

The State of South Carolina
In the Supreme Court

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

S.C. SUPREME COURT

The Honorable Diane S. Goodstein

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

LAURA ABERNATHY..... Plaintiff /*Petitioner*,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was filed and was ruled upon by the Court of Appeals on May 14, 2024. Petitioner received a ten-day extension from this Court (through June 24, 2024) to file this petition for a writ of *certiorari*.

QUESTIONS PRESENTED

1. Where a jury trial has been demanded, must questions of fact critical to the parties' claims and defenses be decided by a jury rather than the court?
2. Is the question of whether a trial court order has denied a plaintiff the right to a jury trial immediately appealable?

INTRODUCTION

The right to a jury trial is among the most fundamental constitutional rights afforded to citizens of South Carolina. Petitioner, Laura Abernathy (“Ms. Abernathy”), was denied that right and appealed.

The Court of Appeals dismissed her appeal, holding the order appealed from was not immediately appealable because either (i) Ms. Abernathy was *not* denied a jury trial or (ii) Ms. Abernathy *was* denied a jury trial but waived her appellate rights. Either would be plain error.

The order denying consolidation of Ms. Abernathy’s jury claims with a non-jury declaratory judgment action—to be tried first before the jury claims—means that material facts common to both suits will be decided by the court, binding Ms. Abernathy, and will not be presented to or decided by the jury. This ruling denied her a particular mode of trial to which she is entitled and did not waive, is immediately appealable, and must be reversed.

STATEMENT OF THE CASE

Two related lawsuits underlie this appeal: one is set to be tried nonjury, and the other to a jury.

A. Declaratory Judgment Action

In the first suit, Ms. Abernathy filed a nonjury declaratory judgment action on June 12, 2020, seeking a declaration that she was the equitable and rightful owner of a residential property in Summerville, South Carolina (“the DJ Action,” Case No. 2022-CP-18-00295). Her claim over ownership is based upon an agreement with the now-deceased record owner of the property, Erwin W. Lambert, Jr. (“the Decedent”). **Ex. 1.** 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 new claims for (i) wrongful termination and (ii) malicious prosecution against Respondent Erwin W. Lambert, Sr. (“Mr. Lambert”) and L&L Contractors, the Decedent’s company that Mr. Lambert, the Decedent’s father, inherited upon the death of his son. **Ex. 2.** 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. **Ex. 3.** Thus, at this time, Ms. Abernathy had not yet been denied a jury trial on her new causes of action; rather, she was simply required to file them in a separate action.

B. Wrongful Termination Action

On October 14, 2022, Ms. Abernathy filed the separate action as directed by the Court (“the Wrongful Termination Action,” Case No. 2022-CP-18-01582, **Ex. 4**) and requested a jury trial. 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. **Ex. 5.** The factual basis of the breach of agreement claim is the same factual basis for her claim to be the equitable owner of the property in dispute in the DJ Action — specifically, an agreement made between Ms. Abernathy and the Decedent. That agreement provided that, in exchange for her past performance at her job with

Decedent's company *and* for her continued assistance with a lawsuit Decedent's company had filed, she would receive: (i) the property that is the subject of the DJ Action, *and* (ii) an additional monetary bonus in the event the lawsuit settled favorably. Ms. Abernathy alleges both prongs of the agreement were breached. Mr. Lambert disputes the existence and/or content of the agreement.

C. Denial of Consolidation

On March 17, 2023, Ms. Abernathy moved to consolidate the two cases (**Ex. 6**) based upon the common questions of law and fact relating to the agreement, contending they overlap to such a degree that the factual determinations in one case would be binding in the other. Accordingly, she argued both cases should be tried together, with the jury to resolve the common factual questions and the court to resolve the equitable claim based upon the jury's factual findings. The trial court denied the motion on April 12, 2023. **Ex. 7**. This cleared the way for the DJ Action to proceed to trial non-jury while discovery continued in the Wrongful Termination Action.

D. Appeal

Because the trial court's denial of the motion to consolidate meant that the common factual and legal issues between the two suits would necessarily be decided by the court before they could be presented to a jury, Ms. Abernathy timely noticed her appeal on April 21, 2023. **Ex. 8**. On January 10, 2024, the Court of Appeals dismissed the appeal on the basis that the underlying orders were not immediately appealable, stating:

After careful consideration, Respondent's motion to dismiss this appeal is granted. The orders on appeal are interlocutory and not immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because they do not deny any party a mode of trial to which they are entitled as a matter of right. *See Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 294, 274 (Ct. App. 2013) ("Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must therefore be appealed immediately." (internal quotation omitted)); [. . .].

Ex. 9 at 1. A petition for rehearing was filed on February 9, 2024 (Ex. 10) and denied by the Court of Appeals on May 14, 2024. Ex. 11.

This petition for a writ of *certiorari* follows.

ARGUMENT

I. The Denial of Ms. Abernathy's Motion to Consolidate Denied Her the Right to Have a Jury Decide Critical Questions of Fact.

Because both the DJ Action and the Wrongful Termination case have parties and material factual issues in common, the determination of those factual issues in one case would bind the parties in the other. If the questions are decided by the court in a stand-alone DJ Action rather than by the jury in the Wrongful Termination Action or a consolidated action, Ms. Abernathy will have been denied the right to have the questions decided by a jury.

A. **The Claims and Allegations Between the Two Actions Are Inextricably Intertwined.**

In both the DJ Action and the Wrongful Termination, Ms. Abernathy alleges in each case that an agreement she made with Decedent (the former president of L&L Contractors) was breached by Mr. Lambert after he took over the company. Her complaint in the DJ action alleges:

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.

Ex. 1 (Compl., DJ Action) at ¶¶ 8–11, 13–16.

In the Wrongful Termination action, Ms. Abernathy alleges:

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].

Ex. 5 (Am. Compl., 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.

As another example, Ms. Abernathy alleges in both cases 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 defense to Respondent’s efforts to evict her and is a basis for the equitable argument that she should be declared the owner of the property. In the Wrongful termination action, it is a basis for her claims that she was wrongfully and maliciously fired and arrested.

B. 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. Coop., 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.”)—and 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 and asserting her additional causes of action, to prevent the statute of limitations from expiring and moved to consolidate the cases. After the denial of her motion to consolidate, she 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, the latter of which would not otherwise have been appealable.¹ There has been no waiver.

C. 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.

The DJ Action was filed before the Wrongful Termination Action. Discovery is complete in the DJ Action, and absent instructions from the appellate courts, it will be tried by the court before the Wrongful Termination Action is ready for trial by jury.

“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

¹ See *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004) (holding that denial of a motion to amend is not immediately appealable); see also *Cox v. Woodman of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (holding a non-appealable issue may be considered by the appellate courts in conjunction with a separate appealable issue).

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* Part I.A) that are, *or even could be*, determined in one action would be binding on the parties in the other action. This means that a resolution of those issues by the court in the DJ Action 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, with the trial court deciding the equitable claims after the legal claims are tried to 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.”).

However, even if the cases are tried separately, the legal claims must be tried to a jury *before* the equitable claims are tried to the trial court. *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.”).

Ms. Abernathy requests that this Court accept this appeal and so hold.

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

Respondent has contended that Ms. Abernathy waived her right to a jury trial by not immediately appealing the denial of her motion to amend filed in the DJ Action. **Ex. 12** (Motion to Dismiss Appeal). This is not accurate. 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. Additionally, the breach of agreement claim in the Wrongful Termination Action that most directly overlaps with the factual basis of the DJ Action had not yet been presented to the trial court when the motion to amend was denied.

In contrast, when the trial court denied the motion to consolidate, the extent of the factual overlap *was* apparent to the trial court. The denial thus—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 claim. Ms. Abernathy timely appealed that order.² Accordingly, she did not waive her right to a jury trial, and the Court of Appeals erred to the extent it found she did.

CONCLUSION

For these reasons, Ms. Abernathy requests this Honorable Court grant a writ of *certiorari* and decide the merits of this appeal.

[signature on following page]

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).

This 21st day of June, 2024
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Respectfully submitted:

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