

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2009-CP-08-3652

First National Bank of
Spartanburg, Div. of First
National Bank of the South

Respondent,

v.

Liberty Village

Appellant.

Appellant's Reply Brief

March 11, 2014



Aaron E. Edwards
The Richter Firm, LLC
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
(843) 849-6000

Attorney for Appellant

Other Counsel of Record:

Robert A. Kerr
Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorney for Respondent

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ARGUMENT1

 I. THE CONSTITUTIONALITY OF DENYING APPELLANT’S RIGHT TO A
 JURY TRIAL IS PRESERVED.....1

 II. DEPRIVING APPELLANT OF ITS CONSTITUTIONAL RIGHT TO A JURY
 TRIAL IS AN ABUSE OF DISCRETION BECAUSE IT IS AN ERROR OF
 LAW.....2

CONCLUSION4

TABLE OF AUTHORITIES

CASES

South Carolina Cases

<u>Alcorn v. Ford Motor Co.</u> , 276 S.C. 180, 276 S.E.2d 925 (1981).....	2
<u>Coward Hund Construction co., Inc. v. Ball Corp.</u> , 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999)....	1
<u>Hannah v. United Refrigeration Servs.</u> , 305 S.C. 394 (S.C. 1991).....	3, 4
<u>In re Treatment & Care of Luckabaugh</u> , 568 S.E.2d 338, 347 (S.C. 2002).....	3
<u>Lane v. Gilbert Construction Co.</u> , 681 S.E. 2d 879, 884 (S.C. 2009).....	3
<u>Ledford v. Pa. Life Ins. Co.</u> , 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).....	2
<u>Lester v. Dawson</u> , 327 S.C. 263, 491 S.E.2d 240 (1997).....	2
<u>Patterson v. McNeill-Patterson & Assocs.</u> , 312 S.C. 471, 472 441 S.E.2d 328 (S.C. Ct. App. 1994).....	4
<u>Pelfrey v. Bank of Greer</u> , 270 S.C. 691, 244 S.E.2d 315 (1978).....	4
<u>Pye v. Estate of Fox</u> , 369 S.C 555, 565-66, 663 S.E.2d 505, 510 (2006).....	1

Other Authorities

James F. Flanagan, <i>South Carolina Civil Procedure</i> 475(2d ed. 1996).....	1
<u>Merrit v. Faulkner</u> , 697 F.2d 761, 767 (7 th Cir.) cert denied 464 U.S. 986 (1983).....	3
<u>SCRCP Rule 38</u>	passim
<u>SCRCP Rule 39</u>	passim
<u>SCRCP Rule 59(e)</u>	1
<u>U.S.C.A. CONST. amend. VII</u>	3
<u>U.S.C.A. CONST. amend. XIV</u>	3
19 <u>S.C Juris. Constitutional Law</u> § 71 (1993).....	3

ARGUMENT

Respondent makes little effort to argue the constitutionality of Rule 38, SCRCP, or the constitutionality of denying the Appellant its right to a jury trial, instead focusing on technical and procedural minutiae in an effort to avoid appellate review. This attempt is unavailing. Since these issues were not addressed in Appellant's initial brief, Appellant respectfully submits the following reply brief in response to the case law, rationale, and arguments set forth by Respondent.

I. THE CONSTITUTIONALITY OF DENYING APPELLANT'S RIGHT TO A JURY TRIAL IS PRESERVED.

If an issue has been raised at trial, and the trial court fails to rule on it, and it is raised again in a motion for reconsideration, the issue is preserved for appellate review even if the trial court does not rule on it. *See Pye v. Estate of Fox*, 369 S.C. 555, 565–66, 633 S.E.2d 505, 510 (2006).

“The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’” Coward Hund Construction Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (internal citations omitted). Once the issue has been properly raised by a Rule 59(e) motion, the issue is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.” *Id* citing James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996).

Here, Appellant raised the constitutionality of depriving it of its fundamental constitutional right to a jury trial in its motion to transfer to the jury roster, in its memorandum in support of its motion to transfer to the jury roster, in its motion to alter or amend, and in its memorandum in support of its motion to alter or amend. The trial court's initial order simply denied the appellant's motion to transfer to the jury roster without explanation. The court's order

denying Appellant's motion to alter or amend states ""With respect to the ruling on the Motion to Transfer, the requirements of Rule 38, SCRPC and case law construing the Rule support the court's ruling that [Appellant] waived its right to a jury trial."

Appellant's appeal is based upon the trial court's orders denying Appellant's fundamental constitutional right to a jury trial. The order affects the mode of trial and is therefore immediately appealable. Furthermore, the court's order specifically mentions SCRPC Rule 38 which acknowledges a trial by jury as of right and makes specific reference the South Carolina Constitutional provision regarding the right to a jury trial which "shall be preserved inviolate." Accordingly, an order, such as the trial court's order in this matter, denying the right to a jury trial under Rule 38 is immediately appealable and properly preserved for appellate review. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997) (Rule 38 concerns trial by jury as of right and is therefore immediately appealable.). The issue of the constitutionality of depriving it of its fundamental constitutional right to a jury trial was presented to the court in the original motion as well as the motion to alter or amend and is, therefore, preserved.

II. DEPRIVING APPELLANT OF ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL IS AN ABUSE OF DISCRETION BECAUSE IT IS AN ERROR OF LAW.

An abuse of discretion occurs if a trial court's decision is unsupported by the evidence or controlled by a legal error. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). The exercise of judicial discretion must be disturbed if it deprives a party of a substantial right to which the party is entitled under the law. Alcorn v. Ford Motor Co., 276 S.C. 180, 276 S.E.2d 925 (1981).

Here, “the right of trial by jury shall be preserved inviolable” in South Carolina under the state constitution. S.C. Const. art. I, § 14 (emphasis added).¹ The trial court’s failure to preserve this fundamental right is *prima facie* violative of the S.C. Constitution. As such, it is an error of law that is to be reversed on appeal despite the discretionary nature of the decision.

Further, the substantive due process clause aims to “prohibit government from engaging in arbitrary or wrongful acts ‘regardless of the fairness of the procedures used to implement them.’” In re Treatment & Care of Luckabaugh, 568 S.E.2d 338, 347 (S.C. 2002) (internal citations omitted); See also, 19 S.C. Juris. Constitutional Law § 71 (1993). Any abridgement of the fundamental right to a jury trial is subject to strict scrutiny. Lane v. Gilbert Construction Co., 681 S.E.2d 879, 884 (S.C. 2009).

“In the absence of strong and compelling reasons to the contrary, untimely jury demands should be granted.” Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983) (citations and footnote omitted). Here, the failure to articulate any reason more specific than “the requirements of Rule 38, SCRPC and case law construing the Rule support the court’s ruling” is almost *de facto* arbitrary. The mere fact that Appellant’s motion for a jury trial was “too late” is neither a strong nor a compelling reason to deny the fundamental right to a trial by jury and there are no strong or compelling reasons for denying Appellant’s motion for a jury trial given by the trial court or the Respondent in its brief.

Appellant notes that the only case cited by the Respondent in support of its position that a ruling on a Rule 39(b) motion is not directly appealable is Hannah v. United Refrigeration Servs., Inc., 305 S.C. 394, 409 S.E.2d 360 (1991).² Hannah is clearly distinguishable insofar as the trial

¹ Appellant notes that the S.C. Constitutional language is much stronger than language of the 7th amendment to the U.S. Constitution which simply states “the right of trial by jury shall be preserved.”

² Appellant notes that it moved for a jury trial based on the Appellant’s constitutional right to a jury trial. Given the inviolability of the right as stated in the S.C. Constitution, the discretionary function of the court pursuant to Rule 39

court *granted* the movant's request for a jury trial under Rule 39 and the Supreme Court found the order interlocutory and not immediately appealable based on the fact that "a party's failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial." 305 S.C. 394, 409 S.E.2d 360 (1991). Since the Respondent does not have the right, as a matter of law, to a non-jury trial on the Appellant's claims, a more similar case to the issue at hand is Patterson v. McNeill-Patterson & Assocs. 312 S.C. 471, 472 441 S.E.2d 328 (S.C. Ct. App. 1994) (upholding the discretionary grant of a jury trial request under Rule 39 because the opposing party would suffer no prejudice).

Given the language of the Constitution prohibiting the violation of a party's right to a jury trial and the trial court's lack of explanation or rationale in depriving the Appellant of its fundamental constitutional right to a jury trial, the discretion exercised by the court is an error of law that must be reversed.

CONCLUSION

For the foregoing reasons, the issues appealed are properly preserved for review and the trial court's Order denying Appellant the right to a jury trial should be reversed.

The Richter Firm, LLC



Lawrence E. Richter, Jr., Esq.

Aaron E. Edwards, Esq.

622 Johnnie Dodds Blvd

Mt. Pleasant, SC 29464

843.849.6000 phone

843.8881.1400 fax

aaron@richterfirm.com

ATTORNEY FOR THE APPELLANT

March 11, 2014
Mt. Pleasant, South Carolina

must be simply to guarantee a jury trial in all cases, such as this appeal, in which the parties were entitled to it under the law or practice existing at the time of the constitution's adoption. *See, eg. Pelfrey v. Bank of Greer*, 244 S.E.2d 315, 316 (S.C. 1978).

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Proof of Service

I certify that I have served the Appellant's Reply to the Brief of Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2014, addressed to the attorney of record, Robert A. Kerr and Lesley A. Firestone at Moore & Van Allen, PLLC, 78 Wentworth Street, Charleston, SC 29401.

March 11, 2014



Aaron E. Edwards
The Richter Firm, LLC
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
(843) 849-6000

Attorney for Appellant

Other Counsel of Record:
Robert A. Kerr
Lesley A. Firestone
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorney for Respondent

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464

Lawrence E. Richter, Jr.
Alice Anne Richter Lehrman
Aaron E. Edwards
Patrick T. Napolski*

Telephone: (843) 849-6000
Telefax: (843) 881-1400

*Also licensed in IL

March 11, 2014

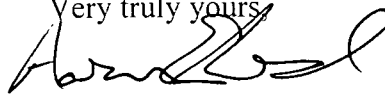
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: First National Bank of Spartanburg, Div. of First National Bank of
The South v. Liberty Village, LLC
Appellant Case No. 2013-001258

Dear Madam Clerk:

Enclosed please find the Appellant's Reply Brief and Proof of Service in regard to the above-referenced matter. Please file the originals and return the file-stamped copies to our office in the enclosed, self-addressed, stamped envelope. By copy of this letter to Robert A. Kerr and Lesley A. Firestone, attorneys for the Respondent, I am serving Respondent with a copy of the same.

Very truly yours,



Aaron E. Edwards

AEE/cms
Enclosures

cc: Robert A. Kerr
Lesley A. Firestone

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