

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-001812

Callawassie Island Members Club, Inc., Respondents

v.

Arthur Applegate, Appellant

INITIAL BRIEF OF APPELLANT

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SEP 23 2013

SC Court of Appeals

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Ward v. West Oil Company, Inc., 379 S.C. 225 at 238, (S.C.App. 2008)

Skinner v. Skinner, 257 S.C. 544, 590-50, 186 S.E.2d 523, 526 (1972).

Watts v. Bell Oil Co. of Ocean Drive, Inc., 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976)).

Statutory

South Carolina Constitution Article I § 14

South Carolina Rule of Civil Procedure 38

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Judge erred in order that the case be heard by the Master in Equity thereby denying the Appellant the right to a jury trial, where the Appellant properly requested a jury trial and where the case is a breach of contract claim for money damages, an action at law, to which the Appellant is entitled to a jury trial.
- II. Whether the Trial Judge in ordered that the Appellant could not have a jury trial exceeded the scope of the motion by finding facts and conclusions of law based upon documents and information not in evidence and where the finding and conclusions had the affect of granting judgment and making finding of fact, particularly where such findings and conclusions had been previously ruled upon and denied in the same case.

STATEMENT OF THE CASE

This appeal arises from a civil action filed by the Callawassie Island Members Club, Inc. filed in Beaufort County Common pleas in which the Respondent/Plaintiff alleged five instances of breach of contract against the Appellant/Defendant. The claims arise from what the Respondent claims are five memberships owned by the Appellant in the Respondent Club, for which the Respondent is seeking monetary relief for unpaid dues, fees, assessments, and other charge accrued, plus interest and the costs of the action. Prior to the date of trial in the action the Appellant stipulated to the dismissal of previously asserted counterclaims with the only matters remaining for trial being the five breach of contract claims of the Respondent (Stip. of Dismissal Order of May 9, 2013).

Based upon the Appellant's request for a jury trial in this case, the trial was set for a jury trial the week of May 13, 2013 in Beaufort County. On May 13, 2013 the assigned trial judge, the Honorable Edward W. Miller, held a pretrial conference for the case in his chambers in which there was pre-trial discussion including Respondent making arguments regarding its' motion to have the matter tried non-jury, which they served May 10, 2013 (Plaintiff's Mot. For Non-Jury Trial). The discussions were conducted in Judge Miller's chambers without a court reporter or transcript being made. Judge Miller was also provided Appellant's memorandum in opposition to the Respondent's motion. (Def. Memo in Opposition) Over the objection of the Appellant, Judge Miller appeared to grant the Respondent's motion and ordered that the case be referred to the Honorable Marvin Dukes, Master in Equity for Beaufort County (Order of May

14, 2013). The Order signed May 14, 2013 is a Form 4 Order which states "This case is referred to the Master in Equity." but does not indicate upon what basis the Order was made or specify upon whose motion said Order was being issued.

Subsequently, the Appellant properly and timely filed a motion to Alter or Amend the Order dated May 14, 2013 seeking to have the Order altered to deny the Respondent's motion to have the case heard non-jury and sought to have the case immediately restored to the jury trial roster. Secondly, if the Judge refused to deny the Respondent's motion, then the Appellant requested that the Order be altered to specify that it was based upon granting the Respondent's motion and was granted over the objection of the Appellant, to protect the Appellant's ability to appeal the same. (Mot. To Alter or Amend dated June 6, 2013)

Judge Miller denied the Appellant's motion to alter or amend signing that Order on July 17, 2013, filed July 23, 2013 (Order Miller dated July 17, 2013). In his Order of July 17, 2013, Judge Miller did note that the Appellant was denied a jury trial based upon the motion of the Respondent, but he did not alter the order to note the Appellant's objection to having the matter removed from the jury trial roster. In addition, Judge Miller issued new findings including finding that the Appellant only raised legal issues and raised no factual issues in the case which would warrant a jury trial. Judge Miller went on to find that documents at issue in the case are not ambiguous and therefore there are no issues of fact for a jury to consider. None of these findings were in the Order of May 13, 2013 nor does Appellant's counsel recall them being voiced by Judge Miller in the pretrial in-chambers conference upon which such Order is understood to have been based.

Appellant timely filed a Notice of Appeal in the instant case on August 19, 2013 seeking to have both the Order of May 13, 2013 denying the Appellant a jury trial, and the Order of July 23, 2013 which denied the Appellant's Motion to Alter or Amend and made new findings and conclusions, be reversed and the matter returned to the jury trial roster for a trial on the merits.

ARGUMENT

- I. The Appellant is entitled to a jury trial in this matter as protected by the South Carolina Constitution Article I, § 14, South Carolina Rules of Civil Procedure 38, case law since the current case is one based upon breach of contract seeking money damages, and where the Appellant requested a jury trial and did not consent to having the case heard non-jury.**

Whether a party is entitled to a jury trial is a question of law. An Appellate court may decide questions of law with no particular deference to the trial court. Wells Fargo Bank, NA v. Smith, 398 S.C. 487 at 492 (S.C.App. 2012) citing In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008).

State law is clear that the Appellant is entitled to a jury trial in this matter and he requested the same in his responsive pleadings. The South Carolina Constitution at Article I § 14 provides that “[t]he right of trial by jury shall be preserved inviolate.” South Carolina Rule of Civil Procedure 38 sets out in relevant part “The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must

be tried by a jury, unless a jury trial be waived.”... “A demand for trial by jury made as herein provided may not be withdraw without the consent of the parties...”.

Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions. Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386, 389 (S.C.App. 2004). An action for breach of contract seeking money damages is an action at law. South Carolina Federal Saving Bank v. Thornton-Crosby Development Company, Inc., 310 S.C. 232, 423 S.E.2d 114 (S.C. 1992) (citing Moore v. Crowley & Associates, Inc., 254 S.C. 170, 174 S.E.2d 340 (1970)). See also R.G. Construction, Inc., v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 540 S.E.2d 113 (S.C.App 2000). (“an action for the recovery of attorneys’ fees is an action in law rather than equity.”...”The proper form of action by which to enforce payment, generally, is by an action at law on the contract...”) Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (S.C. 1997).

The Complaint in this action is based solely upon the Respondent causes of action for breach of contracts seeking monetary damages. The Appellant has demanded a jury trial, which has not been disputed with such demand being acknowledged by the Respondent in their Motion for Non-Jury Trial (Mot. Non-Jury Trial p.2). Prior to the scheduled jury trial date, on or about April 26, 2013, the Appellant stipulated to the dismissal of all of the counterclaims he had alleged, and the parties subsequently filed an Order formalizing such dismissal,

making the only causes of action for trial the five breach of contract claims made by the Respondent (Stip. Dismissal Order of May 9, 2013).

The Respondent's Complaint alleges similar causes of action for breach of contract each based upon separate memberships in the Respondent, Callawassie Island Member Club, Inc., which the Respondent alleges are owned by the Appellant, namely membership #s, 7017A, 7017, 7017C, 7017B, and 3690. For each membership the Respondent is seeking, as their remedy, that they be awarded dues, fees, assessments and other charges, interest and the costs and disbursements of the action, including attorney's fees. The Appellant has denied that he owes the money claimed by the Respondent and in his Answer and responsive pleadings he has raised numerous defenses to these claims.

The Respondent has argued that the Appellant should be denied a jury trial because one issue raised in this case is whether the contract documents in this case are ambiguous. In his Order of July 23, 2013 Judge Miller adopted the Respondent's argument in which it relied up the case of Middleton v. Eubank, 388 S.C. 8 (S.C.App. 2010) to support the proposition that only if the contract is ambiguous would the Appellant have a right to a jury trial. However, in making this argument the Respondent and the court not only ignore the numerous other issues and defenses in the case they also confuse a *question of law* arising in a case with the very nature of the case itself as an *action at law*. In fact, it is quite common that jury trial cases would have issues of law to be determined by the court, but such determinations would not change the nature of the case from being an action at law. Likewise, such determinations would not change the nature of

the case to justify denying the Appellant's right to a jury trial in this case. Unlike the instant action, the Middleton case was a declaratory judgment action in which the parties consented to having the case heard by the Master in Equity. In the Middleton case the parties, in fact, all asserted that the contract was unambiguous, and the Judge heard the testimony and weighed the evidence in a two day trial. In this case, where no evidence or testimony was presented, and where the action is one at law, the Middleton case simply does not stand for the proposition for which it was relied upon by the Respondent and the Court. In fact, this court has held that even an action to construe an unambiguous contract is an action at law. Ward v. West Oil Company, Inc., 379 S.C. 225 at 238, (S.C.App. 2008). Therefore, even if the Court accepts the Respondent's argument, the case remains an action at law, such that it is rightly subject to be determined by a jury.

Furthermore, the Appellant has maintained and pled numerous affirmative and factual defenses, including that the contracts in this case have provisions that create defenses to the current claims, including clear language which sets forth terms of expulsion which would limit and terminate any fees and dues owed by the Appellant, if any (Amended Answer Counterclaims). The Order and the Respondent's assertion that there are no other issues for determination by the jury is completely refuted not only by these numerous defenses but also by the simple denial made to the Respondent's breach of contract allegations.

Quite simply, there is no basis existing in this case upon which the Appellant should be denied the right to have the matter heard by a jury. The South Carolina Constitution at Article I, § 14 and South Carolina Rule of Civil

Procedure 38 codify this right. The case is an action at law to which a right to a jury trial is protected and the court's erroneous reliance upon the possible existence of an issue at law, as opposed to an action at law, compels that the Orders of May 13, 2013 and July 17, 2013 in this case be reversed and the case be returned to the jury trial roster.

II. The Order denying Defendant's Motion to Alter or Amend filed July 23, 2013 is a violation of the right of the Appellant in as much as it exceeds the scope of the motions by finding facts and conclusions of law based upon documents and information not in evidence and where the finding and conclusions has the affect of granting judgment and making finding of fact, particularly where such findings and conclusions had been previously ruled upon and denied in the same case and where the ruling is upon informal and off record proceeding conducted in chambers.

In his Order signed July 17, 2013 Judge Mille finds and rules that 1) The Defendant only raised legal issues- (alleged to be only the interpretation of various statutes) – in contesting the Plaintiff's motion to transfer to the non-jury trial roster, 2) that the Defendant has not raised any factual issues in opposing the Plaintiff's motion, 3) that the documents at issue are unambiguous and 4) that there is no question of fact in the case.

No only are each of these findings wholly unsupported by the record in the case, but it was improper for the Judge to make these ruling in this circumstances given since the ruling exceeded the scope of the motion before it and contradicted previously made rulings in the case.

“A reversal is required when the trial court’s ruling exceeds the limits and scope of the particular motion before it. Skinner v. Skinner, 257 S.C. 544, 590-50, 186 S.E.2d 523, 526 (1972).” Wells Fargo Bank. NA v. Smith, 398 S.C. 487 at 499 (S.C.App. 2012). The trial court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law. Such impermissible findings of fact and conclusions of law should be reversed if they are prejudicial to the Appellant in this case. (Id at 500 citing Watts v. Bell Oil Co. of Ocean Drive, Inc., 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976)).

The order of July 23, 2013 on which the instant appeal is taken, has the effect of granting summary judgment and making findings of fact based on information not admitted or decided by the pleadings. In fact the Order wholly ignores the numerous defenses raised by the Appellant (Amended Answer Counterclaims). Second the Order rules upon whether the five contracts upon which the Respondent’s claims are based are ambiguous and then makes the finding and conclusion that there exists no issue of fact in the case. These finding are beyond the scope of the Respondent’s motion¹ to have the matter heard non-jury, were not presented to Judge Miller, and had been previously ruled upon in Orders received on motions previously argued by Respondent for Summary Judgment in the case, which were denied.

First, it is incorrect for the Respondent to assert (and for the Court to adopt the argument) that the Appellant has raised only the single issue of ambiguity of

¹ The Respondent’s motion to have the matter heard non-jury, upon which Order the instant appeal is taken, was served by regular mail upon the Appellant’s counsel on Friday May 10th prior to the May 13th trial date. The motion was also served by email at 4:33 pm on Friday May 10th 2013.

the contracts. In fact, although the ambiguity question is the only one upon which the Respondent based its motion, it is plainly obvious that the Appellant has asserted that he does not owe the amounts demanded for numerous reasons set forth in the Answer and as further evidenced by discovery in the case. For instance, the Defendant has argued in one defense that under the terms of the parties agreement that he owes no more than 4 months of past dues and fees due to the provisions in the agreement requiring expulsion after 4 months of unpaid dues and fees. (Amended Answer at p.3 lines 11-20 p. 6 lines 37- 44, p. 8 lines 45 – 47) In fact, the Appellant has in the course of defending summary judgment motions in the case provided a record of meritorious defenses. For instance, the Appellant in fact received a letter from the Respondent, prior to litigation indicating that he was going to be expelled in 10 days from the letter, which would effectively terminate his obligations. (Appellant Memo. in Opposition to Sum. Judg. May 8, 2013 p.5 & Exhibit E) These are but two examples out of many which are clear from the pleadings, filed memorandum and documentary evidence presented in the case that present defenses to the claims made against he Appellant, and any indication that Respondent is unaware or not on notice of such claims is untenable since these are filed documents of record.

In addition, the Respondent's reliance (and the Court's adoption of the argument) that Appellant failed to include a full rebuttal of all points and arguments made by the Respondent in Appellant's written response memorandum to the motion to have the made hear non-jury is unpersuasive given the fact that the Respondent waited until the eve of trial to make its motion and to notify the

Appellant of its motion in this case. In fact, the motion of the Respondent to have the matter heard nonjury was filed and served on May 10, 2013, the Friday prior to the Monday trial date, and was delivered to counsel by email at 4:33 pm on that same day (Email of Respondent counsel of May 10, 2013). Although the Appellant did respond (Def. Memo in Opp. to Plaintiff Mot.), he would ask the court to consider the lack of proper notice of Respondent's making the motion upon which the court relied to deny the Appellant a jury trial.

Most compellingly, the Respondent has made these same arguments on two separate occasions during the course of this case in motions requesting the court grant summary judgment, and in both instances the court denied the motions. (Respondent Motion for SJ of April 26, 2013 and June 2, 2010). On June 7, 2011 Judge Carmen Mullen heard the same issues as set forth in the Respondent's Memo in Support of its Motion for Summary Judgment and denied the motion as set forth in the Order of June 10, 2011 noting that there "exists questions of fact in dispute." (Order of June 10, 2011). Again in a Memo in Support of its renewed Motion for Summary Judgment dated May 7, 2013, the Respondent presented these same arguments to Judge Kinard, who issued a May 9, 2013 Order noting that "obviously facts are disputed." (Order of May 9, 2013) The Respondent filed a motion for Judge Kinard to Alter his Order and on June 28, 2013 Judge Kinard denied that motion.² (Order dated June 28, 2013)

In the instant appeal the Appellant notes that in denying the Appellant's motion to reconsider the Order of May 14, 2013 the court took the extraordinary

² In his Order of June 28, 2013 Judge Kinard makes note of the fact that many of the same issues had been previously argued and denied in the Order of Judge Carmen T. Mullen.

step of making new findings of fact and conclusions of law far beyond the scope of the informal in chambers conference held in the case, and made ruling which would only be properly made in a duly noticed and held summary judgment hearing, like the previous two in which the matters were fully presented and denied. By doing so, the court exceeded the scope of the Respondent's last minute motion to have the matter heard non-jury and exceeded the scope of the Appellant's motion to Alter or Amend. The July 17, 2013 Order in fact makes findings and conclusions upon evidence and testimony not before it, and effectively grants summary judgment on specific issues which had twice been ruled upon and denied in the case in hearings in which the parties presented memorandum and supporting documentation.

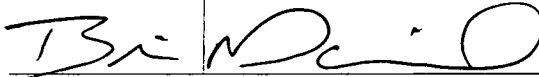
For these reasons the Appellant requests that the Orders of Judge Miller or May 14, 2013 and July 17, 2013 be reversed and the case be returned to the common pleas jury trial on all issues.

CONCLUSION

For the reasons set forth herein and as may be raised in any supplemental or reply brief, and as allowed in oral arguments, the Orders of May 14, 2013 and July 17, 2013 should be reversed for the reasons set forth above and the court should order that the Appellant is entitled to a trial by jury in this matter and that the matter be returned to be heard by a jury trial.

Respectfully submitted,

LAW OFFICE OF BRIAN MCDANIEL, LLC

A handwritten signature in black ink, appearing to read "Brian McDaniel", written over a horizontal line.

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**APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

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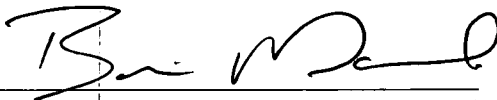
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Appellant's Designation of Matter to be included in the Record on Appeal:

1. Respondent/Plaintiff's Motion for Non-Jury Trial dated May 10, 2013
2. Appellant/Defendant's Memorandum in Opposition to Plaintiff's Motion to Convert to Nonjury Trial dated May 10, 2013
3. Order of Judge Edward W. Miller dated May 14, 2013.
4. Appellant's Motion to Alter or Amend Order dated May 14, 2013 – (Order of Judge Edward W. Miller) – dated June 6, 2013
5. Order of Judge Edward W. Miller dated July 17, 2013
6. Respondent/ The Callawassie Island Members Club, Inc.'s Motion for Summary Judgment dated April 26, 2013
7. Respondent/Plaintiff's Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant's Motions for Same dated May 7, 2013
8. Appellant/Defendant's Memorandum in Opposition to Plaintiff's Motions for Summary Judgment dated May 8, 2013
9. Order of Judge J. Ernest Kinard Jr. dated May 9, 2013
10. Respondent's Motion to Alter or Amend Order the May 9, 2013 Order of Judge J. Ernest Kinard Jr. dated May 15, 2013
11. Order of Judge J. Ernest Kinard, Jr. dated June 28, 2013
12. Respondent/Plaintiff's Notice and Motion for Summary Judgment dated June 2, 2010 with Exhibits A, B, & C
13. Filed Affidavit of William R. Hobson with Exhibits A through F dated June 2, 2011
14. Order of Judge Carmen T. Mullen dated June 10, 2011
15. Summons and Complaint dated November 13, 2009
16. Amended Answer Counterclaims and Third Party Complaint dated October 29, 2011

17. Stipulation of Dismissal of Counterclaims of the Defendant date May 9, 2013
18. Appellant's Supplemental Memorandum in opposition to Respondent's Motion for Summary Judgment dated May 30, 2013
19. Email of Respondent of May 10, 2013 4:33pm



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Rule 209(c) Certification: I certify that this designation contains no matter which is irrelevant to the appeal.



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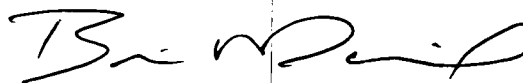
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant and Appellant's Designation of Matter to be included in the record on appeal on The Callawassie Island Members Club, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2013, addressed to its attorneys of record, Ehrick K. Haight, Jr., Esquire, P.O. Drawer 6067, Hilton Head Island, SC 29938; Howell, Gibson & Hughes, P.A., Stephen P. Hughes, Esquire, William T. Young, Esquire, P. O. Drawer 40, Beaufort, SC 29901-0040.

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