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SC Court of Appeals

**The State of South Carolina
In the Supreme Court**

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 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... **ii**

CERTIFICATE OF COUNSEL..... **1**

QUESTIONS PRESENTED..... **1**

INTRODUCTION **1**

STATEMENT OF THE CASE..... **1**

 A. Declaratory Judgment Action 2

 B. Wrongful Termination Action 2

 C. Denial of Consolidation 3

 D. Appeal..... 3

ARGUMENT..... **4**

I. The Denial of Ms. Abernathy’s Motion to Consolidate Denied Her the Right to Have a Jury Decide Critical Questions of Fact..... **4**

 A. The Claims and Allegations Between the Two Actions Are Inextricably Intertwined. 4

 B. Ms. Abernathy Is Entitled to Have the Factual Allegations underlying her Claims in the Wrongful Termination Action Resolved by a Jury. 7

 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. 8

II. Ms. Abernathy Did Not Waive Her Right to a Jury Trial. **10**

CONCLUSION **10**

TABLE OF AUTHORITIES

Cases

Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) 8

Cox v. Woodman of the World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001)..... 8, 10

Culler v. Blue Ridge Elec. Co-op., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) 7

Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm’n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)
..... 8

Johnson v. S.C. Nat. Bank, 292 S.C. 51, 354 S.E.2d 895 (1987)..... 9

Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009)..... 9

Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997) 7

Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30 512 S.E.2d 106 (1999) 8

Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) 7, 9

Rules

Rule 38(b), S.C.R.C.P. 7

Treatises

47 Am. Jur. 2d *Jury* § 81(1969)..... 7

50 C.J.S. *Juries* § 90 (1947)..... 7

Constitutional Provisions

S.C. Const. art. I, § 14..... 7

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
Charleston, South Carolina

Respectfully submitted:

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EXHIBIT 1

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June 12, 2020
Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	CIVIL ACTION NO. 2020-CP-18-_____
)	
LAURA ABERNATHY,)	
)	
Plaintiff,)	
)	
vs.)	<u>COMPLAINT</u>
)	Declaratory Judgment/Quiet Title
ERVIN W. LAMBERT, SR.,)	(Non-Jury)
PERSONAL REPRESENTATIVE OF)	
THE ESTATE OF ERVIN W.)	
LAMBERT, JR., Deceased,)	
)	
Defendant.)	
_____)	

TO THE DEFENDANT ABOVE NAMED:

Plaintiff herein would respectfully allege and show unto this Honorable Court as follows,
to wit:

PARTIES, SUBJECT MATTER AND FACTUAL BACKGROUND

1. Plaintiff is a citizen and resident of Dorchester County, South Carolina.
2. On information and belief Defendant is a citizen and resident of Williamsburg County, South Carolina.
3. On or about October 25, 2018, Ervin Wayne Lambert, Jr., (“Decedent”) died intestate in a plane crash in the Atlantic Ocean.
4. Defendant is father of the Decedent and the duly appointed Personal Representative of the Estate of Ervin Wayne Lambert, Jr., Deceased, Williamsburg County Probate Court, which estate is open and pending.

5. The subject matter herein is a lot of land with improvements located in the Plum Creek Subdivision, situate wholly in Dorchester County, South Carolina, and more particularly described in Exhibit "A", attached hereto and made a part hereof by expressed reference, ("Subject"); the same having a physical address of 106 Sarmiento Lane, Summerville, South Carolina.
6. The Subject appears of record in Dorchester County in the name of Decedent Ervin W. Lambert bearing Dorchester County TMS# 125-15-01-047, the source and origin of which is that certain General Warranty Deed dated October 23, 2015; found of record in the Office of the Register of Deeds for Dorchester County in Book 9976 at Pages 166-170.
7. Decedent was at all times relevant herein the sole owner and President of L& L Contractors, Inc., ("L&L"), which on information and belief is a corporation organized and existing under and by virtue of the laws of the State of South Carolina.
8. Plaintiff was at all times relevant herein a key employee of L&L 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 and accordingly there was a relationship of trust and confidence as and between Decedent and Plaintiff.
11. With respect to the Subject, 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

- (50%) owner in the Subject at or around closing and thereafter a sole and absolute owner of the Subject.
12. In reliance on the aforementioned representations, assurances, guarantees and promises, Plaintiff accepted the arrangement in lieu of an earned cash bonus for extraordinary work performed; she trusted Decedent to follow through; she expended certain monies, including the earnest money deposit which was credited to the buyer at closing, the home inspection fee and property taxes and Plaintiff immediately after closing moved into the Subject, where she has resided as her primary residence continuously since.
 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.
 17. If Defendant continues to maintain that Plaintiff is a mere tenant in the Subject and he denies her legitimate rights with respect to the Subject, a justiciable controversy exists and will continue to exist as between the parties.

JURISDICTION AND VENUE

18. This Court is possessed of jurisdiction over the parties and the subject matter.

19. Venue is proper.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment)

20. Plaintiff repeats the averments contained in ¶¶ 1-19 above as if fully set forth herein *verbatim*.

21. Plaintiff brings this action pursuant to the provisions of the *S.C. Code Ann. § 15-53-10, et seq.*, “*Uniform Declaratory Judgments Act*” for a declaratory order determining the rights, relations and status of the parties with respect to the Subject; for a declaratory order specifically declaring and imposing a *constructive trust* in favor of the Plaintiff in and to the Subject; and/or specifically declaring and imposing a *resulting trust* in favor of the Plaintiff in and to the Subject and/or specifically declaring and determining in the adjustment of the equities that Plaintiff’s rights and interests in the Subject otherwise be made, declared and established.

FOR A SECOND CAUSE OF ACTION

(Quiet Title)

22. Plaintiff repeats the averments contained in ¶¶ 1-21 above as if fully set forth herein *verbatim*.

23. Plaintiff further brings this action pursuant to the provisions of *S.C. Code Ann. § 15-53-10, et seq.*, “*Uniform Declaratory Judgments Act*” and *S.C. Code Ann §15-67-10, et seq.*, for a declaratory order ratifying, quieting and confirming title to the real properties, situate, lying and being wholly within Dorchester County, South Carolina as more particularly described in Exhibit “A” in the name of the Plaintiff against the Defendant and for the purpose of obtaining a declaratory order of this Court establishing that

Plaintiff is seized and possessed of a fee simple title to said properties to the exclusion of any others.

WHEREFORE, having fully set forth his Complaint herein, Plaintiff would pray that this Honorable Court inquire into all matters and things alleged herein and before the Court and enter judgment of as follows:

- a. For a declaratory order determining the rights, relations and status of the parties with respect to the Subject; for a declaratory order specifically declaring and imposing a *constructive trust* in favor of the Plaintiff in and to the Subject; and/or specifically declaring and imposing a *resulting trust* in favor of the Plaintiff in and to the Subject and/or specifically declaring and determining in the adjustment of the equities that Plaintiff's rights and interests in the Subject otherwise be made, declared and established;
- b. For a declaratory order ratifying, quieting and confirming title to the real properties, situate, lying and being wholly within Dorchester County, South Carolina as more particularly described in Exhibit "A" in the name of the Plaintiff and that any other be absolutely divested and forever barred from any right, title, claim, estate, interest therein; and
- c. For such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiff

June 12, 2020
Moncks Corner, SC

EXHIBIT A

All that certain piece, parcel or lot of land, situate, lying and being in the County of Dorchester, State of South Carolina, being known and designated as Lot 147, Plum Creek Subdivision, as more particularly appear on that certain plat entitled "Plum Creek, Phase II, Section 1" prepared by O.F. Hunter, Jr., registered land surveyor, dated February 20, 2004, recorded in the Office of the Register of Deeds for the County of Dorchester, South Carolina in Plat Book K at Page 93, and said lots each having according to said plat the metes and bounds shown thereon, and which plat is incorporated herein by reference as to all matters shown thereon.

THIS BEING the same property conveyed to the Grantor(s) herein by Deed of Lennar Carolinas, LLC f/k/a Lennar Carolina, LLC, a Delaware limited liability company and successor by conversion to Lennar Carolina, Inc. a Delaware corporation f/k/a Lennar Communities of Carolina, Inc., a Delaware corporation and successor by merger to Don Galloway Homes, LLC, a Delaware limited liability company dated the 12th day of December 2015 and recorded January 4, 2006 in Book 5126 at Page 276 in the afore said ROD Office for Dorchester County. Reference that certain Deed from Stefan Gortat and Mirosława Gortat to Ervin W. Lambert, dated October 23, 2015, recorded October 30, 2015 and found of record in the Office of the Register of Deeds for Dorchester County in Book 9976 at Page 166 - 170.

TMS# 128-15-01-047

Property Address: 106 Sarmiento Lane, Summerville, SC 29483

EXHIBIT 2

Respectfully submitted:

EPTING & RANNIK, LLC

/s/ Jaan Rannik

Jaan G. Rannik (SC Bar # 103014)

Clinton T. Magill (SC Bar # 102770)

46A State Street

Charleston, SC 29401

P: (843) 377-1871

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jgr@epting-law.com

ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

This 20th day of September, 2022
Charleston, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

)

FIRST JUDICIAL CIRCUIT

COUNTY OF DORCHESTER

)

CASE NO.: 2022-CP-18-00295

LAURA ABERNATHY,

)

)

Plaintiff,

)

)

v.

)

)

AMENDED COMPLAINT

(Jury Trial Demanded)

ERVIN W. LAMBERT, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF ERVIN W. LAMBERT, JR., Deceased, AND L&L CONTRACTORS, INC.,

)

)

)

)

Defendants.

)

)

TO THE DEFENDANTS ABOVE NAMED:

Plaintiff would respectfully allege and show unto this Honorable Court as follows:

PARTIES, SUBJECT MATTER AND FACTUAL BACKGROUND

1. Plaintiff is a citizen and resident of Dorchester County, South Carolina.

2. On information and belief Defendant Ervin W. Lambert, Sr. is a citizen and resident of Williamsburg County, South Carolina.

3. On information and belief, Defendant L&L Contractors, Inc., (“L&L”), which on information and belief is a corporation organized and existing under and by virtue of the laws of the State of South Carolina.

2. —

3.4. On or about October 25, 2018, Ervin Wayne Lambert, Jr., (“Decedent”) died intestate in a plane crash in the Atlantic Ocean.

~~4.5.~~ Defendant is father of the Decedent and the duly appointed Personal Representative of the Estate of Ervin Wayne Lambert, Jr., Deceased, Williamsburg County Probate Court, which estate is open and pending.

~~5.6.~~ The subject matter herein is a lot of land with improvements located in the Plum Creek Subdivision, situate wholly in Dorchester County, South Carolina, and more particularly described in Exhibit "A" attached hereto and made a part hereof by expressed reference, ("Subject"); the same having a physical address of 106 Sarmiento Lane, Summerville, South Carolina.

~~6.7.~~ The Subject appears of record in Dorchester County in the name of Decedent Ervin W. Lambert bearing Dorchester County TMS# 125-15-01-047, the source and origin of which is that certain General Warranty Deed dated October 23, 2015; found of record in the Office of the Register of Deeds for Dorchester County in Book 9976 at Pages 166-170.

~~7.8.~~ Decedent was at all times relevant herein the sole owner and President of L& L Contractors, Inc., ("L&L"), which on information and belief is a corporation organized and existing under and by virtue of the laws of the State of South Carolina.

~~8.9.~~ Plaintiff was at all times relevant herein a key employee of L&L holding the position of General Superintendent and Project Manager.

~~9.10.~~ Decedent and Plaintiff worked closely together at L&L for many years.

~~10.11.~~ 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 and accordingly there was a relationship of trust and confidence as and between Decedent and Plaintiff.

~~11.12.~~ With respect to the Subject, 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 (50%) owner in the Subject at or around closing and thereafter a sole and absolute owner of the Subject.

13. In reliance on the aforementioned representations, assurances, guarantees and promises, Plaintiff accepted the arrangement in lieu of an earned cash bonus for extraordinary work performed; she trusted Decedent to follow through; she expended certain monies, including the earnest money deposit which was credited to the buyer at closing, the home inspection fee and property taxes and Plaintiff immediately after closing moved into the Subject, where she has resided as her primary residence continuously since.

12-14. Following the closing, Decedent placed an additional condition on his arrangement with Plaintiff and required, in order for Plaintiff to earn the bonus she believed had already earned, that she continue working at L&L and assist with the resolution of a lawsuit involving L&L (“the Lawsuit”).

13-15. Decedent tragically and unexpectedly perished before the Lawsuit was resolved and without the documents were-being executed to accomplishing of record the arrangement originally made and contemplated as between Decedent and Plaintiff with respect to the Subject.

14-16. 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.

15-17. 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.~~18. 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.

~~17.~~19. If Defendant continues to maintain that Plaintiff is a mere tenant in the Subject and he denies her legitimate rights with respect to the Subject, a justiciable controversy exists and will continue to exist as between the parties.

JURISDICTION AND VENUE

~~18.~~20. This Court is possessed of jurisdiction over the parties and the subject matter.

~~19.~~21. Venue is proper.

FOR A FIRST CAUSE OF ACTION **(Declaratory Judgment)**

~~20.~~22. Plaintiff repeats the averments contained in, 1-19 above as if fully set forth herein verbatim.

~~21.~~23. Plaintiff brings this action pursuant to the provisions of the S.C. Code Ann. § 15-53-10, et seq., “Uniform Declaratory Judgments Act” for a declaratory order determining the rights, relations and status of the parties with respect to the Subject; for a declaratory order specifically declaring and imposing a constructive trust in favor of the Plaintiff in and to the Subject; and/or specifically declaring and imposing a resulting trust in favor of the Plaintiff in and to the Subject and/or specifically declaring and determining in the adjustment of the equities that Plaintiff's rights and interests in the Subject otherwise be made, declared and established.

FOR A SECOND CAUSE OF ACTION
(Quiet Title)

22-24. Plaintiff repeats the averments contained in Paragraphs 1-21 above as if fully set forth herein verbatim.

25. Plaintiff further brings this action pursuant to the provisions of S.C. Code Ann. § 15-53-10, et seq., the “Uniform Declaratory Judgments Act,” and S.C. Code Ann §15-67-10, et seq., for a declaratory order ratifying, quieting and confirming title to the real properties, situate, lying and being wholly within Dorchester County, South Carolina as more particularly described in Exhibit “A” in the name of the Plaintiff against the Defendant and for the purpose of obtaining a declaratory order of this Court establishing that Plaintiff is seized and possessed of a fee simple title to said properties to the exclusion of any others.

FOR A THIRD CAUSE OF ACTION
(Wrongful Termination – Lambert and L&L)

26. The foregoing paragraphs are incorporated as if fully restated herein.

27. After Decedent’s death, L&L was the prime contractor on a SCDOT project to widen Henry E. Brown, Jr. Boulevard from two lanes to four lanes (“the Project”). Plaintiff was the project superintendent for the Project.

28. Among L&L’s obligations was to provide material/dirt to the Project. L&L contracted with Richie Dennis for the material from a borrow pit owned by Richie Dennis, and that borrow pit was earmarked for the Project.

29. The borrow pit was surveyed at the start of the Project to determine the quantity of material it contained.

30. L&L was paid by SCDOT for each truckload of material, counted monthly.

31. Final payment would be made to L&L by again surveying the borrow pit owned by Richie Dennis that had been earmarked for the Project, comparing the amount of material reflected in each survey, and paying L&L for any amount removed from the pit above what L&L had already been paid.

32. In or about March 2020, upon completion of the second survey, a discrepancy was discovered between the amount of material removed from the pit and delivered to the Project.

33. After further investigation, it was determined that an additional \$1.2m worth of material above what was delivered to the Project had been removed from the borrow pit and paid for—but never received—by SCDOT.

34. Plaintiff spoke to both Richie Dennis and Defendant Lambert about the discrepancy and was told that Mr. Dennis and Defendant Lambert and/or Defendant L&L had been selling material from the pit to others, thus getting paid twice for the same material.

35. Recognizing the illegality of these actions by Defendant Lambert and/or Defendant L&L, Plaintiff refused to further certify any documents or payments relating to the Project.

36. In addition, in or around February 2020, Defendant Lambert and/or L&L instructed Plaintiff to delete footage from a security camera showing an L&L dump truck knocking over several utility poles near Florence, South Carolina before SCDOT could get the footage and require L&L to pay for the damage. Plaintiff refused to do so.

37. Within approximately two months of these refusals, Plaintiff was terminated from her employment at L&L in April 2020 via telephone.

38. Plaintiff was terminated in retaliation for refusing to perform illegal acts on behalf of Lambert and/or L&L.

39. Lambert's and/or L&L's actions violate public policy.

40. Plaintiff was wrongfully discharged from her employment.

41. Plaintiff was damaged as a result of her wrongful termination.

42. Plaintiff is entitled to compensatory damages, punitive damages, and attorneys' fees.

FOR A FOURTH CAUSE OF ACTION
(Malicious Prosecution – Lambert and L&L)

43. The following paragraphs are incorporated as if fully restated herein.

44. On the days on and leading up to her termination, Plaintiff was working remotely from home on account of an inability to secure childcare, with the knowledge and consent of Lambert and L&L.

45. In order to be able to work remotely, Plaintiff brought the laptop that had been issued to her by L&L home with her.

46. Following her wrongful termination, and in further retaliation for her refusals to take part in illegal conduct as directed by Defendants, Lambert and/or L&L instituted criminal proceedings, alleging that she had stolen property from L&L because she had not returned her laptop.

~~23.47.~~ Plaintiff was arrested within weeks of her termination.

48. The charges were ultimately dismissed, and the record expunged.

49. Defendants acted with malice and without probable cause or a good faith basis in instituting the criminal proceedings against Plaintiff.

50. Plaintiff was damaged as a result.

24.51. Plaintiff is entitled to actual and punitive damages.

WHEREFORE, having fully set forth his-her Complaint herein, Plaintiff would pray that this Honorable Court inquire into all matters and things alleged herein and before the Court and enter judgment of as follows:

a. For a declaratory order determining the rights, relations and status of the parties with respect to the Subject; for a declaratory order specifically declaring and imposing a constructive trust in favor of the Plaintiff in and to the Subject; and/or specifically declaring and imposing a resulting trust in favor of the Plaintiff in and to the Subject and/or specifically declaring and determining in the adjustment of the equities that Plaintiff's rights and interests in the Subject otherwise be made, declared and established;

b. For a declaratory order ratifying, quieting, and confirming title to the real properties, situate, lying and being wholly within Dorchester County, South Carolina as more particularly described in Exhibit "A" in the name of the Plaintiff and that any other be absolutely divested and forever barred from any right, title, claim, estate, interest therein; ~~and~~

c. For actual and punitive damages and attorneys' fees; and

e.d. For such other and further relief as this Honorable Court deems just and proper.

This ___ day of September, 2022
Charleston, South Carolina

EPTING & RANNIK, LLC

/s/ Jaan Rannik
Jaan G. Rannik (SC Bar # 103014)
Clinton T. Magill (SC Bar # 102770)
46A State Street
Charleston, SC 29401
P: (843) 377-1871
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jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT 3

alleged that she and Ervin W. Lambert Jr. had an arrangement whereby she would become a fifty (50%) owner in the Subject around closing and thereafter a sole and absolute owner. Plaintiff alleged that this arrangement was in lieu of a cash bonus for work she performed while employed at Ervin W. Lambert Jr.'s company, L&L Contractors Inc.¹ The Subject of this action was purchased in 2015 and the General Warranty Deed for the Subject was properly recorded on October 23, 2015, in the Office of the Register of Deeds for Dorchester County in the name of Ervin Lambert *only*.

Around October 25, 2018, Ervin W. Lambert Jr. (hereinafter "Decedent") died intestate in a plane crash in the Atlantic Ocean. Shortly thereafter, Decedent's father, Ervin Wayne Lambert Sr. (hereinafter "Mr. Lambert" or "PR") was appointed as Personal Representative of his Estate. Mr. Lambert was also given authority to manage, operate and conduct business on behalf of L&L Contractors Inc. and was given authority to execute any and all documents necessary to continue business operations and to preserve the value of the estate in the best interests of the heirs.

In December of 2020, Defendant filed its Answer and Counterclaim also seeking to Quiet Title to the Subject. Both parties served written discovery in February of 2021. On March 1, 2021, the parties filed their first Consent Scheduling Order with the Court. Because the parties still needed additional time to take depositions in this case, an Amended Consent Scheduling Order was submitted to the Court for its review in early September of 2021. On September 3, 2021, the Court denied the order and suggested that the parties agree to 40(j) the case. John West, Plaintiff's first attorney and Defense Counsel agreed to 40(j) the case pursuant to a consent order and to complete discovery prior to restoring the case. The parties believed that this was the best way to ensure that the case would be ready to proceed to trial once it was restored.

¹ Plaintiff continued to work at L&L Contractors Inc. for Ervin W. Lambert Sr. until she was terminated in April of 2020.

Mr. West also agreed to limit Mr. Lambert's deposition to the 106 Sarmiento Lane dispute and that which could lead to relevant evidence concerning its ownership². Depositions for both parties were scheduled to take place on October 29, 2021. On October 12, 2021, Mr. West informed Defense Counsel that he no longer represented the Plaintiff and that he didn't believe the depositions could go forward as previously scheduled for October 29, 2021.

On February 15, 2022, Mr. Rannik, Plaintiff's new counsel, restored the case to the non-jury roster. On August 16, 2022, an electronic notice was sent out by the Dorchester County Clerk's Office stating that this case was on the Back-Up Non-Jury Roster for the week of September 19, 2022. Mr. Rannik reached out to Defense Counsel about seeking a Consent Scheduling Order from the Court. Defense Counsel agreed to the terms and the parties filed a Motion for Consent Scheduling Order along with an accompanying Proposed Consent Order on August 25, 2022. As part of this motion the parties represented to the Court that the "short extensions requested were not intended to cause delay and would work no prejudice on any party or on the orderly administration of justice". The order further provided that discovery would be completed by October 15, 2022, mediation by November 30, 2022, and that the case would be ready for trial after December 15, 2022.

Defendant finished the depositions needed for its case on August 29, 2022. In early September Plaintiff stated that he wished to take Mr. Lambert's deposition but that he would not limit the deposition to the scope of the pending case because he planned on amending his pleadings to add additional parties and claims.

On September 13, 2022, Plaintiff emailed its Notice of Deposition for Mr. Lambert's

² A case designated complex had been filed against the Decedent's Estate on behalf of some of the passengers who were aboard the airplane Decedent was operating when it disappeared. Defendant wanted to ensure Plaintiff was not trying to use the Declaratory Judgment action to elicit information pertaining to the airplane case because Plaintiff had already provided an affidavit in the complex case.

deposition to take place on October 13, 2022. On September 20, 2022 Plaintiff filed its Motion to Amend pursuant to Rules 15(a) and 18(a) of the *SCRCP* along with its proposed Amended Complaint. The Amended Complaint sought to add two additional defendants, Wayne Lambert Sr. individually and L&L Contractors Inc. It further sought to add two additional claims, Wrongful Termination and Malicious Prosecution. Plaintiff alleged that the two additional claims, which occurred on or about April 2020 respectively were in retaliation for (1) her refusal to certify and falsify documents or payments relating to a work project involving the removal of material from a borrow pit and (2) her refusal to delete video footage of a wreck involving one of L&L's trucks.³

Because of the Amended Complaint and scheduling order that was in place, the parties agreed that a status conference was needed with the Court. The Court held a virtual status conference with the parties on October 3, 2022, and agreed to hear the Plaintiff's Motion to Amend the following day. Defendant filed its Memorandum in Opposition to the Plaintiff's Motion to Amend on October 3, 2022. On October 4, 2022 the Plaintiff's Motion to Amend was heard and verbally denied by the Court during the virtual hearing. This Order is the product of the October 4, 2022 hearing.

STANDARD OF REVIEW FOR AMENDMENTS PURSUANT TO RULE 15(a)

The pertinent section of Rule 15(a) provides that “a party may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a) *SCRCP*. However, “Rule 15(a) only permits an *existing plaintiff* to add, modify, delete, or change claims against an *existing defendant*.” *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995). “It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and

³ Plaintiff's proposed red-lined Amended Complaint was submitted as Ex. A. to its Motion to Amend filed September 20, 2022.

that the party opposing the motion has the burden of establishing prejudice.” “The prejudice contemplated in Rule 15 envisions a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” *Curry v. Carolina Ins. Grp. Of SC, Inc.*, 428 S.C. 60, 75-76, 832 S.E.2d 760, 768 (Ct. App. 2019). “Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 277, 754 S.E.2d 714 (Ct. App. 2014) (*reh’g denied*) citing *Ball v. Canadian Am. Exp. Co., Inc.*, 314 S.C 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). Factors that may be considered in determining whether permitting an amendment would cause prejudice to the nonmoving party include undue delay, jury confusion, and introduction of remote issues. See *Wilson v. Horsley*, 137 Wash.2d 500, 974 P.2d 316 (1999). A motion to amend a complaint may be prejudicial if it would burden the party with more discovery, preparation, expense, etc. and when the amendment is sought after the majority of discovery is completed and the case is up for trial. See *Wal-Mart Super Center v. Long*, 852 So.2d 568, (2003) *reh’g denied*. A denial of a motion to amend under Rule 15 is within the sound discretion of the circuit court. *Oulla v. Velazques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019). “The trial judge’s finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred.” *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232-233, 599 S.E.2d 462, 465 (Ct. App. 2004).

DISCUSSION

The Plaintiff argues that pursuant to Rules 15(a), 18(a), and Rule 20 of the *SCRCP*, the Court should grant its Motion to Amend to add additional causes of action for Wrongful Termination and Malicious Prosecution, and to add defendants, Mr. Lambert individually and L&L Contractors Inc. to the existing Declaratory Judgment action because all of the actions new and

old are related and arise out of the Plaintiff's retaliation claim. The Plaintiff further argues that there is no prejudice to the Defendant or bad faith because the addition of new defendants will give the Defense more time to prepare its case.

The Defendant argues that Plaintiff's new causes of action and additional defendants are totally unrelated to the existing Declaratory Judgment action. The Declaratory Judgment action has to do with a piece of real estate that was purchased by the Decedent back in 2015 while the new action arises out of Plaintiff's termination of employment at L&L which occurred in 2020. The new action also involves two additional parties, Mr. Lambert in his individual capacity and L&L Contractors Inc. Defendant further argues that to allow these actions to come in this late in the game would be highly prejudicial to the Defendant because he has completed discovery, the case is up for trial in less than two months, the case has been pending for over two years, and this amendment could have been made much earlier if Plaintiff had used reasonable diligence. See *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (a prejudicial amendment is one that "raises a new legal theory that would require the gathering and analysis of facts not already considered by the [Defendant, and] is offered shortly before or during trial"); *Wal-Mart Super Center v. Long*, 852 So.2d 568, (2003) *reh'g denied.*; (Amendment may be prejudicial if it would burden the party with more discovery, preparation, expense, etc. and when the amendment is sought after the majority of discovery is completed and the case is up for trial).⁴ Finally, the Defendant argues that the new causes of action can be tried in a separate law suit and are still within the applicable statute of limitations period.

FINDINGS AND CONCLUSIONS

After reviewing the law, pleadings, memoranda and arguments by Counsel the Court

⁴ Rule 15(a) of the SCRCP is substantially the same rule as the Federal rule.

makes the following findings and conclusions:

First, I find that these are separate and distinct law suits and as such should be tried separately. The topics, legal issues and parties are quite different. The pending Declaratory Judgment action arises out of ownership rights to a residence which was purchased by the Decedent in 2015 and recorded by General Warrant Deed in the Decedent's name "only" in the Dorchester County Register of Deeds in 2015. Plaintiff's allegations in that case revolve around an alleged arrangement she had with the Decedent and the Decedent only in regard to that residence. The only connection that these new claims have with this action, is the fact that Mr. Lambert just happens to be managing L&L Contractors now and is PR of the Decedent's Estate.

Secondly, given the fact that this case is almost three years old, and that a jury is going to have to decide without getting confused is yet another reason that these matters should be filed separately. In the Declaratory Judgment action with regards to whether or not the Plaintiff had an equitable ownership is light years away from a wrongful discharge action. Furthermore, the Plaintiff will not be prejudiced because the Plaintiff can still file this new law suit within the applicable statute of limitations and should not have an issue with any collateral estoppel.

Third, while you are allowed to amend freely under Rule 15, you shouldn't be able to shoehorn additional parties that are fairly unrelated with additional causes of action which are in great part unrelated to the existing lawsuit, which is supposed to be ready for trial. Moreover, it is absolutely prejudicial to the Defendant to add these unrelated causes of action and these parties to the existing Declaratory Judgment action. Furthermore, I believe that in combining these actions and parties creates a substantial likelihood that the jury would be confused.

With that said, the Plaintiff's Motion to Amend are DENIED. All of the Plaintiffs issues can still be brought in a separate lawsuit, which would be much cleaner and easier for a jury to

understand. Bringing unrelated causes of action and parties to this action right before trial would be prejudicial and not serve the ends of Justice.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Amend be hereby **DENIED**.

IT IS SO ORDERED!

Hon. Diane S. Goodstein
Presiding Judge, First Judicial Circuit

December _____, 2022



Dorchester Common Pleas

Case Caption: Laura Abernathy VS Ervin W Lambert Sr , defendant, et al

Case Number: 2022CP1800295

Type: Order/Other

It is so Ordered!

s/Diane S. Goodstein

EXHIBIT 4

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

)

FIRST JUDICIAL CIRCUIT

COUNTY OF DORCHESTER

)

CASE NO.: 2022-CP-18-

LAURA ABERNATHY,

)

)

Plaintiff,

)

)

v.

)

)

SUMMONS

(Jury Trial Demanded)

ERVIN W. LAMBERT, SR., individually and
as Personal Representative of the Estate of
Ervin W. Lambert, Jr., Deceased, AND L&L
CONTRACTORS, INC.,

)

)

)

)

Defendants.

)

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your written response to the said Complaint on the subscribers at the law office of Epting & Rannik, LLC, 46A State Street, Charleston, South Carolina 29401, within thirty (30) days after the date of service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

EPTING & RANNIK, LLC

This 14th day of October, 2022
Charleston, South Carolina

/s/ Jaan Rannik
Jaan G. Rannik (SC Bar # 103014)
Clinton T. Magill (SC Bar # 102770)
46A State Street
Charleston, SC 29401
P: (843) 377-1871
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jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) FIRST JUDICIAL CIRCUIT

COUNTY OF DORCHESTER

) CASE NO.: 2022-CP-18-

LAURA ABERNATHY,

) Plaintiff,

v.

) **COMPLAINT**
) **(Jury Trial Demanded)**

) ERVIN W. LAMBERT, SR., individually and
) as Personal Representative of the Estate of
) Ervin W. Lambert, Jr., Deceased, AND L&L
) CONTRACTORS, INC.,

) Defendants.
)

TO THE DEFENDANTS ABOVE NAMED:

Plaintiff would respectfully allege and show unto this Honorable Court as follows:

PARTIES, SUBJECT MATTER AND FACTUAL BACKGROUND

1. Plaintiff is a citizen and resident of Dorchester County, South Carolina.
2. On information and belief Defendant Ervin W. Lambert, Sr. is a citizen and resident of Williamsburg County, South Carolina.
3. On information and belief, Defendant L&L Contractors, Inc., (“L&L”)is a corporation organized and existing under and by virtue of the laws of the State of South Carolina with a principal place of business in Berkeley County, South Carolina.
4. On or about October 25, 2018, Ervin Wayne Lambert, Jr., (“Decedent”) died intestate in a plane crash in the Atlantic Ocean.

5. Defendant is father of the Decedent and the duly appointed Personal Representative of the Estate of Ervin Wayne Lambert, Jr., Deceased, Williamsburg County Probate Court, which estate is open and pending.

6. Decedent was at all times relevant herein the sole owner and President of L& L

7. Plaintiff was at all times relevant herein a key employee of L&L 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.

JURISDICTION AND VENUE

10. This Court is possessed of jurisdiction over the parties and the subject matter.

11. Venue is proper.

FOR A FIRST CAUSE OF ACTION (Wrongful Termination – Lambert and L&L)

12. The foregoing paragraphs are incorporated as if fully restated herein.

13. After Decedent's death, L&L was the prime contractor on a SCDOT project to widen Henry E. Brown, Jr. Boulevard from two lanes to four lanes ("the Project"). Plaintiff was the project superintendent for the Project.

14. Among L&L's obligations was to provide material/dirt to the Project. L&L contracted with Richie Dennis for the material from a borrow pit owned by Richie Dennis, and that borrow pit was earmarked for the Project.

15. The borrow pit was surveyed at the start of the Project to determine the quantity of material it contained.

16. L&L was paid by SCDOT for each truckload of material, counted monthly.

17. Final payment would be made to L&L by again surveying the borrow pit owned by Richie Dennis that had been earmarked for the Project, comparing the amount of material reflected in each survey, and paying L&L for any amount removed from the pit above what L&L had already been paid.

18. In or about March 2020, upon completion of the second survey, a discrepancy was discovered between the amount of material removed from the pit and delivered to the Project.

19. After further investigation, it was determined that an additional \$1.2m worth of material above what was delivered to the Project had been removed from the borrow pit but never received by SCDOT.

20. Plaintiff spoke to both Richie Dennis and Defendant Lambert about the discrepancy and was told that Mr. Dennis and Defendant Lambert and/or Defendant L&L had been selling material from the pit to others, despite Defendants demanding payment from SCDOT for the same material.

21. Recognizing the illegality of these actions by Defendant Lambert and/or Defendant L&L, Plaintiff refused to further certify any documents or payments relating to the Project.

22. In addition, in or around February 2020, Defendant Lambert and/or L&L instructed Plaintiff to delete footage from a security camera showing an L&L dump truck knocking over several utility poles near Florence, South Carolina before SCDOT could get the footage and require L&L to pay for the damage. Plaintiff refused to do so.

23. Within approximately two months of these refusals, Plaintiff was terminated from her employment at L&L in April 2020 via telephone.

24. Plaintiff was terminated by Lambert and/or L&L in retaliation for refusing to perform illegal acts on behalf of Lambert and/or L&L.

25. Lambert's and/or L&L's actions violate public policy.

26. Plaintiff was wrongfully discharged from her employment.

27. Plaintiff was damaged as a result of her wrongful termination.

28. Plaintiff is entitled to compensatory damages, punitive damages, and attorneys' fees.

FOR A SECOND CAUSE OF ACTION
(Malicious Prosecution – Lambert and L&L)

29. The following paragraphs are incorporated as if fully restated herein.

30. On the days on and leading up to her termination, Plaintiff was working remotely from home on account of the Covid-19 pandemic and an inability to secure childcare, with the knowledge and consent of Lambert and L&L.

31. In order to be able to work remotely, Plaintiff brought the laptop , desktop computer, and printer that had been issued to her by L&L home with her.

32. Following her wrongful termination, and in further retaliation for her refusals to take part in illegal conduct as directed by Defendants, Lambert and/or L&L instituted criminal proceedings, alleging that she had stolen property from L&L because she had not returned her laptop and desktop computer.

33. Plaintiff was arrested within weeks of her termination.

34. The charges were ultimately dismissed, and the record expunged.

35. Defendants acted with malice and without probable cause or a good faith basis in instituting the criminal proceedings against Plaintiff.

36. Plaintiff was damaged as a result.

37. Plaintiff is entitled to actual and punitive damages.

WHEREFORE, having fully set forth her Complaint herein, Plaintiff would pray that this Honorable Court inquire into all matters and things alleged herein and before the Court and enter judgment of as follows:

- a. For actual and punitive damages and attorneys' fees; and
- b. For such other and further relief as this Honorable Court deems just and proper.

EPTING & RANNIK, LLC

This 14th day of October, 2022
Charleston, South Carolina

/s/ Jaan Rannik
Jaan G. Rannik (SC Bar # 103014)
Clinton T. Magill (SC Bar # 102770)
46A State Street
Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT 5

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)	
)	CASE NO.: 2022-CP-18-01582
LAURA ABERNATHY,)	
)	
)	
Plaintiff,)	
)	
v.)	
)	AMENDED SUMMONS
)	(Jury Trial Demanded)
ERVIN W. LAMBERT, SR., individually and)	
as Personal Representative for the Estate of)	
Ervin W. Lambert, Jr., Deceased, and L&L)	
CONTRACTORS, INC.,)	
)	
Defendants.)	

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your written response to the said Complaint on the subscribers at the law office of Epting & Rannik, LLC, 46A State Street, Charleston, South Carolina 29401, within thirty (30) days after the date of service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

EPTING & RANNIK, LLC

This 16th day of March, 2023
Charleston, South Carolina

/s/ Jaan Rannik
Jaen G. Rannik (SC Bar # 103014)
Clinton T. Magill (SC Bar # 102770)
46A State Street
Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

5. Defendant is father of the Decedent and the duly appointed Personal Representative of the Estate of Ervin Wayne Lambert, Jr., Deceased, Williamsburg County Probate Court, which estate is open and pending.

6. Decedent was at all times relevant herein the sole owner and President of L& L

7. Plaintiff was at all times relevant herein a key employee of L&L 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.

JURISDICTION AND VENUE

10. This Court is possessed of jurisdiction over the parties and the subject matter.

11. Venue is proper.

FOR A FIRST CAUSE OF ACTION **(Wrongful Termination – Lambert and L&L)**

12. The foregoing paragraphs are incorporated as if fully restated herein.

13. After Decedent's death, L&L was the prime contractor on a SCDOT project to widen Henry E. Brown, Jr. Boulevard from two lanes to four lanes ("the Project"). Plaintiff was the project superintendent for the Project.

14. Among L&L's obligations was to provide material/dirt to the Project. L&L contracted with Richie Dennis for the material from a borrow pit owned by Richie Dennis, and that borrow pit was earmarked for the Project.

15. The borrow pit was surveyed at the start of the Project to determine the quantity of material it contained.

16. L&L was paid by SCDOT for each truckload of material, counted monthly.

17. Final payment would be made to L&L by again surveying the borrow pit owned by Richie Dennis that had been earmarked for the Project, comparing the amount of material reflected in each survey, and paying L&L for any amount removed from the pit above what L&L had already been paid.

18. In or about March 2020, upon completion of the second survey, a discrepancy was discovered between the amount of material removed from the pit and delivered to the Project.

19. After further investigation, it was determined that an additional \$1.2m worth of material above what was delivered to the Project had been removed from the borrow pit but never received by SCDOT.

20. Plaintiff spoke to both Richie Dennis and Defendant Lambert about the discrepancy and was told that Mr. Dennis and Defendant Lambert and/or Defendant L&L had been selling material from the pit to others, despite Defendants demanding payment from SCDOT for the same material.

21. Recognizing the illegality of these actions by Defendant Lambert and/or Defendant L&L, Plaintiff refused to further certify any documents or payments relating to the Project.

22. In addition, in or around February 2020, Defendant Lambert and/or L&L instructed Plaintiff to delete footage from a security camera showing an L&L dump truck knocking over several utility poles near Florence, South Carolina before SCDOT could get the footage and require L&L to pay for the damage. Plaintiff refused to do so.

23. Within approximately two months of these refusals, Plaintiff was terminated from her employment at L&L in April 2020 via telephone.

24. Plaintiff was terminated by Lambert and/or L&L in retaliation for refusing to perform illegal acts on behalf of Lambert and/or L&L.

25. Lambert's and/or L&L's actions violate public policy.

26. Plaintiff was wrongfully discharged from her employment.

27. Plaintiff was damaged as a result of her wrongful termination.

28. Plaintiff is entitled to compensatory damages, punitive damages, and attorneys' fees.

FOR A SECOND CAUSE OF ACTION
(Malicious Prosecution – Lambert and L&L)

29. The following paragraphs are incorporated as if fully restated herein.

30. On the days on and leading up to her termination, Plaintiff was working remotely from home on account of the Covid-19 pandemic and an inability to secure childcare, with the knowledge and consent of Lambert and L&L.

31. In order to be able to work remotely, Plaintiff brought the laptop, desktop computer, and printer that had been issued to her by L&L home with her.

32. Following her wrongful termination, and in further retaliation for her refusals to take part in illegal conduct as directed by Defendants, Lambert and/or L&L instituted criminal proceedings, alleging that she had stolen property from L&L because she had not returned her laptop and desktop computer.

33. Plaintiff was arrested within weeks of her termination.

34. The charges were ultimately dismissed, and the record expunged.

35. Defendants acted with malice and without probable cause or a good faith basis in instituting the criminal proceedings against Plaintiff.

36. Plaintiff was damaged as a result.

37. Plaintiff is entitled to actual and punitive damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Agreement)

38. The following paragraphs are incorporated as if fully restated herein.

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 Litigation.

41. She was instrumental in achieving a substantial recovery for L&L in the Litigation.

42. Prior to the Litigation 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 Litigation.

44. Ms. Abernathy is entitled to payment of the bonus promised to her relating to the Litigation.

WHEREFORE, having fully set forth her Complaint herein, Plaintiff would pray that this Honorable Court inquire into all matters and things alleged herein and before the Court and enter judgment of as follows:

- a. For actual and punitive damages and attorneys’ fees; and
- b. For such other and further relief as this Honorable Court deems just and proper.

This 16th day of March, 2023
Charleston, South Carolina

EPTING & RANNIK, LLC

/s/ Jaan Rannik

Jaen G. Rannik (SC Bar # 103014)
Clinton T. Magill (SC Bar # 102770)
46A State Street
Charleston, SC 29401
P: (843) 377-1871
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jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT 6

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

)

FIRST JUDICIAL CIRCUIT

COUNTY OF DORCHESTER

)

CASE NO.: 2022-CP-18-00295

LAURA ABERNATHY,

)

)

Plaintiff,

)

)

v.

)

)

**PLAINTIFF’S MOTION TO
CONSOLIDATE AND FOR AN
EXPEDITED HEARING**

ERVIN W. LAMBERT, SR., Personal
Representative of the Estate of Ervin W.
Lambert, Jr., Deceased,

)

)

)

)

Defendant.

)

Plaintiff Laura Abernathy (“Ms. Abernathy”) moves pursuant to Rule 42(a), S.C.R.C.P., for an Order consolidating this case with Case number 2022-CP-18-01582, also filed by Ms. Abernathy against Defendant Ervin Wayne Lambert et al. and requests a jury trial. The two cases share parties, counsel in common, common questions of fact and/or law, and Ms. Abernathy contends that the attempted eviction that is the subject of this case is part of a common scheme of retaliation along with the forms alleged in Case number 2022-CP-18-01582.

Accordingly, it would be more just and more efficient for the parties and the Court for these matters to be consolidated and tried together to a jury. Ms. Abernathy so moves and requests an expedited hearing.

Plaintiff sought Defendants’ consent prior to filing this motion, but consent was not obtained.

[signature on following page]

This 17th day of March, 2023
Charleston, South Carolina

Respectfully submitted:

/s/ Jaan Rannik

Jaan G. Rannik

EPTING & RANNIK, LLC

46A State Street

Charleston, SC 29401

P: (843) 377-1871

F: (843) 377-1310

jgr@epting-law.com

COUNSEL FOR LAURA ABERNATHY

EXHIBIT 7

Laura Abernathy
PLAINTIFF(S)

Ervin W Lambert, Sr et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Consolidate this matter with 2022CP1801582 is hereby denied. The parties are to reach out to Judge Murphy as Chief Administrative Judge to have this matter set for a 2- day trial.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/12/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Dorchester Common Pleas

Case Caption: Laura Abernathy VS Ervin W Lambert Sr , defendant, et al

Case Number: 2022CP1800295

Type: Order/Electronic Form 4

It is so Ordered!

s/Diane S. Goodstein

EXHIBIT 8

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Apr 21 2023

SC Court of Appeals

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

The Honorable Diane S. Goodstein

Case No.: 2022-CP-18-00295

LAURA ABERNATHY.....Plaintiff /Appellant,

v.

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

NOTICE OF APPEAL

Plaintiff, Laura Abernathy, appeals from two orders of the Honorable Diane S. Goodstein, one dated April 12, 2023 (**Exh. A**, denying Plaintiff's Motion to Consolidate and requesting a jury trial) and the other dated December 19, 2022 (**Exh. B**, denying Plaintiff's Motion to Amend).

Plaintiff moved to consolidate two separate actions involving the same parties and overlapping facts, one which is to be tried non-jury and one which is to be tried to a jury, being concerned that the nonjury trial would decide factual issues that Plaintiff is entitled to have decided by a jury. Plaintiff therefore requested a jury trial as part of its consolidation motion. The April 12, 2023 order denied that motion. That ruling is immediately appealable because it denied a request for a jury trial, affecting a substantial right. S.C. Code § 14-3-330(2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *see also Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74,

78, 533 S.E.2d 575, 577 (2000) (noting that the “majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate”).

The December 19, 2022 order denied Plaintiff’s motion to amend. While a denial of a motion to amend is not ordinarily appealable prior to final judgment, this order may now be considered in conjunction with the April 12 order because this Court may hear the appeal of 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).

Defendant received notice of the latter order on April 12, 2023 and timely notices this appeal.

The transcripts are being requested.

Respectfully submitted:

EPTING & RANNIK, LLC

April 21, 20223
Charleston, South Carolina

/s/ Jaan Rannik
Jaan G. Rannik
Clinton T. Magill
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
Fax: 843-377-1310
jgr@epting-law.com
ctm@epting-law.com

ATTORNEY FOR PLAINTIFF/APPELLANT

RECEIVED

Apr 21 2023

SC Court of Appeals

EXHIBIT A

Laura Abernathy
PLAINTIFF(S)

Ervin W Lambert, Sr et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (*CHECK REASON*): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN** (*CHECK REASON*): Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Consolidate this matter with 2022CP1801582 is hereby denied. The parties are to reach out to Judge Murphy as Chief Administrative Judge to have this matter set for a 2- day trial.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/12/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Dorchester Common Pleas

Case Caption: Laura Abernathy VS Ervin W Lambert Sr , defendant, et al

Case Number: 2022CP1800295

Type: Order/Electronic Form 4

It is so Ordered!

s/Diane S. Goodstein

RECEIVED

Apr 21 2023

SC Court of Appeals

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
)
LAURA ABERNATHY,)
)
)
Plaintiff,)
)
vs.)
)
)
ERVIN W. LAMBERT, SR.,)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF ERVINE E.)
LAMBERT, JR. Deceased,)
)
Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO.: 2022-CP-18-00295

**ORDER DENYING PLAINTIFF'S
MOTION TO AMEND AND FOR
JOINDER**

RECEIVED
Apr 21 2023
SC Court of Appeals

This Matter came before the Court on October 4, 2022, during a virtual hearing on Plaintiff's Motion to Amend pursuant to Rules 15(a), 18(a), and 20 of the *South Carolina Rules of Civil Procedure (SCRCP)*. Present on behalf of the Plaintiff was Jaan Rannik, Esquire and Lionel S. Lofton, Esquire, on behalf of the Defendant. After reviewing the pleadings, motions and memoranda filed by counsel, the law as it relates to the issues presented, and oral arguments presented during the hearing, the Court finds that Plaintiff's Motion to Amend to join additional defendants and claims and Plaintiff's Motion for joinder additional parties are DENIED for the reasons set forth herein.

BACKGROUND

The Plaintiff initiated this action on June 12, 2020, as a Declaratory Judgment/Quiet Title action against Ervin W. Lambert Sr., Personal Representative of the Estate of Ervin W. Lambert Jr. (Deceased) arising out of ownership rights of a residence located at 106 Sarmiento Lane, Summerville, South Carolina (hereinafter "Subject"). As part of the complaint, the Plaintiff

alleged that she and Ervin W. Lambert Jr. had an arrangement whereby she would become a fifty (50%) owner in the Subject around closing and thereafter a sole and absolute owner. Plaintiff alleged that this arrangement was in lieu of a cash bonus for work she performed while employed at Ervin W. Lambert Jr.'s company, L&L Contractors Inc.¹ The Subject of this action was purchased in 2015 and the General Warranty Deed for the Subject was properly recorded on October 23, 2015, in the Office of the Register of Deeds for Dorchester County in the name of Ervin Lambert *only*.

Around October 25, 2018, Ervin W. Lambert Jr. (hereinafter "Decedent") died intestate in a plane crash in the Atlantic Ocean. Shortly thereafter, Decedent's father, Ervin Wayne Lambert Sr. (hereinafter "Mr. Lambert" or "PR") was appointed as Personal Representative of his Estate. Mr. Lambert was also given authority to manage, operate and conduct business on behalf of L&L Contractors Inc. and was given authority to execute any and all documents necessary to continue business operations and to preserve the value of the estate in the best interests of the heirs.

In December of 2020, Defendant filed its Answer and Counterclaim also seeking to Quiet Title to the Subject. Both parties served written discovery in February of 2021. On March 1, 2021, the parties filed their first Consent Scheduling Order with the Court. Because the parties still needed additional time to take depositions in this case, an Amended Consent Scheduling Order was submitted to the Court for its review in early September of 2021. On September 3, 2021, the Court denied the order and suggested that the parties agree to 40(j) the case. John West, Plaintiff's first attorney and Defense Counsel agreed to 40(j) the case pursuant to a consent order and to complete discovery prior to restoring the case. The parties believed that this was the best way to ensure that the case would be ready to proceed to trial once it was restored.

¹ Plaintiff continued to work at L&L Contractors Inc. for Ervin W. Lambert Sr. until she was terminated in April of 2020.

Mr. West also agreed to limit Mr. Lambert's deposition to the 106 Sarmiento Lane dispute and that which could lead to relevant evidence concerning its ownership². Depositions for both parties were scheduled to take place on October 29, 2021. On October 12, 2021, Mr. West informed Defense Counsel that he no longer represented the Plaintiff and that he didn't believe the depositions could go forward as previously scheduled for October 29, 2021.

On February 15, 2022, Mr. Rannik, Plaintiff's new counsel, restored the case to the non-jury roster. On August 16, 2022, an electronic notice was sent out by the Dorchester County Clerk's Office stating that this case was on the Back-Up Non-Jury Roster for the week of September 19, 2022. Mr. Rannik reached out to Defense Counsel about seeking a Consent Scheduling Order from the Court. Defense Counsel agreed to the terms and the parties filed a Motion for Consent Scheduling Order along with an accompanying Proposed Consent Order on August 25, 2022. As part of this motion the parties represented to the Court that the "short extensions requested were not intended to cause delay and would work no prejudice on any party or on the orderly administration of justice". The order further provided that discovery would be completed by October 15, 2022, mediation by November 30, 2022, and that the case would be ready for trial after December 15, 2022.

Defendant finished the depositions needed for its case on August 29, 2022. In early September Plaintiff stated that he wished to take Mr. Lambert's deposition but that he would not limit the deposition to the scope of the pending case because he planned on amending his pleadings to add additional parties and claims.

On September 13, 2022, Plaintiff emailed its Notice of Deposition for Mr. Lambert's

² A case designated complex had been filed against the Decedent's Estate on behalf of some of the passengers who were aboard the airplane Decedent was operating when it disappeared. Defendant wanted to ensure Plaintiff was not trying to use the Declaratory Judgment action to elicit information pertaining to the airplane case because Plaintiff had already provided an affidavit in the complex case.

deposition to take place on October 13, 2022. On September 20, 2022 Plaintiff filed its Motion to Amend pursuant to Rules 15(a) and 18(a) of the *SCRCP* along with its proposed Amended Complaint. The Amended Complaint sought to add two additional defendants, Wayne Lambert Sr. individually and L&L Contractors Inc. It further sought to add two additional claims, Wrongful Termination and Malicious Prosecution. Plaintiff alleged that the two additional claims, which occurred on or about April 2020 respectively were in retaliation for (1) her refusal to certify and falsify documents or payments relating to a work project involving the removal of material from a borrow pit and (2) her refusal to delete video footage of a wreck involving one of L&L's trucks.³

Because of the Amended Complaint and scheduling order that was in place, the parties agreed that a status conference was needed with the Court. The Court held a virtual status conference with the parties on October 3, 2022, and agreed to hear the Plaintiff's Motion to Amend the following day. Defendant filed its Memorandum in Opposition to the Plaintiff's Motion to Amend on October 3, 2022. On October 4, 2022 the Plaintiff's Motion to Amend was heard and verbally denied by the Court during the virtual hearing. This Order is the product of the October 4, 2022 hearing.

STANDARD OF REVIEW FOR AMENDMENTS PURSUANT TO RULE 15(a)

The pertinent section of Rule 15(a) provides that “a party may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a) *SCRCP*. However, “Rule 15(a) only permits an *existing plaintiff* to add, modify, delete, or change claims against an *existing defendant*.” *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995). “It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and

³ Plaintiff's proposed red-lined Amended Complaint was submitted as Ex. A. to its Motion to Amend filed September 20, 2022.

that the party opposing the motion has the burden of establishing prejudice.” “The prejudice contemplated in Rule 15 envisions a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” *Curry v. Carolina Ins. Grp. Of SC, Inc.*, 428 S.C. 60, 75-76, 832 S.E.2d 760, 768 (Ct. App. 2019). “Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 277, 754 S.E.2d 714 (Ct. App. 2014) (*reh’g denied*) citing *Ball v. Canadian Am. Exp. Co., Inc.*, 314 S.C 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). Factors that may be considered in determining whether permitting an amendment would cause prejudice to the nonmoving party include undue delay, jury confusion, and introduction of remote issues. See *Wilson v. Horsley*, 137 Wash.2d 500, 974 P.2d 316 (1999). A motion to amend a complaint may be prejudicial if it would burden the party with more discovery, preparation, expense, etc. and when the amendment is sought after the majority of discovery is completed and the case is up for trial. See *Wal-Mart Super Center v. Long*, 852 So.2d 568, (2003) *reh’g denied*. A denial of a motion to amend under Rule 15 is within the sound discretion of the circuit court. *Oulla v. Velazques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019). “The trial judge’s finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred.” *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232-233, 599 S.E.2d 462, 465 (Ct. App. 2004).

DISCUSSION

The Plaintiff argues that pursuant to Rules 15(a), 18(a), and Rule 20 of the *SCRCP*, the Court should grant its Motion to Amend to add additional causes of action for Wrongful Termination and Malicious Prosecution, and to add defendants, Mr. Lambert individually and L&L Contractors Inc. to the existing Declaratory Judgment action because all of the actions new and

old are related and arise out of the Plaintiff's retaliation claim. The Plaintiff further argues that there is no prejudice to the Defendant or bad faith because the addition of new defendants will give the Defense more time to prepare its case.

The Defendant argues that Plaintiff's new causes of action and additional defendants are totally unrelated to the existing Declaratory Judgment action. The Declaratory Judgment action has to do with a piece of real estate that was purchased by the Decedent back in 2015 while the new action arises out of Plaintiff's termination of employment at L&L which occurred in 2020. The new action also involves two additional parties, Mr. Lambert in his individual capacity and L&L Contractors Inc. Defendant further argues that to allow these actions to come in this late in the game would be highly prejudicial to the Defendant because he has completed discovery, the case is up for trial in less than two months, the case has been pending for over two years, and this amendment could have been made much earlier if Plaintiff had used reasonable diligence. See *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (a prejudicial amendment is one that "raises a new legal theory that would require the gathering and analysis of facts not already considered by the [Defendant, and] is offered shortly before or during trial"); *Wal-Mart Super Center v. Long*, 852 So.2d 568, (2003) *reh 'g denied.*; (Amendment may be prejudicial if it would burden the party with more discovery, preparation, expense, etc. and when the amendment is sought after the majority of discovery is completed and the case is up for trial).⁴ Finally, the Defendant argues that the new causes of action can be tried in a separate law suit and are still within the applicable statute of limitations period.

FINDINGS AND CONCLUSIONS

After reviewing the law, pleadings, memoranda and arguments by Counsel the Court

⁴ Rule 15(a) of the SCRCF is substantially the same rule as the Federal rule.

makes the following findings and conclusions:

First, I find that these are separate and distinct law suits and as such should be tried separately. The topics, legal issues and parties are quite different. The pending Declaratory Judgment action arises out of ownership rights to a residence which was purchased by the Decedent in 2015 and recorded by General Warrant Deed in the Decedent's name "only" in the Dorchester County Register of Deeds in 2015. Plaintiff's allegations in that case revolve around an alleged arrangement she had with the Decedent and the Decedent only in regard to that residence. The only connection that these new claims have with this action, is the fact that Mr. Lambert just happens to be managing L&L Contractors now and is PR of the Decedent's Estate.

Secondly, given the fact that this case is almost three years old, and that a jury is going to have to decide without getting confused is yet another reason that these matters should be filed separately. In the Declaratory Judgment action with regards to whether or not the Plaintiff had an equitable ownership is light years away from a wrongful discharge action. Furthermore, the Plaintiff will not be prejudiced because the Plaintiff can still file this new law suit within the applicable statute of limitations and should not have an issue with any collateral estoppel.

Third, while you are allowed to amend freely under Rule 15, you shouldn't be able to shoehorn additional parties that are fairly unrelated with additional causes of action which are in great part unrelated to the existing lawsuit, which is supposed to be ready for trial. Moreover, it is absolutely prejudicial to the Defendant to add these unrelated causes of action and these parties to the existing Declaratory Judgment action. Furthermore, I believe that in combining these actions and parties creates a substantial likelihood that the jury would be confused.

With that said, the Plaintiff's Motion to Amend are DENIED. All of the Plaintiffs issues can still be brought in a separate lawsuit, which would be much cleaner and easier for a jury to

understand. Bringing unrelated causes of action and parties to this action right before trial would be prejudicial and not serve the ends of Justice.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Amend be hereby **DENIED**.

IT IS SO ORDERED!

Hon. Diane S. Goodstein
Presiding Judge, First Judicial Circuit

December _____, 2022



Dorchester Common Pleas

Case Caption: Laura Abernathy VS Ervin W Lambert Sr , defendant, et al

Case Number: 2022CP1800295

Type: Order/Other

It is so Ordered!

s/Diane S. Goodstein

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Apr 21 2023

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

SC Court of Appeals

The Honorable Diane S. Goodstein

Case No.: 2022-CP-18-00295

LAURA ABERNATHY.....Plaintiff /Appellant,

v.

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

NOTICE OF APPEAL

I certify that I have served Appellant’s Notice of Appeal, with all supporting exhibits, dated August 21, 2023, on opposing counsel via e-mail, this 21th day of April, 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

Angela Gross
Legal Assistant to
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310

Angela Gross

From: Angela Gross
Sent: Friday, April 21, 2023 3:52 PM
To: 'Lionel Lofton'; Lynn Lofton
Cc: Angela Gross; Terri Ackerman; Jaan Rannik
Subject: Abernathy v. Lambert / Case No. 2022-CP-18-00295
Attachments: 2023 04 21 - Ltr to Ct. App. filing NOA.pdf; 2023 04 21 - Ltr to Lower Court filing NOA.pdf; 2023 04 21 - Notice of Appeal.pdf; EXH A - 2023 04 12 - Form 4 - Order Denying Motion to CONSOLIDATE.pdf; EXH B - 2022 12 19 - Order Denying Motion to Amend.PDF; 2023 04 21 - Ltr to Court Reporter re 4-6-23 hearing transcript.pdf; 2023 04 21 - Ltr to Court Reporter re 10-4-22 hearing transcript.pdf

Counsel:

Attached for service please find the following:

- Appellant's Notice of Appeal, with supporting exhibits, dated April 21, 2023;
- Letter to the S.C. Court of Appeals dated April 21, 2023;
- Letter to the Charleston County Clerk of Court filing Notice of Appeal dated April 21, 2023;
- Letter to Court Reporter requesting transcript of October 4, 2022 hearing; and
- Letter to Court Reporter requesting transcript of April 6, 2023 hearing.

A Proof of Service will follow under separate email.

With kindest regards,



Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esq.
Jaan G. Rannik, Esq.
Clinton T. Magill, Esq.
EPTING & RANNIK, LLC
46A State Street
Charleston, SC 29401
Telephone: (843) 377-1871
Facsimile: (843) 377-1310
agg@epting-law.com

From: Lionel Lofton <lionel@loftonandlofton.com>
Sent: Monday, March 6, 2023 9:52 AM
To: Jaan Rannik <jgr@epting-law.com>; Lynn Lofton <lynn@loftonandlofton.com>; mbarfield@barnwell-whaley.com
Cc: Angela Gross <agg@epting-law.com>; Terri Ackerman <terri@loftonandlofton.com>
Subject: RE: Abernathy v. Lambert

Jaan,

This issue has already been ruled on by Judge Goodstein during the Motion to Amend Hearing.

Thanks,
Lionel

From: Jaan Rannik [<mailto:jgr@epting-law.com>]

Sent: Friday, March 3, 2023 2:13 PM

To: Lionel Lofton <lionel@loftonandlofton.com>; Lynn Lofton <lynn@loftonandlofton.com>; mbarfield@barnwell-whaley.com

Cc: Angela Gross <agg@epting-law.com>; Terri Ackerman <terri@loftonandlofton.com>

Subject: Abernathy v. Lambert

Dear Lionel, Lynn, and Michael (and it's nice to meet you, Michael!),

Now that summary judgment has been ruled upon in the DJ action and the wrongful termination case has been filed, I intend to move to consolidate the two cases. I expect you will not consent, but if I am mistaken, please let me know and I will prepare a consent order.

Best regards,
Jaan

Jaan G. Rannik, Esq.
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
jgr@epting-law.com

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EXHIBIT 9

The South Carolina Court of Appeals

Laura Abernathy, Appellant.

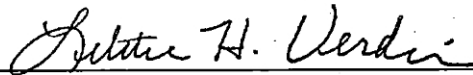
v.

Ervin W. Lambert, Sr., Personal Representative of The
Estate of Ervin E. Lambert, Jr. Deceased, Respondent.

Appellate Case No. 2023-000655

ORDER

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 269, 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)); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (explaining the analysis of issues of denial of a mode of trial "proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case"); *id.* (holding that a party appealing an order requiring the bifurcation of issues and discovery is not immediately appealable because no party was denied the right to a jury trial); *id.* at 73, 533 S.E.2d at 333 (stating an immediate appeal pursuant to § 14-3-330(2) is "permitted only where the alleged error cannot be corrected by a new trial" and "[t]o hold otherwise would require this Court to, *inter alia*, predetermine the admissibility of evidence in advance of trial, to pass upon matters of pretrial discovery and to engage in 'piecemeal litigation'" (citing *Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11 (2000))).



FOR THE COURT

FILED
Jan 10 2024

Columbia, South Carolina

cc:

Jaan Gunnar Rannik, Esquire

Lionel S. Lofton, Esquire

V. Lynn Lofton, Esquire

Clinton Thomas Magill, Esquire

EXHIBIT 10

RECEIVED

Feb 09 2024

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 ABERNATHY.....Plaintiff / *Appellant*,

v.

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

PETITION FOR REHEARING

NOW COMES Appellant, Laura Abernathy (“Ms. Abernathy”), by and through her undersigned counsel, pursuant to Rule 221(a), SCACR, following the filing of this Court’s Order filed January 10, 2024 dismissing this appeal (the “Subject Opinion”), and hereby timely petitions for rehearing of this matter, contending most respectfully that the Court overlooked and/or misapprehended material points, namely that the denial of Ms. Abernathy’s Motion to Consolidate will mean that factual issues about which she has requested a jury trial will be decided nonjury, denying her the right to a jury trial on those issues.¹

¹ Further, because the determination of whether a jury trial has been denied to Appellant is closely tied to the facts of the appeal, this Court may consider permitting the appealability issue to be decided with the merits of the appeal, when the briefing is complete and Court has the benefit of a Record on Appeal.

BACKGROUND

There are two lawsuits relevant to this appeal. One is set to be tried nonjury, and the other to a jury. In the first, Ms. Abernathy filed a nonjury 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,” Case No. 2022-CP-18-00295). **Exh. 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 additional causes for (i) wrongful termination and (ii) malicious prosecution against Respondent Erwin W. Lambert, Sr. (“Mr. Lambert”) and, L&L Contractors, the company Mr. Lambert inherited from upon the death of his son, Erwin W. Lambert, Jr. (“the Decedent”). **Exh. 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. **Exh. 3.** Thus, at this time, Ms. Abernathy had not been denied a jury trial on her new causes of action; rather, she was simply required to file them in a separate action that could be tried to a jury. On October 14, 2022, Ms. Abernathy filed the separate action as directed by the Court and requested a jury trial (“the Wrongful Termination Action,” Case No. 2022-CP-18-01582). **Exh. 4.**

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. **Exh. 5.** The factual basis of the breach of agreement claim directly overlaps with the factual basis of her claim to be the equitable owner of the property in dispute in the DJ Action — both center upon the same agreement allegedly made between Mr. Abernathy and the Decedent. Ms. Abernathy alleges that agreement (“the Agreement”) provided that, in exchange for her past good performance at her job with Decedent’s

company, L&L Contractors, *and* for her continued and future assistance to be given to the Decedent and his company regarding a lawsuit they had filed, she would receive: (i) the property that is the subject of the DJ Action, *and* (ii) a monetary bonus in the event the lawsuit settled favorably. Ms. Abernathy alleges both prongs of the Agreement were breached.

On March 17, 2023, Ms. Abernathy moved to consolidate the two cases (**Exh. 6**), 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. The trial court denied the motion on April 12, 2023. **Exh. 7**.

Ms. Abernathy timely noticed her appeal on April 21, 2023. **Exh. 8**. On January 10, 2024, this Court entered the Subject Order dismissing the appeal. **Exh. 9**. On January 25, this Court granted Ms. Abernathy a fifteen-day extension to file the instant petition for rehearing (**Exh. 10**), which she now files.

STANDARD OF REVIEW

A petition for rehearing shall state with particularity the points supposed to have been overlooked or misapprehended by the court. S.C.A.C.R. 221(a). While this Court usually does not entertain petitions for rehearing of a motion, it will do so when the effect of the order resolving the motion is to dismiss the appeal. SCACR 221(c).

ARGUMENT

There are two motions at issue in this appeal – a Motion to Amend the complaint in the DJ Action, and a subsequent Motion to Consolidate the DJ Action and the Wrongful Termination Action. Ms. Abernathy contends that denial of the latter, the Motion to Consolidate, has the effect of denying her the right to a jury trial because it necessarily means certain common issues between the two suits will be tried nonjury instead of to a jury. Moving to dismiss this appeal, Respondent

contended the denial of the earlier Motion to *Amend* denied Ms. Abernathy a jury trial, and Ms. Abernathy therefore waived her right to a jury trial by not immediately appealing the earlier order.

Dismissing the instant appeal, the Subject Opinion from this Court stated:

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)); [. . .].

Subject Order at 1.

There are various ways the holding of Subject Order can be understood, for example: (i) Ms. Abernathy was *not* denied a jury trial by virtue of the denial of the Motion to Consolidate from which she appealed, rendering the orders interlocutory, (ii) Ms. Abernathy *was* denied a jury trial by virtue of the earlier denial of her Motion to *Amend*, and therefore has waived her appellate rights by not immediately appealing that order, rendering the orders interlocutory, or (iii) both. Any of these three conclusions would, respectfully, be a misapprehension of the circumstances present.

I. The Denial of the Motion to Amend Did Not Deny Ms. Abernathy Her Right to a Jury Trial; Denial of the Motion to Consolidate Did.

The trial court’s December 19, 2022 order denied Ms. Abernathy’s Motion to Amend her complaint and add new claims in the DJ Action, requiring instead that she file the claims in a separate action, at which time Ms. Abernathy could request a jury trial on those claims. This she promptly did, thus preserving her right to have a jury decide those claims and the factual

underpinnings thereof. And so, the denial of the Motion to Amend did not deny Ms. Abernathy a jury trial on her new claims; it simply held that they could not be added to the existing DJ Action.

A. The Denial of the Motion to Consolidate Denies Ms. Abernathy a Jury Trial on Key Issues.

Further—and here is where the undersigned submits that the record on appeal would be of assistance to the Court in deciding this issue—the proposed amended pleading submitted along with the Motion to Amend contained only two new causes of action: (i) Wrongful Termination and (ii) Malicious Prosecution. After the Motion to Amend was denied, Ms. Abernathy filed the Wrongful Termination Action and requested a jury trial.

The operative pleading in the Wrongful Termination Action contains *three* causes of action – (i) Wrongful Termination, (ii) Malicious Prosecution, and (iii) Breach of Agreement. It is this third cause of action that particularly requires the two cases be tried together, because it relates to the same alleged Agreement that underpins Ms. Abernathy’s contentions in the DJ Action, which concerns Ms. Abernathy’s claim to be the title owner of the house in question. Ms. Abernathy contends in the DJ Action that it was Decedent’s demonstrable intent that Ms. Abernathy would become the record owner of the property and that she would have but for the Decedent’s untimely demise. Because Ms. Abernathy requested a jury trial in the Wrongful Termination Action, she is entitled to have the factual underpinnings of all of her claims in that case decided by a jury, including all factual determinations regarding the Agreement.

However, the DJ Action was filed first and will be ready for trial by the court before the Wrongful Termination Action is ready for trial by jury. The DJ Action cannot be adjudicated without the Court making findings of fact as to the Agreement between Ms. Abernathy and the Decedent. But, Ms. Abernathy is entitled to have a jury make those findings of fact, not the Court, as those findings would bind Ms. Abernathy and the jury in the Wrongful Termination suit.

Accordingly, it was only when this third cause of action was not allowed to be combined with the claim in the DJ Action that Ms. Abernathy was denied a jury trial. This did not occur until the denial of the Motion to Consolidate. Therefore, the trial court's denial of the Motion to *Amend* did not deny Ms. Abernathy the right to a jury, the subsequent denial of the Motion to *Consolidate* did.

The order is therefore immediately appealable, and this appeal should not be dismissed.

II. *Flagstar*

The Subject Order cites the case of *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 553 S.E.2d 331 (2000) for the proposition that “the bifurcation of issues and discovery is not immediately appealable because no party was denied the right to a jury trial.” Subject Order at 1. That case is distinguishable from the present case.

Flagstar involved an order by the trial court bifurcating the case into two distinct trials—each to be decided by a jury²—because it found there was a threshold coverage issue that should be determined before the parties engaged in extensive discovery and a lengthy trial as to other coverage questions. Accordingly, the court bifurcated the case. Because both phases would be decided by a jury, the Supreme Court held that order was not immediately appealable because no party had been denied the right to a jury trial.

Here, in contrast, the first “phase” would be *nonjury*, and factual determinations made therein would bind the jury and the parties in the second “phase.” Accordingly, the cases are distinguishable, and the underlying order *is* immediately appealable.

² “Flagstar proposed that **a jury** would first determine whether Exclusion C operated to preclude coverage. . . . If not, trial would proceed on to the issues of whether the acts constituted ‘occurrences’ or ‘personal injury’ under the policy.” *Flagstar*, 341 S.C. at 70, 533 S.E.2d at 332 (emphasis added).

CONCLUSION

For these reasons, Ms. Abernathy respectfully submits that it was error to dismiss the appeal, requests rehearing on Respondent’s Motion to Dismiss, and requests that the Motion to Dismiss be denied. Should the Court deem it appropriate, Ms. Abernathy has no objection to the Motion to Dismiss being denied without prejudice to raise the issue of appealability in the briefing.

Respectfully submitted:

EPTING & RANNIK, LLC

This 9th day of February, 2024
Charleston, South Carolina

/s/ Jaan Rannik
Jaan G. Rannik
Clinton T. Magill
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
Fax: 843-377-1310
jgr@epting-law.com
ctm@epting-law.com

ATTORNEYS FOR PLAINTIFF/APPELLANT

EXHIBIT 11

The South Carolina Court of Appeals

Laura Abernathy, Appellant.

v.

Ervin W. Lambert, Sr., Personal Representative of The
Estate of Ervin E. Lambert, Jr. Deceased, Respondent.

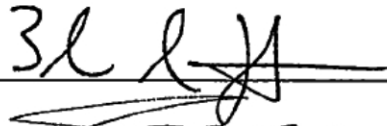
Appellate Case No. 2023-000655

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED
May 14 2024

cc:

Jaan Gunnar Rannik, Esquire

Lionel S. Lofton, Esquire

V. Lynn Lofton, Esquire

Clinton Thomas Magill, Esquire

EXHIBIT 12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein

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

LAURA ABERNATHY.....Appellant,

v.

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

**RESPONDENT’S MOTION TO DISMISS AND MEMORANDUM OF LAW IN
SUPPORT THEREOF**

Respondent respectfully moves before this Court for an order dismissing the Appeal filed by the Appellant on the basis (1) Appellant has waived her right to review of these orders by not immediately appealing the denial of her motion to amend which raised the same or similar “mode of trial” issue set forth in this appeal; (2) the orders are interlocutory and not immediately appealable pursuant to § 14-3-330(2) and the related case law because Appellant has not been denied a right to a jury trial as a matter of right. Respondent respectfully requests that this Court dismiss this appeal and remand the case for further proceedings.

BACKGROUND

Ervin Lambert, Jr., (hereinafter "Decedent") was the sole owner and manager of L&L Contractors, Inc. (hereinafter "L&L") until his untimely death in 2018. Ms. Abernathy was employed as a Project Manager at L&L until her termination in 2020. See, DJ Complaint, attached as **Ex. A**.

Approximately three years prior to Decedent's death, he and Ms. Abernathy executed a buy-sell agreement to purchase a residence (hereinafter "Subject"). Prior to closing on the Subject, Ms. Abernathy executed an addendum to the purchase agreement, removing herself as a co-purchaser of the Subject. The General Warranty Deed for the Subject was properly recorded in the Office of the Register of Deeds for Dorchester County in Decedent's name. See, Memo Opp. Consolidation attached as **Ex. B**; Order Denying Motion to Amend attached as **Ex. C**; and Memo Opp. Motion Amend attached as **Ex. D**.

Immediately after closing on the Subject, Decedent allowed Ms. Abernathy to reside in the house while she was employed with L&L. It was not uncommon for Decedent to allow employees to reside in the various properties he owned while they were working for his company. Decedent continued to pay the property taxes and the repairs for the Subject until his death when the Estate took over the payments. See, Trans. Hrg' Motion to Consolidate attached as **Ex. E** at 5.

In October 2018, Decedent and his wife died in a plane crash in the Atlantic Ocean. Decedent's father Ervin W. Lambert, Sr. (hereinafter "Mr. Lambert" or "Respondent") was appointed as the Personal Representative of his son's estate. **Ex. C** at 2. Ms. Abernathy continued to work for L&L until her employment was terminated in April 2020. After her termination, Mr.

Lambert as PR for the Estate sought to secure the Subject for inclusion in his son's estate. Mr. Lambert requested Ms. Abernathy vacate the premises and after she refused, he served her with eviction papers. **Ex. E** at 13.

FACTUAL AND PROCEDURAL HISTORY

In June 2020, Ms. Abernathy (hereinafter "Appellant" or "Ms. Abernathy") filed a Declaratory Judgment action (2022-CP-18-00295)¹ arising out of equitable ownership rights she had in the Subject. Ms. Abernathy brought this action in equity with causes of action that sought imposition of a constructive/resulting trust quieting title in her favor. As part of her DJ Complaint, Ms. Abernathy alleged that she and the Decedent had an oral arrangement whereby she would become a fifty percent (50%) owner in the Subject around closing and thereafter a sole and absolute owner, in lieu of a cash bonus, for work already performed while an employee at the Decedent's company, L&L Contractors Inc. **Ex. A**. However, prior to closing Ms. Abernathy of her own volition removed herself as a co-purchaser and never obtained any ownership rights in the Subject which was deeded solely in the Decedent's name. *See, Ex. C* at 2; **Ex. D** at 2.

In September 2021 the DJ action was stricken from the docket pursuant to SCRCP 0(J) in order to allow both parties time to finish discovery and be ready for trial when the case was restored to the non-jury docket. Shortly there after, Ms. Abernathy's counsel notified counsel for Mr. Lambert that he would no longer be representing Ms. Abernathy. **Ex. C** at 2.

In February 2022, Ms. Abernathy's new counsel restored the DJ action to the non-jury docket. Approximately seven months later, Ms. Abernathy filed a Motion to Amend her Complaint

¹ Case Number changed when it was restored in 2022.

to join additional defendants and claims. Specifically, Ms. Abernathy sought to add claims for Wrongful Termination and Malicious Prosecution, and to add defendants, Ervin W. Lambert, Sr., individually and L&I Contractors Inc.² See, Motion to Amend, attached as **Ex. F**. The lower court heard Ms. Abernathy's motion to amend on October 4, 2022, and denied said motion by oral order that day and written order filed on December 19, 2022. See Trans. Hrg' Motion to Amend attached as **Ex. G**; **Ex. C**. Specifically the lower court, found that separate trials would be more appropriate based on the relationship of the claims and the parties, and more efficient since the DJ action had been pending for almost three (3) years and should be ready for trial. Moreover, the Court found that the delay and the amendment prejudiced Mr. Lambert. The lower court further explained that Ms. Abernathy still had time to file these new actions in a separate law suit and would not be prejudiced from advancing claims relating to retaliation and eviction in the trial of this separate action. **Ex. C** at 7; **Ex. G**, 17-21.

On October 14, 2022, Ms. Abernathy filed the new law suit (2022-CP-18-01582) for causes of action arising out of wrongful termination and malicious prosecution. See, Wrongful Termination action attached as **Ex. H**. On March 16, 2023, Ms. Abernathy amended her Wrongful Termination action to add an addition claim for breach of agreement. See, Amended Wrongful Termination Action, attached as **Ex. I**. The following day, Ms. Abernathy filed her Motion to Consolidate the DJ action with this second law suit (2022-CP-18-01582). See, Motion to Consolidate, attached as **Ex. J**. The lower court heard arguments from counsel and denied the motion. See Form 4 Order denying Consolidation, attached as **Ex. K**. On April 21, 2023, Ms. Abernathy filed her Notice of

²Ms. Abernathy did not seek to add the breach of agreement cause of action in her motion to amend.

Appeal, appealing the orders denying her motions to amend and to consolidate on the basis that she would be denied a right to a jury trial. *See*, Notice of Appeal.

ARGUMENTS

I. The Appeal should be dismissed because Ms. Abernathy failed to immediately appeal the denial of her motion to amend which alleges the same or similar “mode of trial”(right to a jury trial) issue as raised in this appeal.

Pursuant to §14-3-330(2), our Supreme Court has held “that when a trial court’s order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 334 (2000). Orders that deny a party’s right to a mode of trial must be appealed immediately or they can not be raised in a subsequent appeal. *See Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct.App.2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost). The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997).

Ms. Abernathy argues that she would be denied her right to a jury trial because there are intertwined issues of fact in the DJ and Wrongful Termination actions. Specifically, Ms. Abernathy alleges that “material common issues of fact exist between the two actions” and then she provides examples. In the first example she states that in both cases her “unwillingness to perform illegal actions on behalf of L&L Contractors led to her being retaliated against” and that “in the DJ action this would be the basis for her equitable argument that she be declared the equitable title holder of

the property". Appellant's Initial Brief, 5-6. However, these were the same arguments raised to the lower court in her motion to amend. **Ex. G, 3-7.** If these actions argued by Ms. Abernathy during the motion to amend hearing affected Ms. Abernathy's alleged right to a jury trial as she argues now in her initial brief, she was obligated to immediately appeal the denial of her motion to amend in order to protect those rights or lose them. Our Supreme Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. §14-3-330(2) and must be appealed immediately. *Lester v. Dawson*, 327 S.C. 263, 255, 491 S.E.2d 240,241 (1996). E.g., *Foggie v. CSX Transp.*, 313 S.C. 98, 431 S.E.2d 587 (1993) ("Issues regarding mode of trial must be raised in the trial court at the **first** opportunity, and the order of the trial judge is immediately appealable."). Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. *Id.*

Furthermore because Ms. Abernathy has waived her mode of trial argument by failing to immediately appeal the denial of her motion to amend, the Court should dismiss this appeal. Ms. Abernathy should not be allowed to circumvent the law by asserting the same mode of trial issue which she previously waived. Because the orders denying her motions to amend and for consolidation were interlocutory and this Court's jurisdiction is based on §14-3-330(2), which jurisdiction no longer exists, the Court should dismiss the appeal and remand the case back to the lower court.

II. The Appeal should be dismissed because trying the equitable (“DJ”) action first and the at law action (Wrongful Termination) second does not violate Ms. Abernathy’s right to a jury trial as a matter of right making these orders immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) nor does it invoke the doctrines of Res Judicata or Collateral Estoppel preventing a full and fair opportunity to litigate the Wrongful Termination action to a jury.

“The constitutional provision (Art. I, Section 14), that the right of jury trial shall remain inviolate, does not apply to cases within the equitable jurisdiction of the court.” *Pelfrey v. Bank of Greer*, 270 S.C. 691 (1978). The proper analysis in determining whether Ms. Abernathy has been denied a mode of trial to which she is entitled to as a matter of right is simply to determine whether or not she has been wrongfully denied a trial by jury in a law action or wrongfully forced to proceed before a jury in an equitable action. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 334 (2000).

As Justice Pleicones noted in his dissent in *Salmonsén*, “the ‘mode of trial’ exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” 377 S.C. at 461, 661 S.E.2d at 91. Here, there has been no abridgment of Ms. Abernathy’s right to a jury trial for the reasons and arguments set forth below.

A. Ms. Abernathy is not entitled to a jury trial in the DJ action as a matter of right because it arises in equity and seeks an equitable remedy.

Ms. Abernathy’s first case (2022-CP-18-00295) is a DJ action against the Estate of Ervin W. Lambert, Jr. (Deceased) which seeks to quiet title to a residence based on claims of a constructive/resulting trust. See, Ex. A.

The relevant question in determining the right to a trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions. *Const. Art. 1. § 14; Verenes v. Alvanos*, 387 S.C. 11 690 S.E.2d 771 (2010) reh'g denied (April 7, 2010). While under Rule 39 (c), *SCRCP*, “a jury may render an advisory verdict in equity matters, it may not however render a verdict granting ultimate relief unless consented to by both parties. Whether an action is legal or equitable is primarily determined by the allegations in the complaint. *Nat'l Bank of South Carolina v. Daniels*, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). “Characterization of an action as equitable or legal depends on [Ms. Abernathy’s] ‘main purpose’ in bringing the action.” *Ins. Fin. Servs, Inc. V. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). “The main purpose to the action should generally be ascertained from the body of the complaint or if necessary from the prayer for relief.” *Id.*

The main purpose of the DJ action centers on Ms. Abernathy’s belief that she has equitable ownership rights in the Subject. Based on these allegations she seeks the trial court impose a constructive/resulting trust quieting title in her favor.

However, the only question before the lower court in the DJ action would be whether or not Ms. Abernathy owns the Subject based on an equitable right. This declaration of rights by the lower court would have no bearing on Ms. Abernathy’s “Wrongful termination” action or her ability to fully litigate that action.

Actions to quiet title and actions to declare constructive and resulting trusts arise in equity. *See Johnson v. Arbabi*, 355 S.C. 64, 584 S.E.2d 113 (2003) (An action to quiet title is an action in equity); *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) (An action to declare a constructive trust is in equity) *Jocoy v. Jocoy*, 349 S.C. 441, 444, 562 S.E.2d 674, 675 (Ct. App.

2002). (Actions to determine resulting trusts sound in equity). Moreover, the standard of proof required in order to establish a constructive/resulting trust, requires that the evidence must be clear, definite, and unequivocal, a much higher burden of proof than the claims set forth in Ms. Abernathy's Wrongful Termination action which all require a mere preponderance of the evidence. *See, Lollis v. Lollis* 291 S.C. 525, 354 S.E.2d 559 (1987); (The burden of proof for claims seeking imposition of a constructive trust is clear and convincing evidence). *Privette v. Garrison*, 235 S.C. 119, 119, 110 S.E.2d 17, 21 (1959) (With a resulting trust the evidence to establish it must be clear, definite and convincing).

B. Ms. Abernathy is able to fully litigate her Wrongful Termination action to a Jury in a separate trial.

Ms. Abernathy has argued that the common theme to the DJ action and the Wrongful Termination action arises out of retaliatory conduct taken by Mr. Lambert and I&I Contractors, Inc., against her for failing to do numerous alleged illegal acts. *See, Appellant's Initial Brief at 3.* Furthermore, Ms. Abernathy argues that she would be denied the right to specifically raise and prove that the eviction attempts instigated against her were similar to the forms of retaliatory conduct alleged by her in the Wrongful Termination Action. *See, Appellant's Initial Br., 3-6.* However, this argument is flawed because Ms. Abernathy will not be prevented from fully litigating those issues regardless of whether the lower court finds she owns the house or does not own the house. Specifically, if the lower court finds that Ms. Abernathy does not own the house, Ms. Abernathy can still raise the issue that eviction proceedings were taken against her solely for retaliatory reasons because she had lived there for years while she was employed with L&I. The "eviction" issue and/or "common scheme" as asserted by Ms. Abernathy would still be preserved for litigation in her

Wrongful Termination suit. Furthermore, if the lower court finds that she owns the house then she can still argue that eviction attempts were used as an attempt for retaliation etc.

All of the causes of action set forth in Ms. Abernathy's Wrongful Termination action are at law. Furthermore, the burden of proof for each of the causes of action in the Wrongful Termination Action is by the preponderance of evidence as opposed to the heightened burden of proof found in the claims in the DJ action. It would not be fair to allow a jury to determine whether or not there was an enforceable agreement as to the house based on a preponderance of the evidence standard which is basically what Ms. Abernathy is requesting this Court to do. Ms. Abernathy is free to argue all of her claims in her Wrongful Termination action to a jury notwithstanding the affirmative defenses raised in the Amended Answer. *See*, Amended Answer(Wrongful Termination Action) attached as **Ex. L.**

C. The Doctrine of Res Judicata does not bar Appellant's right to a jury trial in her Wrongful Termination action.

Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties or could have been raised during the prior action. *Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999). Res Judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by the court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc.*, 327 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). Res judicata will not bar Ms. Abernathy's right to a jury trial in her subsequent wrongful termination action. Specifically,

the subject matter at issue in the DJ action is simply whether or not Ms. Abernathy has equitable rights in the house pursuant to an oral arrangement she had with the Decedent. Ms. Abernathy has to prove that equitable right by clear and convincing evidence. *See, Lollis v. Lollis* 291 S.C. 525, 354 S.E.2d 559 (1987); (The burden of proof for claims seeking imposition of a constructive trust is clear and convincing evidence). *Privette v. Garrison*, 235 S.C. 119, 119, 110 S.E2d 17, 21 (1959) (With a resulting trust the evidence to establish it must be clear, definite and convincing).

Furthermore, while *res judicata* normally applies to issues that were previously raised or could have been raised in an earlier action, declaratory judgment actions are different. “As one legal treatise has observed, *res judicata* does not apply to declaratory judgments, but only as to issues *actually decided* by the court:

Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby but, in addition, also all matters which could have been presented for adjudication. *A declaratory judgment is not res judicata as to matters not at issue and not passed upon.* Unlike other judgments, a declaratory judgment determines only what it actually decides and does not preclude, under *res judicata* principles, other claims that might have been advanced. *Catawba Indian Nation v. State*, 407 S.C. 526, 539-4-, 756 S.E.2d 900, 908 (2014) citing 22A Am.Jur.2d Declaratory Judgments § 244 (2013).

The only issue before the lower court in the DJ action is the ownership rights of the Subject property. *See, Ex. A.*

D. The Doctrine of Collateral Estoppel does not bar Ms. Abernathy's right to fully litigate her Wrongful Termination action before a jury.

The doctrine of collateral estoppel, also known as "issue preclusion", prevents an issue from being re-litigated in a subsequent action when an issue has been actually litigated and determined by a valid and final judgment. *S.C. Prop. and Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action. *Id.* Mr. Lambert submits collateral estoppel will not be an issue in the DJ action as it will be limited solely to the issue of who owns the house. Ms. Abernathy would not be afforded a full and fair opportunity to litigate her Wrongful Termination claims in the DJ action so estoppel can not be used against her.

Moreover, the Restatement (Second) of Judgments § 28 (1982 as amended) enumerates five exceptions to the general rule of issue preclusion:

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action. *Pye v. Aycock*, 325 S.C. 426, 437, 480 S.E.2d 455 (1997). *See Also McHan v. C.I.R.*, 558 F.3rd 326 (4th Cir. 2009).

In the DJ action the burden of proof required to establish a constructive/resulting trust is clear and convincing evidence, a much heavier burden compared to that required to establish the claims in the Wrongful Termination which only require a preponderance of the evidence.

CONCLUSION

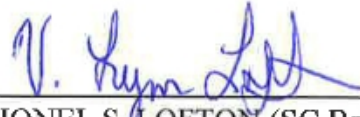
The Respondent respectfully requests that this Court dismiss Ms. Abernathy's appeal on the basis that Ms. Abernathy has waived her right to argue mode of trial in this appeal by not immediately appealing the denial of her motion to amend which first raised the mode of trial issues. Moreover, the two orders are interlocutory and not immediately appealable because they do not affect her right to a jury trial or her ability to fully litigate her Wrongful Termination action. The DJ action has been pending for over three (3) years and was number one on the non-jury docket when this appeal was filed. The trial of the DJ action has been delayed over and over again. On the other hand the Wrongful Termination action is in its infancy and will likely drag out in the courts for another three (3) years as the action is currently stayed with nothing having been done on the case since the filing of the Amended Answer. This case has been plagued by dilatory tactics and the procedural history has been arduous and contentious. See Ex.'s **B, D, E** and **G**.

For over three years now Ms. Abernathy has lived in a house which doesn't belong to her where she has paid no rent, no property taxes and which Mr. Lambert has had to make repairs. It is highly prejudicial and unfair to the Decedent's beneficiaries (the children left behind from their parents death) to prevent Mr. Lambert, as their representative, from having his day in court. This appeal was procedurally planned as another dilatory tactic to stymie the DJ action and is absolutely without merit. Ms. Abernathy should not be rewarded for sitting on her rights and playing procedural games with the lower court and now this Court. This appeal does not affect Ms. Abernathy's right to a mode of trial to which she is entitled to as a matter of right. Therefore, Mr. Lambert respectfully requests this Court dismiss the appeal and remand the case back to the lower court so that the DJ action can be tried and the Wrongful Termination action can move forward.

Respectfully Submitted,

LOFTON & LOFTON, P.C.

BY:



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Charleston, South Carolina

October 26, 2023

RECEIVED

Jun 21 2024

SC Court of Appeals

The State of South Carolina
In the Supreme Court

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 ABERNATHY..... Plaintiff /Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on opposing counsel
via e-mail this 21st day of June, 2024, addressed to Respondent’s 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

Angela Gross
Legal Assistant to
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310

EXHIBIT A

From: [Angela Gross](#)
To: "lynn@loftonandlofton.com"; "lionel@loftonandlofton.com"
Cc: [Jaan Rannik](#); [Angela Gross](#)
Subject: Abernathy v. Lambert / Appellate Case No.: 2023-000655
Date: Friday, June 21, 2024 2:53:00 PM
Attachments: [2024 06 21 - LT Supreme Court filing Petition for Certiorari.pdf](#)
[2024 06 21 - Petition for Writ of Certiorari.pdf](#)
[Ex. 1 - 2020 06 12 - Summons and Complaint with exhibit.pdf](#)
[Ex. 2 - 2020 09 20 - Motion to Amend Complaint.pdf](#)
[Ex. 3 - 2022 12 19 - Order Denying Motion to AMEND.PDF](#)
[Ex. 4 - 2022 10 14 - Summons and Complaint \(Wrongful Termination\).pdf](#)
[Ex. 5 - 2023 03 16 - Amended Summons and Complaint.pdf](#)
[Ex. 6 - 2023 03 17 - Motion to CONSOLIDATE.pdf](#)
[Ex. 7 - 2023 04 12 - Form 4 - Order Denying Motion to CONSOLIDATE.pdf](#)
[Ex. 8 - Notice of Appeal.pdf](#)
[Ex. 9 - 2024 01 10 - Order Granting Motion to Dismiss.pdf](#)
[Ex. 10 - 2024 02 09 - Petition for Rehearing \(003\).pdf](#)
[Ex. 11 - 2024 05 14 - Order Denying Petition for Rehearing.pdf](#)
[Ex. 12 - 2023 10 26 - Respondent's Motion to Dismiss and Memo of Law.10262023.pdf](#)

Lynn and Lionel,

Attached for service, please find the Petition for Writ of Certiorari together with the exhibits (1-12) in the above-referenced appeal. The Proof of Service will follow under separate email cover.

Please disregard my email below because it did not include the exhibits. I apologize for any inconvenience.

With kindest regards,



Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esq.
Jaan G. Rannik, Esq.
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46A State Street
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From: Angela Gross
Sent: Friday, June 21, 2024 2:46 PM
To: lynn@loftonandlofton.com; lionel@loftonandlofton.com
Cc: [Jaan Rannik <jgr@epting-law.com>](mailto:jgr@epting-law.com); [Angela Gross <agg@epting-law.com>](mailto:agg@epting-law.com)

Subject: Abernathy v. Lambert / Appellate Case No.: 2023-000655

Dear Counsel:

Attached for service please find the Petition for Writ of Certiorari in the above appeal. A proof of service will follow under separate email.

With kindest regards,



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Jun 21 2024

SC Court of Appeals

EPTING & RANNIK

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June 21, 2024

**VIA E-Filing and FedEx**

The Honorable Patricia A. Howard  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29211

RE: *Laura Abernathy v. Ervin W. Lambert, Sr.*  
Case No. 2022-CP-18-00295  
Appellate Case No.: 2023-000655

Dear Ms. Howard:

Enclosed please find a Petition for Writ of Certiorari and Proof of Service in the above matter.

I enclose my firm's check in the amount of \$250.00 for the filing fee.

With kindest regards,

EPTING & RANNIK



Jaan G. Rannik  
JGR/agg

cc:

The Honorable Jenny Abbott Kitchings, Clerk of Court  
All counsel of record (*via email only*)