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SC Court of Appeals

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

APPELLANT'S PETITION FOR REHEARING

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Attorney for the Appellant

The Appellant, Arthur Applegate, hereby petitions for rehearing of the April 15, 2015 per curiam order affirming the trial court on the apparent conclusion that Appellant 1) failed to provide the court with a record sufficient to allow appellate review and/or failed to preserve the issue for appeal, and 2) failed to preserve the issue of whether the Order Denying Defendant's Motion to Alter or Amend exceeded the scope of the Plaintiff's motion to have the case heard non-jury. The Appellant respectfully submits that in these conclusions the Court of Appeals paneled overlooked the record presented and misapprehended the law and arguments made by Appellant. The Appellant hereby motions for a rehearing and for reversal of the trial court Order based upon consideration of the arguments set forth herein and in Appellant's appeal, which is incorporated herein by reference.

I. The Court of Appeals refusal to rule upon the appealed issues presented was improper where the record on appeal fully sets forth the preservation of the issues, the positions of the parties and the basis for the ruling; and where the error appealed (granting the Plaintiff's motion to have the case heard non-jury) is based upon an incorrect conclusion of law which violates the rights of the Defendant.

In this case the Trial Court ruled upon a motion of the Respondent/ Plaintiff requesting that the matter be moved to the non-jury roster. It is not disputed that the Appellant/Defendant requested a jury trial and that the Defendant objected to, and contested the motion submitted by the Plaintiff on which the ruling was based. All relevant material, including, the Plaintiff's Motion to move the case to the non-jury roster (ROA pp. 50-57), the Defendant's

(Appellant's) Memorandum in Opposition to that motion (ROA pp. 58-60), the Order of May 14, 2013 (ROA pp. 3-4) granting that motion, the Defendant's Motion to Alter or Amend (ROA pp. 61-66), the July 13, 2014 Order (ROA pp. 5-7) affirming the May 2013 Order, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (ROA pp. 154-179), Defendant's Supplemental Memorandum In Opposition to the Motion for Summary Judgment (ROA pp. 2244-246) and the Defendant's Amended Answer (ROA pp. 35- 48) were all included in the Record on Appeal, and therefore presented to the Court of Appeals for review.

The first issue on appeal is whether the trial should have granted the Plaintiff's Motion to have the matter heard non-jury. The preservation of this issue is demonstrated by the Defendant's opposition and objection to the motion, preserved by both the Defendant's (Appellant's) Memorandum in Opposition to the motion and the Defendant's Motion to Alter or Amend. The subsequent Order of July 13, 2013 specifies that the court's ruling was to grant the Plaintiff's Motion so nothing else is necessary or required for this Court to review the plain legal error made in the trial court's ruling. The fact that the trial court did not hold a hearing on this matter (and is in fact not required to hold a hearing) is immaterial and there is nothing additional needed for any of the arguments raised by either side for the issue to be preserved in the current appeal. The matter at issue is not one based upon admission of evidence or witness testimony not presented to the court, but instead the appeal is of the motions presented and the legally defective conclusions reached by the trial court in its order of July 17,

2013 (ROA pp. 5-7). The Court of Appeals should not refuse to hear a matter simply because the lower court rules without conducting a hearing on a motion where the Order reaches legally defective and improper conclusions, particularly where those conclusions violate such fundamental rights of a party, as the right to a jury trial in actions at law. The Appellant incorporates its appeal brief in regard to the issues and arguments that, if the Court of Appeals will review the matter, provide the legal support for reversal of the trial court's order.

Furthermore, the Appellant's brief does not raise issues in this case that rely upon statements or a "fact which does not appear in the Record on Appeal" as referenced in the Court of Appeals Order of April 15, 2015. As stated above, there were no oral arguments presented on the motion from which the appealed order springs, and it was for that reason that the Appellant properly filed a Motion to Alter or Amend the Order of May 14, 2013 to establish the basis for the trial judge's Order to transfer the case off of the jury roster. The subsequent "revised" Order of July 17, 2013 gave that basis[1] for the first time and was issued without the judge (who was then not in the trial county) conducting a hearing. It is not improper for the trial court to have ruled without hearing oral arguments[2] and Appellant should not therefore be denied a review of the issues and arguments presented in the Appeal of this case based upon the fact that the trial court made its ruling without conducting such a hearing.

[1] "upon motion of the Plaintiff who sought to transfer the matter to the non-jury roster..." ROA p.5
[2] Particularly when both the motion and the responsive Memorandum in Opposition were in writing and filed, as is the case in this instance.

II. The Court of Appeals refusal to rule upon the appealed issues presented was improper where the Order purports to make its ruling based upon errors of law and upon clearly erroneous misapprehensions concerning the filings and pleadings in the case.

The July 17, 2013 Order on appeal in this case makes the assertion that **"only when the contract is deemed ambiguous does a question of fact exist for a jury to consider**." (Emphasis Added) (ROA p.6) and cites Middleton v Eubank, 388 S.C. 8, 14 (Ct.App 2010) for this proposition. The entire order hinges on this legal conclusion, but this is an **incorrect statement of law**, as Middleton nowhere states, nor stands for, this proposition. The July 17, 2013 Order's reliance upon this proposition is therefore also in error and makes this a matter for which no additional documentation or evidence is required to have this court correct the error of the trial court. This issue was ruled upon by the lower court and is fully preserved for appellate review (I'On, L.C.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526, S.E.2d 716 (2000)). This and other issues set forth herein present clear errors of law which demand a reversal of the trial court.

The July 17, 2013 Order on appeal in this case also makes the assertion that "the Defendant only raised legal issues" (ROA p. 6) and that the "Defendant has not raised any factual issues". (ROA p. 6) These are incorrect statements which can be seen as incorrect with a review of the documents submitted in the Record on Appeal, including the Amended Answer (ROA pp. 35- 48), the Defendant's (Appellant's) Memorandum in Opposition to that Motion to have the case heard non-jury (ROA pp. 58-60) the Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (ROA pp. 154-179) and

Defendant's Supplemental Memorandum In Opposition to the Motion for Summary Judgment (ROA pp. 244-246). Notice that the order does not say that any evidence was reviewed, but simply indicates that the record lacks any other factual claims by the Defendant, this conclusion is patently false with even a cursory review of the pleadings and filings in the case. For instance, the Amended Answer in fact goes into significant factual allegations which raise defenses that the construction of the contract requires that the Defendant be expelled which would end all obligations (ROA p. 36- 38), and that would be total or partial defenses to liability. The Memorandum in Opposition to Summary Judgement (ROA pp. 154- 179) and the Supplemental Memo (ROA pp. 244-246) systematically sets forth a laundry list of facts in dispute in the case. These documents are a matter of record for the trial court and the appellate court and it is not reasonable that the Defendant would need to re-plead his entire Answer or resubmit all evidence previously submitted in every filing to preserve those defenses raised. Again, this alone presents for Appellate review a clear error by the trial court in as much as it simply misstates the record in the case. In this instance, where the matter was decided without a hearing, there is simply no way the trial court ruling can withstand what are obvious defects both legally and factually and a review by the Court of Appeals is warranted.

III. The Court of Appeals conclusion that the Appellant failed to present the court with an adequate record for review misapprehends the fact that the July 23, 2013 Order appealed was the resulting order from the Appellant's Rule 59 Motion to Alter or Amend the May 14, 2013 Order which first granted the Respondent's motion to have the case removed from the jury trial roster, and as such, it would be improper

to seek a second motion to reconsider where successive motions would not toll the time to file the appeal.

In its' ruling the Court of Appeals appears to indicate that the Appellant failed to provide a record for the court to review the ruling made in the July 17, 2013 Order (ROA pp. 5-6.) sufficient for the Court to determine if the Order exceeded the scope of the Motion upon which it is based. This misapprehends the fact that the July 17, 2013 order itself states that it was "*entered upon motion of the Plaintiff who sought to transfer the matter to the non-jury roster upon the grounds that no triable issue of facts exists.*" (ROA p. 5). It is clearly set forth in the July 17, 2013 Order that the ruling is upon the Plaintiff's Motion to have the matter heard non-jury (ROA pp. 50-57), to which the Appellant provided a written Memorandum in Opposition (ROA pp. 58-60). The July 17, 2013 Order is the result of the Defendant's South Carolina Rule 59(e) Motion to Alter or Amend the judgment. The trial court decided not to conduct a hearing on the Defendant's Motion to Reconsider (Alter or Amend), as there is not required to be a hearing. But for appeal purposes, the Court of Appeals has the ruling which resulted, and there is simply no additional information which is, or should be, provided to this court to rule on these issues even had there been oral arguments. As this Court is aware, even had the Judge elected to conduct a hearing, an oral ruling by a judge can be changed and is only final once it is reduced to writing, so even had there been a hearing (hypothetically speaking) it would be immaterial to the current appeal. In fact, the Defendant's appeal would have been jeopardized by any subsequent attempts to have the Court make an additional

record because successive SC Rule 59(e) motions do not toll the time limit to file an appeal (Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E. 2d 772 (S.C. 2004). (An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion) Id. at 20.

Likewise, it is patently clear that the ruling that there are no "triable issues of fact" the trial court clearly went beyond the scope of the motion (to transfer the matter to non-jury) upon which the Order itself indicates it is based. The case law is directly on point on this issue "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 ruling in this case did precisely the same as that which was ruled to be improper in the Wells Fargo Bank, N.A. case where the striking of a request for a jury trial and adding additional findings in the order was held to not be within the scope of the motion. The trial court "abused its discretion when factual findings are without evidentiary support **or** a ruling is based upon an error of law." (Emphasis Added) (Citing Edwards v. Edwards, 384 S.C. 179, 183 (Ct.App 2009)). The July 17, 2013 order reflects both an error of law, by concluding that a breach of contract claim is not an action at law to which a jury trial is protected, and in making factual conclusions without providing evidentiary support. Furthermore, in this case, a review of the Record on Appeal, quickly dispel any notion that this matter

has no "triable issues of fact"[3]. If the Court is going to rule upon the merits of the case, there must be a motion before the court which would make such a ruling appropriate and the court must provide "evidentiary support". , The July 17, 2013 order tells us that it is based upon the motion of the Plaintiff to transfer the case to the non-jury roster and not on a summary judgment motion. The Order is completely devoid of any supporting evidence and is beyond the scope of the motion upon which it purports to rule.

IV. The determination of a right to a jury trial is one in which the Appellate Court does not need any additional record to make a ruling.

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

[3] Again, even if this statement of the trial judge is deemed to be true, which is contested, it still would not support the denial of a jury trial as set forth in the Final Brief of the Appellant because the underlying case is an action at law and the ruling is an error of law.

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. (ROA p. 51)

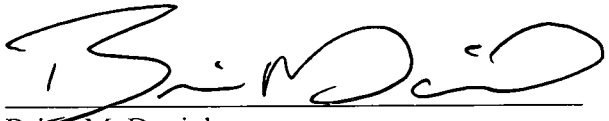
Quite simply, there is no basis existing in this case upon which the Appellant should be denied the right to have the matter heard by a jury. The South Carolina Constitution at Article I, § 14 and South Carolina Rule of Civil Procedure 38 codify this right. The case is an action at law to which a right 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.

CONCLUSION

For the reasons set forth above the Court of Appeals ruling that it was not able to review the appealed issues in this case because the record was insufficient or because the issues were not preserved overlooks and/or misapprehends the issues raised, the legal and factual errors presented and the record on appeal presented. Appellant requests that this Court re-examine the issues and claims set forth in the Appellant's Appeal Brief, which is incorporated herein by reference. The Appellant again requests that 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



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April 24, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-07-05410
Appellate Case No. 2013-001812

The Callawassie Island
Members Club, Inc.,

Respondent,

v.

Arthur H. Applegate

Appellant.

PROOF OF SERVICE

I hereby affirm that I have served upon counsel for the Plaintiff/respondent a copy of the

Appellant's Petition for Rehearing

By causing a copy of the document to be placed in the US Mail first class prepaid postage on April 27, 2015, addressed to their attorneys of record, and mailed to the following addresses:

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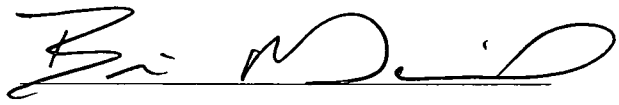
Appellate Case No. 2013-001812
Proof of Service
Petition for Rehearing



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VIA FED EX OVERNIGHT

April 22, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

RE: The Callawassie Island Members Club, Inc. Respondent v. Arthur H. Applegate, Appellant; Appellate Case No. 2013-001812.

Dear Ms. Kitchings:

For filing please find enclosed an original and seven (7) copies of Appellant's Petition for Rehearing for the above captioned appeal. I would appreciate your filing as appropriate and returning to my office a clocked-in copy in the enclosed stamped, self-addressed envelope.

Also enclosed are the following:

1. Proof of service of the Petition on counsel for the Respondent;
2. A filing fee of $25.00 for the required fee for the Petition.

Thank you for your assistance.

Sincerely,

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Enclosures

cc: Ehrick K. Haight, Jr., Esquire, Minor, Haight & Arundell, P.C., P.O. Drawer 6067, Hilton Head Island, SC 29938;

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