THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Alexander S. Macaulay, Circuit Court Judge

Case No. 2013-CP-04-2409

Hubert Bethune, ... Respondent,

v.

Waffle House, Inc., ... Appellant.

BRIEF OF APPELLANT

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V. Did the Magistrate's Court and the Circuit Court err in dismissing the Magistrate's Court Complaint filed by the Respondent Hubert Bethune when those courts failed to consider or otherwise summarily rejected the legal prejudice demonstrated by the Appellant Waffle House in opposition to the dismissal?

STATEMENT OF THE CASE

This is an appeal from a decision of a Magistrate's Court to dismiss a personal injury lawsuit filed by the Respondent Hubert Bethune in Magistrate's Court against the Appellant Waffle House, Inc. On February 16, 2012, Bethune filed a negligence action against Waffle House in Magistrate's Court in Anderson County. Bethune alleged that Waffle House was negligent in serving him food that contained a shard from a broken plate that he caused him personal injury. (R. 9-10). Then, seventeen months later, on July 16, 2013, Bethune filed the identical suit in the Court of Common Pleas, which was subject to dismissal under Rule 12(b)(8), SCRCP. (R. 14-15). However, Bethune's counsel then sent an Order of Dismissal, without the consent of the parties, to the Magistrate which dismissed the Magistrate's Court action. The Magistrate signed the Order of Dismissal, and later issued an Amended Order of Dismissal, after Waffle House objected and was given a hearing. (R. 6-7).

Waffle House appealed to the Circuit Court. (R. 28-31). Circuit Judge Alexander S. Macaulay affirmed the dismissal by the Magistrate's Court, but he never addressed the procedural errors made by the Magistrate nor the legal

prejudice asserted by Waffle House. (R. 1-3). A subsequent Rule 59(e) motion was denied. (R. 4-5).[1]

[1] A more detailed procedural history of the case is set forth below.

ARGUMENTS

I. The Magistrate's Court, as affirmed by the Circuit Court, erred in dismissing the Complaint filed by the Respondent Hubert Bethune in Magistrate's Court after Bethune filed the identical Complaint in the Circuit Court.

The Appellant Waffle House, Inc. contends on appeal that the Magistrate's Court erred in dismissing the Complaint filed by the Respondent Hubert Bethune in Magistrate's Court after Bethune filed the identical Complaint in the Circuit Court. On appeal, the Circuit Court affirmed the ruling by the Magistrate's Court, but the Circuit Court failed to address the issues raised on appeal by Waffle House.

According to South Carolina law, in applying Rule 41(a)(2), SCRCP, "the plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless legal prejudice is shown by the defendant or important issues of public policy are present." *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313, 314 (1992). "Once legal prejudice is found, the granting or denial is within the discretion of the trial court." *Id.* An appellate court is required to reverse the trial court's decision upon an abuse of discretion. *In re Miller*, 393 S.C. 248, 713 S.E.2d 253, 257 (2011). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id., citing Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439, 445 (2009). *See also, South*

Carolina Department of Social Services v. Pritcher, 329 S.C. 242, 495 S.E.2d 242 (Ct. App. 1997).

Waffle House contends that the Magistrate's Court committed errors of law and abused its discretion in several particulars: First, the Magistrate's Court granted a voluntary dismissal of Bethune's Complaint although no motion was filed requesting that dismissal, and no grounds for the voluntary dismissal were ever cited. Second, Bethune did not support his "motion" or request with any evidence to support any basis for a voluntary dismissal. Third, the Magistrate's Court mistakenly believed that Bethune had a "right" to file the identical action in Circuit Court and thus failed to exercise any discretion in deciding whether the action should proceed in Magistrate's Court. Fourth, the Magistrate's Court failed to consider or otherwise summarily rejected the legal prejudice demonstrated by Waffle House in opposition to the voluntary dismissal. These same errors were made by the Circuit Court by rejecting Waffle House's appeal.

A. Procedural Background

On February 16, 2012, Hubert Bethune filed a negligence action against Waffle House, Inc. in Magistrate's Court in Anderson County. (R. 8-9). Bethune alleged that Waffle House was negligent in serving him food that contained a shard from a broken plate that he caused him personal injury. Bethune included a prayer for an unspecified amount of actual and punitive damages. Bethune voluntarily

filed this action in Magistrate's Court, subject to that jurisdictional limit of $7,500, as establish by Section 22-3-10 of the Code of Laws. *See*, S.C. Code Ann. § 22-3-10. By filing in Magistrate's Court, Bethune represented that the amount in controversy was $7,500 or less.

On May 22, 2013, *after the case had been pending for over fifteen months*, Bethune filed a motion to transfer the case to Circuit Court. Bethune states in the motion that "[t]he Plaintiff has determined that his damages exceed the jurisdictional amount of Seven Thousand Five Hundred Dollars ($7,500.00) for Magistrate's Court." (R. 25). That motion, however, was withdrawn by Bethune on July 22, 2013. (R. 58).

On July 16, 2013, exactly seventeen months after the filing of the action in Magistrate's Court, Bethune filed a Complaint in the Circuit Court. *See*, *Bethune v. Waffle House, Inc* , Civil Action Number 2013-CP-04-1658. (R. 14-15). The Complaint filed in the Circuit Court is *word-for-word identical* to the Complaint filed in Magistrate's Court. That Complaint likewise includes a prayer for an unspecified amount of actual and punitive damages. There are no new allegations of damages, nor any averments that suggest any newly discovered evidence or changes from the original suit.

Therefore, as of July 16, 2013, Bethune had pending two identical lawsuits, one in Magistrate's Court and one in Circuit Court. Bethune, however, did not file any subsequent motion seeking the dismissal of either action. Instead, on August

29, 2013, Bethune's counsel sent an Order of Dismissal to the Magistrate which dismissed that action without prejudice. On September 3, 2013, without giving Waffle House an opportunity to be heard, the Magistrate signed the Order of Dismissal. (R. 6).

On September 9, 2013, Waffle House filed an objection to the proposed Order of Dismissal. (R. 26-27). The Magistrate subsequently held a hearing on October 3, 2013. As a result of that hearing, the Magistrate issued an Amended Order of Dismissal, on which he handwrote as follows: "Dismissal only applies as to Magistrate's Court and is Dismissal with prejudice as to the Magistrate's Court." (R. 7). (Emphasis in original).

Waffle House subsequently appealed the dismissal of the Magistrate's Court action to the Circuit Court. In his Order filed May 16, 2014, Circuit Judge Alexander S. Macaulay found "that the Magistrate Court did take the proper action in dismissing the case pending in Magistrate Court and denies the Defendant's request to overturn the dismissal ordered by the Magistrate." (R. 3). He also concluded that "the Magistrate, *ex mero motu*, dismissed the action pursuant to their [sic] duty and authority to control the docket in their Court" upon learning that "there were two identical actions pending in different Courts." (R. 2). Judge Macaulay also ruled that "Defendant has suffered no legal prejudice inasmuch as they have the right to present any and all evidence to determine liability and damages, as would have been the case in Magistrate Court or the Court of Common Pleas." (R. 3).

Waffle House filed a Rule 59(e) motion, which was denied, thereby leading to the filing of this appeal. (R. 4-5, 35-37).

B. Procedural Errors

As indicated above, this Court is required to overturn the voluntary dismissal of the Magistrate Court's action if the Magistrate's Court committed errors of law or otherwise abused its discretion. An abuse of discretion "occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *In re Miller*, 393 S.C. 248, 713 S.E.2d 253, 257 (2011).

Here, the Magistrate's Court dismissed Bethune's Complaint without prejudice when no motion pursuant to Rule 41(a)(2) was even filed or pending. Bethune had earlier filed a motion to transfer the case to Circuit Court, but then on July 22, 2013, that motion was withdrawn. (R. 58). Later on August 29, 2013, Bethune's counsel sent the Magistrate a proposed Order of Dismissal, which was signed and filed without even giving Waffle House an opportunity to be heard.

Bethune had submitted the proposed Order of Dismissal without complying with Rule 7(b), SCRCP, or Rule 41(a), SCRCP. He submitted the proposed Order of Dismissal without first filing a motion seeking that relief. Rule 7(b) provides that "[a]n application to the court for an order shall be by motion which ... shall be in

writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 7(b), SCRCP. Yet, Bethune failed to file *any* written motion seeking the voluntary dismissal of this action. The proposed Order of Dismissal did provide as follows: "The Plaintiff has gone ahead and filed this action in Anderson County Common Pleas listed as case number 2013-CP-04-1658 due to his damages being in excess of $7,500.00." (R. 6). However, Bethune never filed any affidavits or other evidentiary support for the voluntary dismissal granted by that proposed order. In fact, even after Waffle House raised its objections, Bethune still made no attempt to submit any affidavits or evidentiary support for his claim that the damages then exceeded the jurisdictional limit of $7,500.

In his return, the Magistrate cites no such evidence that was submitted and on which he relied. (R. 32-34). A representation by a party in a proposed order (which is no substitute for a motion) is not evidence. Likewise, it is well-established law that "counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence." *Ex Parte Morris*, 367 S.C. 56, 624 S.E.2d 649, 653 (Ct. App. 2006). A court "may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments. *Id.* However, that is precisely what occurred here. The Magistrate accepted the unsupported assertion by Bethune's counsel that his client's damages exceeded $7,500. It is also important to recognize that Bethune, as the Plaintiff, chose Magistrate's Court as its forum in the first place. By filing in Magistrate's Court, he agreed that the amount

in controversy was $7,500 or less. Bethune made no allegation or showing that any original allegations or circumstances had changed. In fact, the Complaint filed in Circuit Court shows no change in allegations or circumstances; that Complaint is word-for-word identical to the one filed in Magistrate's Court. Thus, given this scenario, it was clear error for the Magistrate to accept and rely on an unsupported, bald assertion by Bethune and his attorney that the damages exceeded the jurisdictional limit.

Thus, there should be no reasonable doubt that the Magistrate abused his discretion. There is *absolutely no evidentiary support* for the conclusion that Bethune's damages exceeded $7,500, when clearly those damages did not exceed that amount when the suit was initially filed in Magistrate's Court on July 16, 2012. There is no evidentiary basis for the Magistrate's Court's conclusion, and thus, clearly the ruling constitutes an abuse of discretion.

In addition, the Magistrate clearly did not understand the nature of the decision before him. At the October 3, 2013 hearing, he amended the Order of Dismissal to make the dismissal "with prejudice as to the Magistrate's Court," which is an obvious error of law. (R. 7). The case cannot be dismissed "with prejudice" in one court and allowed to proceed in another court.

Moreover, it is obvious from the return that the Magistrate did not believe he had *any* discretion in determining whether a voluntary dismissal should be permitted under the existing circumstances. He wrote: "Magistrate's Court *cannot* deny the

plaintiff the right to file his case in Circuit Court when alleged damages exceed Magistrate Court jurisdiction." (R. 34). (Emphasis added). This shows that the Magistrate did not believe he could even exercise discretion; he believed that he was required by law to grant the dismissal. It is, however, well settled that the failure to exercise discretion is itself an abuse of discretion.[2] As the record shows, the Magistrate mistakenly believed that Bethune had a "legal right" to file a separate action in Circuit Court, when in reality, the action in Circuit Court was subject to dismissal as a duplicative action under Rule 12(b)(8), SCRCP, as long as the Magistrate's Court action remained pending simultaneously.[3] The Magistrate also erroneously believed that he was deciding the propriety of Bethune's filing of the Circuit Court action, which in actuality was not and could not be before him and could only be determined by the Circuit Court. Accordingly, as amply shown, the legal errors committed by the Magistrate were numerous and significant.

On appeal to the Circuit Court, Judge Macaulay compounded the procedural errors committed by the Magistrate. He ruled that "the Magistrate, *ex mero motu*,

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[2] *See, Balloon Plantation, Inc. v Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439, 441 (1990) ("[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly"); *CEL Products, LLC v Rozelle*, 357 S C. 125, 591 S.E.2d 643, 645 (Ct. App. 2004) ("[w]hen a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred"); *Samples v Mitchell*, 329 S.C. 105, 495 S E.2d 213, 216 (Ct. App. 1997) ("[a] failure to exercise discretion amounts to an abuse of that discretion").

[3] Waffle House, in fact, filed a motion to dismiss the Circuit Court action under Rule 12(b)(8), SCRCP, as well preserved that issue in its Answer. (R. 18, 19-20).

dismissed the action pursuant to their duty and authority to control the docket in their Court" upon learning that "there were two identical actions pending in different Courts." (R. 2). Judge Macaulay cited the case of *Crestwood Golf Club v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997), as authority for the action taken by the Magistrate and for the proposition that a court has the authority to control its docket in this manner. The *Crestwood Golf Club* case, however, does not stand for the proposition for which it is cited. Moreover, there is no authority that allows a court to *sua sponte* or *ex mero motu* dismiss a pending action *for any reason other than a party's failure to prosecute.* In short, contrary to Judge Macaulay's erroneous conclusion, the Magistrate's Court lacked the authority to *sua sponte* or *ex mero motu* dismiss the action on the basis that Bethune chose to file an identical action in the Circuit Court and have two identical actions pending simultaneously.

Therefore, on the procedural errors alone, the dismissal of Bethune's action in Magistrate's Court must be reversed and the case remanded for trial in Magistrate's Court.

C. Substantial Showing of Legal Prejudice

Waffle House also submits that the Magistrate Court failed to consider and address the legal prejudice that it has shown. Likewise, on appeal, Judge Macaulay failed to even properly describe the legal prejudice claimed. Judge Macaulay, in fact,

only ruled that "Defendant has suffered no legal prejudice inasmuch as they have the right to present any and all evidence to determine liability and damages, as would have been the case in Magistrate Court or the Court of Common Pleas." (R. 3). That, however, entirely disregards the issue presented.

As the Waffle House raised in its Notice of Appeal and as argued at the April 15, 2014 hearing as well as before the Magistrate, the dismissal of the action in Magistrate's Court has resulted in Waffle House being denied the monetary cap on damages that is established by the jurisdictional statute for cases commenced in Magistrate's Court. As already stated, Hubert Bethune originally chose to bring the suit in Magistrate's Court which set a cap on his recovery at $7,500. No one made him file in Magistrate's Court. That was a choice that he deliberately and alone made. Waffle House, however, is subjected to legal prejudice by the loss of that cap on damages resulting from the dismissal in Magistrate's Court. That is a defense that Waffle House acquired by Bethune's decision to commence his suit in Magistrate's Court. Bethune should not therefore be permitted to unilaterally seek a different forum that compels Waffle House to lose that defense. In the Circuit Court, the Waffle House will be subjected to unlimited and unqualified liability, and that constitutes clear legal prejudice that should have resulted in the denial of the voluntary dismissal.

The case of *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313, 314 (1992), presents a comparable scenario and is thus highly

instructive. In that case, the Supreme Court affirmed the denial of a motion for voluntary dismissal. The plaintiff had filed suit in the defendant's county of residence, and the defendant then asserted a counterclaim. The plaintiff later sought a voluntary dismissal, which the defendant opposed on the ground that he would then have to re-file and prosecute his counterclaim in the county of the plaintiff's residence. He would therefore lose the opportunity to have the counterclaim tried in his own county of residence, which importantly was an initial pleading decision made by the plaintiff alone. The Supreme Court affirmed the denial of the motion for voluntary dismissal and "agree[d] that the loss of proper venue in one's county of residence suffices to establish legal prejudice." 426 S.E.2d at 314.

In the case at bar, the loss of a jurisdictional cap on damages, which is based on an initial pleading decision made by the plaintiff alone, should be no different. Clearly, Waffle House has shown legal prejudice consistent with the Supreme Court's decision in *Burry*. Therefore, on this additional basis, the Appellant Waffle House requests that the dismissal of Bethune's action in Magistrate's Court be reversed and the case remanded for trial in Magistrate's Court subject to the $7,500 cap on damages.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Waffle House, Inc. respectfully requests that this Court reverse the Amended Order of Dismissal issued by the Magistrate's Court and the Order issued by Circuit Judge Alexander S. Macaulay affirming that dismissal. The Court is requested to remand with instructions that the case be reinstated and scheduled for trial in Magistrate's Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Brief of Appellant complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, does hereby certify that service of the **Brief of Appellant** was made upon Respondent's counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 31st day of March 2015:

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