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**Apr 24 2025**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas  
The Honorable R. Scott Sprouse

Case No. 2020-CP-04-01202  
Appellate Case No. 2022-001527

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Moats Construction, Inc.,

Appellant,

v.

Cecil R. Dyar,

Respondent.

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APPELLANT'S PETITION FOR REHEARING

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Appellant requests rehearing pursuant to Rule 221(a), SCACR, regarding this Court's Opinion filed April 9, 2025.

## ARGUMENT

### **I. Moats Was Denied Its Right to a Jury Trial on Its Legal Claims.**

Moats Construction, Inc. ("Moats") contends that the lower court erred when it denied Moats the right to a jury trial on its legal claims. The relevant questions on this point of error are: (1) did Moats have a right to a jury trial on its claims; and, if so, (2) was Moats denied the right to a jury trial. The answer to both questions is a resounding yes.

"The South Carolina Constitution provides that the right of trial by jury is to be 'preserved inviolate.'" *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) (quoting S.C. Const. art. I, § 14). "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." *Id.* Causes of action for breach of contract and negligence are legal causes of action and provide a right to trial by jury. *Sterling Development Co. v. Collins*, 309 S.C. 237, 241, 421 S.E.2d 402, 404 (1992) ("An action for breach of contract seeking money damages is an action at law."); *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 271, 449 S.E.2d 580, 583 (Ct. App. 1994) (recognizing that a claim for negligence is an action at law), *aff'd in part and vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

#### **A. Moats was entitled to a jury trial on its breach of contract and negligence causes of action.**

Moats initiated this action and asserted claims against Cecil Dyar for breach of contract and negligence related to the possession and maintenance of real property in Anderson County (the "Property"), which are causes of actions at law with a right to trial by jury. (R. pp. 50, 52-53, Compl. 1, 4-5). Moats's legal claims were not simply payment defenses to Dyar's foreclosure

counterclaim, but were independent *legal* claims based on alleged breaches of Dyar’s duties under the relevant contract, the Agreement for Sale and Purchase of Real Property (the “Agreement”).

Moats asserted a legal claim for breach of contract, contending that Dyar breached the parties’ Agreement by failing to exercise good faith and fair dealing to keep the property insured when Dyar failed to pursue an insurance claim in 2017 that would have kept the building insurable after a 2017 hurricane damaged the roof. (R. pp. 52-53, Compl. ¶¶ 6-7). Moats also alleged that Dyar breached the Agreement by leaving numerous pieces of equipment on the Property, which interfered with Moats’s exclusive possession and entitled Moats to recover the reasonable rental value for the lost use of the Property. (R. p. 53, Compl. ¶ 8).

Moats also asserted a legal claim against Dyar for negligence. (R. pp. 53-54, Compl. ¶¶ 9-12). Moats contended that Dyar was negligent in failing to pursue insurance payment for the 2017 hurricane damage to the Property. (R. pp. 53-54, Compl. ¶¶ 10-12). Pursuant to a mutual modification to the Agreement, Dyar undertook a duty to maintain insurance coverage on the Property and to pursue insurance claims for damage to the building. (R. p. 53, Compl. ¶ 10). Moats contended that Dyar breached this duty when he settled a roof damage claim for \$3.31 where the estimated repairs were in excess of \$100,000. (R. p. 472, lines 3-25).

Based on the allegations in Moats’s complaint, the answer to the first question is therefore “yes”; Moats was entitled to a jury trial on its legal causes of action for breach of contract and negligence.

**B. Moats was denied the right to a jury trial on its legal causes of action.**

The second question is whether Moats was deprived of its right to a jury trial. This question concerns the procedural history of the case. A jury never heard Moats’s legal claims because the lower court granted summary judgment on Dyar’s equitable foreclosure counterclaim, held a

damages hearing, entered judgment, and ended the case by ordering the sale of the Property, all before Moats could move forward with discovery and a jury trial on its legal claims.

Moats acknowledged that foreclosure was a proper remedy for Dyar under the Agreement, as the Court observed in its Order; however, Moats never agreed that foreclosure and sale of the Property should proceed ahead of its legal claims. Throughout the lower court proceedings, Moats repeatedly brought to the court's attention its right to proceed with a jury trial on its legal claims before a final resolution of Dyar's equitable counterclaim, including before the entry of foreclosure in its briefing in opposition to summary judgment, (R. pp. 138-39), and in moving the court to reconsider its order granting summary judgment, (R. p. 146-47, Mot. Reconsider & Amend ¶ 1 (May 7, 2021); R. pp. 150, 153, Am. Mot. Reconsider & Amend at 2, 5 (June 19, 2021)). Then, before the damages hearing commenced, Moats's counsel twice reiterated to the court Moats's position that its legal claims should proceed ahead of Dyar's equitable counterclaim. (R. pp. 267, line7-268, line 21). Moats's counsel again raised the issue while moving the court to reconsider the order entering damages. (R. pp. 186-87). In each instance, the circuit court denied Moats's request to pause the equitable foreclosure proceeding. The case ended with the court setting damages, ordering a judgment of foreclosure, and directing the sale of the Property without a jury, or anyone, hearing Moats's legal claims. (R. p. 34). This was error.

This case is procedurally similar to *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). In *Bateman*, the plaintiff asserted equitable causes of action and a legal cause of action for conversion but did not request a jury trial; however, defendant Rouse answered and demanded a jury trial. The trial court denied Rouse's request for a jury trial, believing the entire action to be in equity, and the case proceeded with a bench trial. *Id.* at 672, 596 S.E.2d at 388. On appeal, the question was whether the lower court properly denied Rouse the right to a jury trial

on the conversion cause of action. After concluding that conversion is an action at law, this Court had no trouble in then concluding that the lower court erred when it denied Rouse her right to a jury trial, and it remanded for a new trial. *Id.* at 673-74, 596 S.E.2d at 389. Both Bateman and Moats initiated their case and asserted legal claims and equitable claims. Like the defendant Rouse, Moats demanded a jury trial on its legal claims in its complaint. This case should be treated no differently than *Bateman*, and a jury trial should be ordered on Moats's legal claims.

There is no contention that Moats waived its right to a jury trial on its legal claims. The only pertinent basis for such a waiver would be if Moats's legal claims were asserted as permissive counterclaims in an otherwise equitable action. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Here, Moats's legal claims were asserted as direct claims, not counterclaims. Even where legal claims are asserted as counterclaims, the right to a jury trial is only waived if the legal claims are evaluated and determined to be permissive. *Id.* However, a court must undertake that analysis and rule on that issue before denying a party the right to a jury trial on its legal claims. *Id.* Here, the lower court did not undertake any analysis of Moats's legal claims and its right to jury trial and never ruled on that issue, despite numerous requests to do so. The lower court simply ignored Moats's legal claims and resolved the entire case on Dyar's equitable foreclosure counterclaim. This was error and should be reversed. *See generally Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (discussing the well-known maxim that "equity follows the law" and noting that "[w]hen providing an equitable remedy, the court may not ignore statutes, rules, and other precedent" (citation omitted)).

Therefore, the answer to the second question, "was Moats denied its right to a jury trial," is also "yes," and this error should be corrected.

## **II. Moats Should Be Granted Restitution for Windfalls Awarded and Paid to Dyar.**

It is undisputed that Dyar was awarded and paid a windfall in his equitable foreclosure action. The damages award was pulled directly from a spreadsheet that: (1) on its face has multiple errors in the date column causing the damages amount to be overstated by \$7,887; (2) included Moats “reimbursing” Dyar for taxes that Dyar never paid but instead Moats paid, resulting in Moats paying these amounts twice, plus interest (totaling \$18,648); (3) included Moats “reimbursing” Dyar for insurance premiums that Dyar never paid, plus interest (totaling \$13,738); and (4) omitted a \$3,000 payment Moats made in February 2013, plus interest (totaling \$5,141). The Court’s Order denying relief leaves Dyar holding this \$45,000 windfall.<sup>1</sup>

Such a windfall to Dyar and penalty to Moats should not be permitted in an equitable action, particularly under Moats’s unique circumstances. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002) (“Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.” (quoting *Lane v. N.Y. Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928))).

### **A. The \$7,887 data error is on the face of Dyar’s spreadsheet entered into evidence at the damages hearing.**

The \$7,887 overpayment that Moats identified<sup>2</sup> comes directly from errors in the month column on the damages spreadsheet that Dyar entered into evidence during the damages hearing. This Court may take its own view of the evidence in an equitable proceeding. *Wachovia Bank*, 407 S.C. at 328, 755 S.E.2d at 441 (“In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence.”).

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<sup>1</sup> Moats maintains its position that there are other errors present in the damages calculation that should be corrected in this appeal, as previously identified and that total over \$83,000. (Final Brief of Appellant at 16.)

<sup>2</sup> Final Brief of Appellant at 17-18.

As such, for this first error, the timing of Moats's Rule 59(e) motion does not impact this Court's ability to correct the judgment amount to avoid this windfall to Dyar and penalty to Moats.

**B. Moats's alleged damages calculation errors were raised prior to its Rule 59(e) motion.**

There is evidence in the record showing that Moats disputed the payment of taxes, insurance premiums, late fees, interest, and the missing \$3,000 payment well before and during the damages hearing. Russell Moats's deposition testimony shows that prior to the damages hearing he identified the missing \$3,000 payment, (R. p. 145, Dep. 39:4-20; p. 390, Dep. 37:17-25), and maintained that he had always paid property taxes and insurance premiums, (R. p. 145, Dep. 41:6-21). Even Dyar, in opposing Moats's motion to alter or amend the damages order, filed an unsigned report from Michael Meilinger, CPA, dated September 21, 2021, showing that Dyar's alleged damages should be reduced by amounts of property taxes and insurance based on information that Russell Moats paid all property taxes and insurance after 2016. (R. p. 260, 321, 323, 327 "paid by Moats"). During the damages hearing, Russell Moats testified to the missing \$3,000 payment, (R. p. 505, lines 10-16, p. 524, lines 16-19); to having paid taxes and insurance, (R. p. 507, lines 12-508, line 2); and to disputing any responsibility to pay "extra interest or penalties or late fees," (R. p. 509, lines 5-8; p. 524, line 25-525, line 5). All of these errors were identified on the record *before* Moats's Rule 59(e) motion was filed, even if perhaps not with as much mathematical specificity as presented to the lower court after the damages hearing.

Even so, Moats should have been permitted, pursuant to the South Carolina Supreme Court's directive in *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004), to seek reconsideration of the lower court's damages order and revisit these issues as necessary. *Id.* at 21-22, 602 S.E.2d at 778-79 ("A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask

the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.”). The motion to reconsider is a party’s “one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.” *Id.* at 22, 602 S.E.2d at 779. It is unfair to prevent Moats from revisiting and clarifying its position on these damages calculation errors in a Rule 59(e) motion. *Id.* (“It is inherently unfair to disallow such an opportunity.”).

These damages calculation errors resulted in a windfall to Dyar and penalty to Moats of over \$83,000 and should be corrected.<sup>3</sup>

**C. Moats raised its damages calculation errors in a motion to reconsider at the lower court’s direction.**

Unlike the cases cited in the Court’s Order, Moats did not wait until filing its Rule 59(e) motion to bring these errors and additional evidence to the lower court’s attention. After the damages hearing, but prior to entry of the damages order, Moats retained new counsel who brought these errors to the circuit court’s attention at a motions hearing and requested the court to reopen the damages hearing to fully address these errors. (R. p. 552, 557, line 23-558, line 8, Transcript of July 20, 2022 hearing). These errors were supported by Moats’s sworn affidavit and copies of Anderson County public tax records. (R. pp. 559, line 3 -565, line 24). The court heard the motion on the errors but ultimately directed Moats’s new counsel to present these errors in a Rule 59(e) motion, which the court explained would also afford Dyar’s counsel adequate time to review the asserted errors and respond. (R. p. 565, lines 10-17). Moats presented these errors in its Rule 59(e) motion to reconsider, (R. p. 173), to which Dyar responded and did not dispute any of the alleged errors identified by Moats. (R. p. 259).

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<sup>3</sup> Each of these errors is set forth in detail in Moats’s Final Brief at 16-27.

In contrast to the Supreme Court’s decision in *Hicks Unlimited, Inc. v. Unifirst Corp.*, 439 S.C. 623, 889 S.E.2d 564 (2023), where information was first presented to the circuit court solely in a motion to alter or amend as assertions by counsel and with no additional evidence or affidavits, here Moats provided a sworn affidavit *prior to* and along with its Rule 59(e) motion that attached Anderson County public tax records showing that Moats paid real property taxes and business records reflecting Moats’s insurance payments. (R. pp. 210-231).

Moats presented its damages errors to the lower court *before* the court entered the damages order and the court directed Moats to submit its errors in a Rule 59(e) motion, which the court indicated would be timely. This Court’s ruling that the evidence Moats presented in its Rule 59(e) motion was untimely conflicts with the lower court’s direction to Moats. Moats’s presentation of damages calculation errors in its Rule 59(e) motion should not be a basis to deny Moats relief on erroneously awarded damages.

**D. Moats’s counsel at the damages hearing had requested to be relieved.**

Before the damages hearing was held, Moats’s prior legal counsel moved to withdraw. (R. p. 154). The lower court acknowledged this pending motion before the damages hearing but required Moats’s counsel to remain on the case through the damages hearing. (R. pp. 490, line 10 – 491 line 6; pp. 492, line 20 – 495, line 6). Dyar’s bookkeeper’s entire testimony on \$250,000 in damages lasted less than three full pages in the transcript, no supporting documents were entered into evidence showing taxes or insurance premiums paid by Dyar, and Moats’s counsel did not ask Dyar’s bookkeeper a single question on cross examination. (R. pp. 496, line 6 – 498, line 20). These are undoubtedly unusual circumstances in an equitable proceeding and Moats should not be penalized for its counsel’s failure to raise these errors with more specificity during the damages hearing, especially when that counsel had a pending motion to withdraw.

**E. Damages should be adjusted to comport with equitable principles.**

Dyar's foreclosure counterclaim was an action in equity, and equity does not favor windfalls and penalties. *Wachovia Bank*, 407 S.C. at 328, 755 S.E.2d at 440-41 ("A mortgage foreclosure is an action in equity." (citation omitted)); *Regions Bank*, 394 S.C. at 256, 715 S.E.2d at 356 ("A court of equity abhors forfeitures, and will not lend its aid to enforce them." (citation omitted)). In equity, "[c]ourts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Regions Bank*, 394 S.C. at 252, 715 S.E.2d at 354 (citation omitted). "The court has the power in equity to deny or delay forfeiture when fairness demands." *Id.* at 256, 715 S.E.2d at 356.

If Dyar's award is not remitted and Moats not reimbursed, Dyar will have received a windfall and Moats a penalty, a result that is contrary to equitable proceedings. *See, e.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002) ("Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." (quoting *Lane v. N.Y. Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928))). Accordingly, the damages award should be remitted and Moats reimbursed for these windfalls paid to Dyar.

**CONCLUSION**

Moats respectfully requests rehearing of the Court's April 9, 2025 Order based on the foregoing grounds.

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PROOF OF SERVICE

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I certify that the Appellant's Petition for Rehearing has been served on James W. Logan, Jr., counsel for Respondent Cecil R. Dyar, by email sent to his primary e-mail address listed in the Attorney Information System, [logan@loganandjolly.com](mailto:logan@loganandjolly.com) on April 24, 2025.

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