion, to both raise and obtain a ruling upon a motion to amend his pleadings to add a negligence claim to his Complaint, which the Court found would have been futile. "This Court does not require parties to engage in futile actions in order to preserve issues for appellate review. See*, e.g., State v. Bryant*, 316 S.C. 216, 220, 447 S.E. 2d 852, 855 (1994)(where the Court found that it would have been futile to move to strike testimony which the trial court had already ruled was proper*); State v. Ross* 272 S.C. 56, 60-61, 249 S.E. 2d 159, 162 (1978)(once the court rules on an objection, counsel need not repeat the objection after each question).

The *Staubes* Court recognized a respondent cannot maintain that there was a lack of notice or a lack of opportunity to refute the negligence claim where the respondent's arguments acknowledged the presentation of appellant's argument before the lower court. In the present case Respondents' attorney acknowledged that Penland had requested, and was entitled to, a jury trial: "…At the day of the eviction in front of the initial magistrate, he [Penland] requested a jury trial. That kicked it down the road, which is understandable, that's his right to request a jury trial. He showed up on the term of court and we picked the jury. We had the jury set…" R.87. This issue was clearly and fully presented to the lower court, and was denied. It is axiomatic that the lower court's decision affirming the magistrate ejectment order was mutually exclusive of him ruling that Appellant had been denied his right to a jury trial.

2. **Appellant's argument concerning the applicability of the South Carolina Manufactured Home Park Tenancy Act ("MHPTA") is properly preserved for appeal.**

The MHPTA is jurisdictional, in that it provides concurrent jurisdiction for the circuit courts and magistrate courts of this State "*... over any landlord with respect to any conduct in this State governed by this chapter or with respect to any claim arising from a transaction subject to this chapter."* (S.C. Code Ann. §27-40-130 – Residential Landlord and Tenant Act; and §27-47-130 – Manufactured Home Park Tenancy Act.) Thus, the authority of the Magistrate's Court to hear Respondents' Petition for Writ of Ejectment, and its subsequent Motion for Writ of Ejectment, depended upon Respondent alleging and proving its entitlement to eject/evict Appellant from its Park, in accordance with the terms of the MHPTA. Aside from the fact that Appellant was denied an opportunity to present his arguments under the MHPTA, "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court*."* *Eagle Container v County of Newberry,* 366 S.C. 611, 622 S.E. 2d 733, 743 (S.C. 2005). (Citations omitted.) This Court held, inexplicably, that Appellant failed to preserve his arguments regarding the MHPTA in the magistrate's court. Appellant simply asks how Appellant was supposed to preserve ANY issues before the magistrate when he was not provided a hearing to do so?

CONCLUSION

Pursuant to foregoing arguments, Appellant respectfully requests that this Court reconsider its Unpublished Opinion No. 2024-UP-200, finding that the Orders of Ejectment issued by the Magistrate's Court and Circuit Court were controlled by errors of fact, and were in violation of South Carolina law. Appellant therefore moves that Respondents' Eviction and Ejectment Action be reversed and remanded, with appropriate instructions to the lower courts.

RESPECTFULLY SUBMITTED,

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June 12, 2024

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