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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

Moats Construction, Inc.,

Appellant,

v.

Cecil R. Dyar,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

On June 2, 2020, after Moats Construction, Inc. (“Moats”) and Cecil Dyar (“Dyar”) were unable to resolve multiple disputes relating to Moats’s purchase of a commercial property in Anderson, South Carolina, Moats filed a complaint in Anderson County Circuit Court asserting claims in both law and equity. As to the legal claims, Moats requested a jury trial. In response, Dyar asserted an equitable counterclaim for foreclosure to which Moats’s former counsel did not timely respond. Dyar moved for judgment on the pleadings or, in the alternative, summary judgment. The circuit court granted the motion and scheduled a damages hearing. Moats’s former counsel then moved to withdraw, but the circuit court required former counsel to remain on the case until after the damages hearing could be concluded. Moats began seeking replacement counsel.

On April 11, 2022, following a damages hearing at which Moats remained represented by former counsel, the circuit court entered a Form 4 order directing Dyar to prepare a draft order to be circulated among the parties prior to submission to the court.

On May 6, 2022, replacement counsel for Moats entered an appearance. Replacement counsel reviewed the proposed order and requested a hearing at which he drew the court’s attention to multiple errors in Dyar’s damages calculation and requested that the court reopen the damages hearing. These errors were obvious from the evidence presented to the court at that hearing. Replacement counsel also pointed out that the court had committed a legal error by disposing of the entire case when Moats had pending legal claims to which he was entitled to a jury determination. The circuit court denied the request to reopen and instructed counsel to include any errors in the damage calculation in a Rule 59(e) motion to alter or amend the judgment, stating this procedure would allow both parties ample time to fully review and brief the issues.

Replacement counsel for Moats briefed the issues in the Rule 59(e) motion as instructed. The circuit court then denied the motion finding that, even though it may have ruled differently had it been presented with the errors earlier, the issues had been presented too late. The court then ordered the property to be sold. The case ended with Moats never being able to present its legal claims to a jury and instead having to pay windfall damages to Dyar.

The questions presented are:

QUESTIONS PRESENTED

1. Is a plaintiff's constitutional right to a jury trial violated when the circuit court grants summary judgment on an equitable counterclaim and ends the case without affording the plaintiff the opportunity to conduct discovery and present its legal claims to a jury?
2. Where the plaintiff's complaint is legal and the defendant's counterclaim is equitable and both arise out of the same transaction or occurrence, are the legal claims required to be tried before the equitable claims?
 - a. If so, does a lower court err in granting summary judgment on a foreclosure counterclaim and ending the entire case before a jury makes factual findings on disputed issues of material fact?
3. In a foreclosure action, where damages calculation errors are brought to the circuit court's attention either before entry of the court's order on damages, or in a Rule 59(e) motion, should the court sitting in equity modify its damages award to avoid windfalls?

STATEMENT OF THE CASE

In 2011, Moats Construction, Inc. and Cecil Dyar entered in an Agreement for Sale and Purchase of Real Property (the "Agreement") for Moats to purchase from Dyar the real property located at 300-600 W. Orr Street Anderson, South Carolina (the "Property"), for \$250,000.00. (R. p. 56, Agreement ¶¶ 1, 2). Moats agreed to make a down payment of \$37,500.00 and finance the \$212,500.00 balance at six percent interest over five years, equating to a monthly payment of \$4,108.22. (R. p. 56, Agreement ¶ 3). The Agreement also required a monthly escrow payment

of \$405.00, reflecting Moats's responsibility to pay real property taxes and casualty insurance, making the total combined monthly payment \$4,513.22. (R. p. 56-57, Agreement ¶¶ 3(c), 5, 14).

Modifications of the Agreement

After entering the Agreement, Dyar and Moats modified its terms in three significant ways: (1) insurance coverage; (2) payment of taxes; and (3) payment terms.

First, the Agreement required Moats to insure the Property, (R. p. 57, Agreement ¶ 14); however, the parties modified this provision when they agreed that Dyar would continue to insure the Property under his prior company's name, Anderson Steel Processing, Inc., and that Moats would reimburse Dyar for insurance premiums. (R. p. 212, Moats Aff. ¶¶ 8-9). This practice continued for seven years until the February 2017-2018 policy period, when Moats paid premiums directly to the insurance carrier. (R. p. 212, Moats Aff. ¶ 9). Moats did not renew the insurance policy after 2018 when the insurance carrier paid only \$3.31 towards a roof damage claim caused by Hurricane Irma in September 2017. (R. p. 212, Moats Aff. ¶¶ 10-12). The Property has been uninsured since 2018, and neither Moats nor Dyar have paid premiums to insure the Property. (R. p. 212, Moats Aff. ¶ 12).

Second, the Agreement required Moats to pay real property taxes directly to Anderson County. (R. p. 57, Agreement ¶ 5). The parties modified this provision such that Dyar agreed to pay taxes directly to the county and get reimbursed by Moats. (R. pp. 211-12, 214-19, Moats Aff. ¶¶ 6-7, Ex. 1 thereto). This practice continued through 2015. Beginning with the 2016 tax year, Moats began paying all real property taxes directly to Anderson County rather than reimbursing Dyar. (R. p. 212, 214-19, Moats Aff. ¶ 7, Ex. 1 thereto (2015-2020 tax bills)).

Third, the Agreement required Moats to pay monthly installments of \$4,513.22, (R. p. 56, Agreement ¶ 3); however, after six months of payments, the parties modified the payment terms.

(R. p. 540, Pruett-Lange Spreadsheet Ex. 1 Damages Hearing). Dyar permitted Moats to make irregular payments, which it did for the next six and a half years, through May 2018. (R. p. 520, lines 17-21; p. 531, line 2 – p. 532, line 20; R. p. 540, Pruett-Lange Spreadsheet Ex. 1 Damages Hearing). Even though the Agreement included a 5% late payment penalty, (R. p. 57, Agreement ¶ 12), Dyar never asserted his right to a late payment penalty and he assented to the modified payment structure as reflected by the parties' course of dealing over six and a half years, where Dyar: (1) accepted Moats's modified payments—larger or smaller than the monthly amount set forth in the Agreement; (2) never declared Moats in default; (3) never terminated the contract; (4) never notified Moats that any payment was late or that a late pay penalty would be assessed; and (5) sought to extend the Agreement another five years. (R. p. 508, lines 19-24, R. p. 520, lines 19-21; R. p. 142-43, Moats Dep. 100:24-103:14).

Agreement's Expiration - April 2016

At the end of the Agreement's five-year term in April 2016, the principal balance on the loan according to Dyar's bookkeeper was \$148,228.71—Moats having paid Dyar over \$195,000.00 through April 2016, of which approximately \$26,000 was for taxes and insurance, over \$100,000 (40%) toward the purchase price, and the balance for interest and late payment penalties, which are disputed. (R. p. 541, line 60). In addition to the more than \$195,000 paid to Dyar between May 2011 and April 2016, Moats paid an additional \$35,000 between May 2016 and May 2018. (R. p. 544).

On or about July 1, 2016, Dyar unilaterally signed an extension of the Agreement to March 16, 2021; however, Moats testified at the damages hearing that he never received a copy of this proposed extension. (R. p. 551; R. p. 510, line 8-p. 512, line 19). Moats had no intention of agreeing to an extension because he wanted to reach an agreement with Dyar on a full payoff

amount considering there were numerous issues with the Property, including: (1) Dyar's failure to remove heavy equipment stored inside the building on the Property, which hindered Moats's use and enjoyment of the Property for more than five years; (2) Dyar's failure to clean-up pallets on the property as agreed; (3) Dyar's failure to pay certain fees and resolve resultant liens placed on the Property by the City of Anderson that were sent to Dyar's attention as the listed property owner; and, (4) disputed access with the nearby railroad owner that forced Moats to hire legal counsel and incur professional fees for surveying and appraisal. (R. p. 503, lines 9-18; R. p. 504, lines 10-14; R. p. 508, line 3-p. 509, line 8; R. p. 511, lines 7-8; R. p. 520, lines 1-15; R. p. 531, line 22-p. 532, line 3). Moats requested a payoff from Dyar that fully accounted for these issues so that Moats could pay off the balance and become the owner of record and more effectively address the railroad access issue and the liens from the City of Anderson. (R. p. 508, line 14-p. 509, line 3).

Before the parties could reach agreement on a payoff amount, in September 2017, Hurricane Irma damaged the building's roof. (R. p. 212, Moats Aff. ¶ 10; R. p. 504, lines 15-19). The insurance company denied the full amount of the claim and only paid \$3.31. (R. p. 212, Moats Aff. ¶ 10). Moats requested that Dyar, as the insured, contest the claim payment amount, but Dyar refused to do so. (R. p. 504, lines 15-19).

The parties never reached agreement on a final payoff amount and Moats filed this action in June 2020 to resolve the parties' dispute.

Procedural History

On June 2, 2020, Moats filed a complaint for a jury trial against Dyar asserting causes of action for breach of contract, negligence, accounting and set-off, and specific performance, all arising out of the parties' Agreement. (R. pp. 52-54, 56-59). On June 23, 2020, Dyar answered the complaint and asserted a counterclaim for foreclosure. (R. p. 63). A reply to Dyar's

counterclaim was not timely filed, and Dyar's counsel filed an affidavit of default on February 15, 2021. On February 18, 2021, Dyar moved for judgment on the pleadings or, in the alternative, for summary judgment. (R. p. 78). On February 22, 2021, Moats's then-counsel moved for enlargement of time to reply to Dyar's counterclaim. (R. p. 88).

On April 13, 2021, the circuit court held a hearing on Dyar's motion for summary judgment. (R. p. 462). On May 4, 2021, the circuit court granted Dyar's motion for summary judgment by Form 4 Order, directing that a formal order would follow, as well as a damages hearing. (R. p. 5). The court did not rule on Moats's motion for enlargement of time to file a reply to the counterclaim. On May 7, 2021, Moats moved for reconsideration of the Form 4 Order granting summary judgment, in part on the basis that it prevented Moats from pursuing its legal claims for breach of contract and negligence against Dyar. (R. p. 146 ¶ 1). On June 10, 2021, the circuit court entered its formal Order Granting Defendant's Motion for Summary Judgment. (R. p. 9). On June 18, 2021, Moats filed an amended motion to reconsider and amend judgment, again raising the argument that it was prevented from moving forward on its legal claims against Dyar. (R. p. 149 ¶ 1).

On February 4, 2022, Moats's then-counsel moved to be relieved. On February 24, 2022, the circuit court held a damages hearing on Dyar's foreclosure counterclaim for which it had previously granted summary judgment. (R. p. 481). At the hearing, Moats's counsel was directed to remain in the case until the order setting damages was entered. (R. p. 535, lines 6-13). On April 11, 2022, the circuit court issued a Form 4 Order awarding damages to Dyar and directing a formal order to follow. (R. p. 17). On July 20, 2022, the circuit court held a hearing on the proposed order on damages, Moats's motions to reconsider summary judgment, Moats counsel's motion to be relieved, and Moats's new counsel's motion for status conference. (R. p. 552). Moats's new

counsel brought to the court's attention certain errors in the damages calculation in the proposed order and requested that the damages hearing be reopened and Moats be allowed to present testimony from a licensed CPA on these errors. (R. p. 557, line 23-p. 558, line 8). The court denied Moats's request to reopen the damages hearing and directed that all such errors be addressed in a motion to alter or amend. (R. p. 565, lines 7-24).

On July 21, 2022, the circuit court: (1) issued a Form 4 Order denying Moats's motions for reconsideration of the order granting summary judgment, (R. p. 20); (2) granted Moats's former counsel's motion to be relieved; and, (3) issued an Order Granting Defendant's Motion for Damages and Judgment of Foreclosure and Sale, setting damages as of April 1, 2022, at \$250,614.04, (R. p. 38). On July 29, 2022, as directed by the court, Moats moved to alter or amend the order on damages and foreclosure, contending that the principal and interest due under the Agreement should be reduced by approximately eighty-three thousand dollars, and again asking the circuit court to allow Moats's legal claims to be pursued prior to Dyar's equitable counterclaim for foreclosure and sale of the Property. (R. p. 173). On September 8, 2022, the circuit court held a hearing on Moats's motion to alter or amend the order on damages and foreclosure, (R. p. 574), and ultimately denied Moat's motion to alter or amend on October 4, 2022. (R. p. 23). This appeal followed.

ARGUMENT

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

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 the Property it purchased from Dyar, 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 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 its 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 of Appeals observed; 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, line 7-268, 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, the 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, the Court of Appeals 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)).

In *Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987), this Court set forth the framework for trial courts to use in cases where a plaintiff’s complaint is equitable and the defendant’s counterclaim is legal and compulsory, ruling that in such circumstances if there are common issues of fact to both claims “absent the ‘most imperative circumstances,’ the ‘at law’ claim must be tried first. *Id.* at 56, 354 S.E.2d at 897 (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959)). Later cases addressing mixed legal and equitable claims arise primarily in this context where courts are asked to evaluate whether legal counterclaims are entitled to a jury trial ahead of equitable claims.¹

This case presents the opposite scenario. Moats’s complaint is legal and Dyar’s counterclaim is equitable. In this scenario, there is no reason Moats’s legal claims should not have

¹ *E.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015); *Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *First-Citizens Bank and Trust Co. of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991); *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989); *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013).

been resolved first by a jury before Dyar's equitable claims. Even if the lower court could have ordered a separate trial of Moats's legal claims and Dyar's equitable claim, there is no scenario under which Dyar's equitable claim should have been allowed to proceed first and end the entire case without Moats ever having a jury hear its legal claims, yet that is exactly what happened here.

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 lower court's and Court of Appeals's rulings leave Dyar holding these windfalls.²

The Court of Appeals ruled that Moats did not timely raise these damages errors at the initial damages hearing. However, equitable principles weigh against affirming windfall damages at *any* stage of litigation and particularly in this case where Moats's legal counsel had moved to withdraw prior to the damages hearing, the entire damages testimony was a mere three pages in length, and Moats's counsel asked no questions on cross examination. Moreover, these errors were brought to the lower court's attention by replacement counsel as soon as practicable and

² Moats maintains its position that there are other errors in the damages calculation that should be corrected in this appeal and combined with these windfalls total over \$83,000. (Final Brief of Appellant at 16.) Each of these errors is set forth in detail in Moats's Final Brief at 16-27.

before entry of the final order on damages and at the lower court's request were then presented in a Rule 59(e) motion.

Such a windfall to Dyar and penalty to Moats should not be permitted in an equitable action, particularly under these 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))).

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.”).

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 identified³ comes directly from errors in the month column on the damages spreadsheet that Dyar entered into evidence during the damages hearing.

The bookkeeper made three compounding date errors in succession in his spreadsheet as highlighted in Table 1 below. Therefore, when the bookkeeper testified that the Balance as of February 1, 2022, was \$222,415.95, the correct Balance should have been payment 130 at \$214,528.12, a \$7,887.83 difference. Accordingly, the court should have reduced the “Principal and Interest due as of February 1, 2022” in its damages order by \$7,887.83.

³ Final Brief of Appellant at 17-18.

Table 1:

PMT No.	Joshua Pruett-Lange	Corrected Date	Balance
120	April 1, 2021	April 1, 2021	201,895.12
121	May 1, 2021	May 1, 2021	203,130.25
122	June 1, 2021	June 1, 2021	204,371.57
123	July 1, 2021	July 1, 2021	205,619.08
124	May 1, 2021	August 1, 2021	206,872.84
125	June 1, 2021	September 1, 2021	208,132.86
126	July 1, 2021	October 1, 2021	209,399.19
127	August 1, 2021	November 1, 2021	210,671.84
128	September 1, 2021	December 1, 2021	211,950.86
129	May 1, 2022	January 1, 2022	213,236.28
130	June 1, 2022	February 1, 2022	214,528.12
131	July 1, 2022	March 1, 2022	215,826.42
132	October 1, 2021	April 1, 2022	217,131.21
133	November 1, 2021	May 1, 2022	218,442.53
134	December 1, 2021	June 1, 2022	219,760.40
135	January 1, 2022	July 1, 2022	221,084.86
136	February 1, 2022	August 1, 2022	222,415.95

For this first error, the timing of Moats’s Rule 59(e) motion and timing of when the court was first made aware of this error should not impact the court’s ability to correct the judgment to avoid this windfall to Dyar and penalty to Moats because this error is on the face of a document admitted into evidence and forming the basis of the lower court’s judgment, and it should have been corrected. Correcting errors is one purpose of a motion to reconsider. *Elam v. S.C. DOT*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (“The wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed” for the practice of freely allowing a motion for reconsideration.” (quoting *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) (internal quotation marks omitted))).

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

As to Moats’s other damages errors, 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 by substitute counsel.

Even so, Moats should have been permitted, pursuant to this Court's directive in *Elam v. S.C. DOT*, to seek reconsideration of the lower court's damages order and revisit these issues as necessary, particularly in an equitable action. 361 S.C. 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 damages calculation errors in a Rule 59(e) motion. *Id.* (“It is inherently unfair to disallow such an opportunity.”). These damages calculation errors in this foreclosure action resulted in a windfall to Dyar and penalty to Moats and should be corrected as a matter of equity.

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 of Appeals’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).

In contrast to this 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 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. The Court of Appeals’s ruling that the evidence Moats presented in its Rule 59(e) motion was untimely conflicts with *Elam v. S.C. DOT* and with the lower court’s direction to Moats to raise these issues in its motion to alter or amend. 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 in an equitable proceeding.

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 substantial 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

For all of the reasons stated above, this Court should grant certiorari to (1) clarify that a plaintiff’s constitutional right to a jury trial is not lost where summary judgment is granted on an equitable counterclaim; (2) clarify that where a plaintiff’s complaint is legal and the defendant’s counterclaim is equitable, legal claims must be tried first; (3) rule that in a foreclosure action damages errors and windfalls brought to the court’s attention in a Rule 59(e) motion should be corrected as a matter of equity; and, (4) order that windfall damages awarded and paid to Dyar should be reimbursed to Moats.

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Columbia, South Carolina
August 22, 2025

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Aug 22 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

Moats Construction, Inc.,

Appellant,

v.

Cecil R. Dyar,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Petition for Writ of Certiorari complies with Rule 211(b), SCARC, and the Supreme Court's April 15, 2014 Order regarding personal identifiers.

/s/ David L. Paavola

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PROOF OF SERVICE

I certify that the Appellant's Petition for Writ of Certiorari 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 on August 22, 2025.

/s/ David L. Paavola

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