THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-001812

The Callawassie Island Members Club, Inc., Respondents

v.

Arthur H. Applegate, Petitioner

PETITION FOR WRIT OF CERTIORARI

Brian D. McDaniel
bmcdaniel@attorneymcdaniel.com
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117

Attorney for the Petitioner

Beaufort, South Carolina
June 12, 2015

Other Counsel of Record:

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff / Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff/ Respondent

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Statutory

Certification by Counsel

Counsel certifies pursuant to SCACR 242(d) that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 19, 2015.

Questions Presented For Review

1. **Did the Court of Appeals err in relying upon Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000) and concluding that Petitioner failed to provide a record sufficient for appellate review where the record shows a written motion, for which memorandums in support and opposition were filed, and to which the Petitioner properly filed a Rule 59 Motion to Alter or Amend and for which the trial court issued a two page Order Denying Defendant's Motion to Alter or Amend, and where the question of whether a party is entitled to a jury trial is a question of law for which the Appellate may decide without deference to the trial court?**

2. **Did the Court of Appeals err in effectively requiring a second Rule 59(e) motion for an argument presented and denied by the trial court, where the Order of the trial court ruled on the issue and set forth a basis for that ruling, and where the parties presented written and filed memorandum in support and in opposition and where the Petitioner filed a Rule 59 Motion on the issues now appealed?**

3. **Did the Court of Appeals err in affirming the trial court by concluding that the Petitioner did not preserve his position where the record indicates a filed memorandum in opposition to the Motion upon which the appealed ruling is based and the record reflects Petitioner filed a Rule 59 Motion to Alter or Amend as well as many other filed documents which also set forth the Peitioner's position and upon which the appeal was taken and upon which the trial court ruling includes clear errors of law and misapprehension of the facts.**

4. **Did the Court of Appeals err in concluding that the appealing party failed to present the court with an adequate record to review whether the appealed from Order exceeded the scope of the motion to have the matter heard non-jury where the Appellant/Petitioner provided for review, among other things, the motion, the opposing and supporting memorandum, and the Order?**

Statement of the Case

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Petioner – Arthur Applegate (hereinafter (Applegate) seeks certiorari regarding the Court of Appeals decision in The Callawassie Island Members Club, Inc., v. Arthur Applegate, S.C. Ct. App. Filed April 15, 2015 (2015-UP-203) reh'g denied (May 19, 2015).

Certiorari should be granted, among other reasons, because of the direct involvement of the Petitioner's constitutional right to a trial by jury and because the decision of the Court of Appeals, denying review on procedural grounds, conflicts with prior decisions and is not supported by the record in the case.

This appeal arises from a civil action filed by the Respondent-Callawassie Island Members Club, Inc. filed in Beaufort County Common pleas in which the Respondent alleged five instances of breach of contract against the Petitioner/Defendant. [App. pp. 15- 34] The claims arise from what the Respondent claims are five memberships owned by the Petitioner in the Respondent (the Club), for which the Respondent is seeking monetary relief for unpaid dues, fees, assessments, and other charge accrued, plus interest and the costs of the action. Prior to the date of the jury trial in the action the Petitioner stipulated to the dismissal of previously asserted counterclaims with the only matters remaining for trial being the five breach of contract claims of the Respondent [App. p. 13] (Stip. of Dismissal Order of May 9, 2013).

Based upon the Petitioner's request for a jury trial in this case, the trial was set for a jury trial the week of May 13, 2013 in Beaufort County. On May 13, 2013 the assigned trial judge held a pretrial conference for the case in his chambers in which there was pre-trial discussion including Respondent making arguments regarding its' motion to have

the matter tried non-jury, which they served May 10, 2013 [App. pp. 50-57] (Plaintiff's Mot. For Non-Jury Trial). The trial judge was also provided Petitioner's memorandum in Opposition to the Respondent's motion. [App. pp. 58– 60] Over the objection of the Petitioner, the trial judge granted the Respondent's motion and ordered that the case be referred to the Honorable Marvin Dukes, Master in Equity for Beaufort County. [App. pp. 3-4] The Order signed May 14, 2013 is a Form 4 Order which states "This case is referred to the Master in Equity." but does not indicate upon what basis the Order was made or specify upon whose motion said Order was being issued. [App. p. 3]

Subsequently, the Petitioner properly and timely filed a motion to Alter or Amend the Order dated May 14, 2013 seeking to have the Order altered to deny the Respondent's motion to have the case heard non-jury and seeking to have the case immediately restored to the jury trial roster. Secondarily, if the Judge refused to deny the Respondent's motion, then the Petitioner in his motion alternatively requested that the Order be altered to specify that it was based upon granting the Respondent's motion and was granted over the objection of the Petitioner, to protect the Petitioner's ability to appeal the same. [App. pp. 61–66]

The trial judge denied the Petitioner's motion to alter or amend signing that Order on July 17, 2013, filed July 23, 2013 [App. pp. 5-6] However, in his Order of July 17, 2013, the trial judge did clarify that the Petitioner was denied a jury trial based upon the motion of the Respondent. In addition, the trial judge issued new findings including finding that the Petitioner only raised legal issues and raised no factual issues in the case which would warrant a jury trial. The trial judge went on to find that documents at issue

in the case are not ambiguous and therefore there are no issues of fact for a jury to consider. [App. p. 5-6]

Petitioner timely filed a Notice of Appeal in the instant case on August 19, 2013 seeking to have both the Order of May 13, 2013 which disallowed the Petitioner's requested jury trial, and the Order of July 17, 2013 which denied the Petitioner's Motion to Alter or Amend and which made new findings and conclusions, be reversed and the matter returned to the jury trial roster for a trial on the merits. The Court of Appeals issued an order affirming the trial court and indicating that the record presented was insufficient and/or that the arguments made were not preserved for review. Petitioner's Petition for rehearing was denied.

Arguments in Support of the Petition

1. **The Court of Appeals erred in relying upon Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000) and concluding that Petitioner failed to provide a record sufficient for appellate review where the record shows a written motion, for which memorandums in support and opposition were filed, and to which the Petitioner properly filed a Rule 59 Motion to Alter or Amend and for which the trial court issued a two page Order Denying Defendant's Motion to Alter or Amend, and where the question of whether a party is entitled to a jury trial is a question of law for which the Appellate may decide without deference to the trial court?**

The Court of Appeals erred as a matter of law, and abused discretion, in relying upon Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306, 29 S.E.2d 45, 57 (Ct.App. 2000) for the position that the Petitioner failed to take some steps (a motion) sufficient to preserve its demand for a jury trial. In the *Hundley* case the Defendant appealed from the denial of its **oral motion** for continuance made pretrial and in chambers. In that case, counsel for Defendant later reduced the motion to writing in an affidavit (made at the

urging of the trial judge) completed after trial. Even in that case the Court of Appeals found the affidavit record to be sufficient for preservation, though stating that the "absence of the trial court's reasoning makes our task difficult." 339 S.C. 306.

In the Court of Appeals Order in this case, it cites Hundley v. Rite Aid of S.C., Inc., apparently for the proposition that **the Petitioner** should have put a motion or other writing in the record, but this overlooks the fact that the granted motion in dispute was in writing [App. pp. 50-57] and was made by the Respondent and was fully contested by the Petitioner [App. pp. 58-60]. Unlike Hundley in which the basis for a denied oral motion was at issue, this case involves a granted **written motion** [App. pp. 3-4 & pp. 5-6]. The demand for a jury having been made, it was (as the Order states) upon the motion of the Respondent [App. pp. 50-57] that the trial court removed the case from the trial roster [App. p. 5]. It is without dispute that the Petitioner opposed the Respondent's motion, as evidenced by the Opposing memorandum filed [App. pp. 58-60] on the motion so there is no other record that would need to be made. However, the Petitioner also filed a Motion to Alter or Amend [App. pp. 61-66] which was also ruled upon [App. pp. 5 -6] by the trial judge and which further made record of those items appealed, from which the Court of Appeals claims were not preserved or for which they claim there is no record.

The refusal to examine the merits of the appeal, and reliance by the Court of Appeals on *Hundley,* in this case is improper since the position of the Petitioner is set forth in the record and since the motion upon which the appeal arises, the supporting and opposing memorandum, the motion to alter and the order being appealed are all preserved, written and included in the record on appeal.

Furthermore, 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).

As set forth in the Petitioner's Memorandum in Opposition to the Motion to Convert to Non-jury [App. pp. 58-60] and subsequent Rule 59 Motion to Alter or Amend [App. pp. 62-64] as to the underlying order, which was included in the Record on Appeal, State law is clear that the Petitioner 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 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...". This is an issue of a fundamental right of the Petitioner.

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. [App. pp. 15-34] The Petitioner has demanded a jury trial [App. p. 35], which has not been disputed, and to which the Court of Appeals accepts, with such demand being acknowledged by the Respondent in their Motion for Non-Jury Trial [App. p. 51]. Prior to the scheduled jury trial date, on or about April 26, 2013, the Petitioner stipulated to the dismissal of all of the counterclaims he had alleged, and the parties subsequently filed an Order formalizing such dismissal, making the only causes of action for trial the five breach of contract claims made by the Respondent [App. pp. 13-14].

The Respondent's Complaint alleges similar causes of action for breach of contract each based upon separate memberships in the Respondent, Callawassie Island Member Club, Inc., which the Respondent alleges are owned by the Petitioner, namely membership #s, 7017A, 7017, 7017C, 7017B, and 3690. For each membership the Respondent is seeking, as their remedy, that they be awarded dues, fees, assessments and other charges, interest and the costs and disbursements of the action, including attorney's fees [App. pp.23 ¶ 16, p. 24 ¶ 22, p. 25 ¶ 28, p. 26 ¶ 34, and p. 28 ¶ 40]. The Petitioner has denied that he owes the money claimed by the Respondent and in his Answer and responsive pleadings he has raised numerous defenses to these claims.

Furthermore, the Petitioner has maintained and pled numerous affirmative and factual defenses, including that the contracts in this case have provisions that create defenses to the current claims, including clear language which sets forth terms of expulsion which would limit and terminate any fees and dues owed by the Petitioner, if any [App. pp. 35-48]. The trial court Order holding that there are no other issues for determination by the jury is completely refuted, not only by these pled defenses but as further argued in previous memorandum in opposition to two summary judgment motions filed by the Respondent which were argued and denied by the trial court in full summary judgment hearings in the case. [App pp. 154-179, 244-246 & 253- 272]

All of these arguments and as further set forth in the Final Brief of the Appellant/Petitioner were included in the record on appeal and it is error for the Court of Appeals to hold that the Petitioner failed to preserve its opposition to the motion for the record. Clearly the Petitioner took every available step and opportunity to oppose and contest the Motion of the Respondent to move the case to the Non-jury roster and the Petitioner deserves a full review of the merits of his appeal by the appellate court.

2. The Court of Appeals erred in requiring a second Rule 59(e) motion for an argument presented to, and denied by, the trial court, where the Order of the trial court set forth the basis for that ruling, and where the parties presented written and filed memorandum in support of, and in opposition of, the motion and where the Petitioner filed a Rule 59 Motion on the issues appealed.

This Court has held to the general preservation rule, that an issue must be raised to and ruled upon in order to be preserved for review Brown v. S.C. Dep't Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002). The Court has also held that as an exception to this general rule, an issue was preserved for review through a post

trial motion (Rule 59(e)) but not ruled upon, noting that lawyers can not force trial courts to address an issue, and a proper Rule 59 request is sufficient without a specific judicial decision on the issue. Pye v. Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Sierra Club v. South Carolina Dep't of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (S.C.App. 2010).

In this case, the issues appealed were in fact raised and ruled upon, thereby preserving them for the current appeal. The record contains the opposing positions of the parties, including the Motion made by the Respondent to have the matter heard non-jury over the demand for a jury of the Petitioner. [App. pp. 50- 57 & p. 35]. The record contains the Petitioner's objection and arguments opposing the motion in its filed memorandum in opposition. [App. pp. 58-60] The record contains the May 14, 2013 Form 4 Order effectively granting the Plaintiff's motion to move the matter to the non-jury roster [App. pp. 3-4]. The record contains the Petitioner's Rule 59 Motion to Alter or Amend the May 14, 2013 Order. [App. pp. 61-64] The record also contains the Order of July 17, 2013 which specifies that the Order is granting the Motion of the Respondent and which makes other rulings upon which the current appeal is based. [App. pp. 5-6]

The Court of Appeals appears to rest upon the incorrect belief that the Petitioner can not appeal issues in the final order unless he made another Rule 59 motion, but this is simply not the law. 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.

3. The Court of Appeals erred in affirming the trial court by concluding that the Petitioner did not preserve his position where the record indicates a filed memorandum in opposition to the Motion upon which the appealed ruling is based and the record reflects Petitioner's filed Rule 59 Motion to Alter or Amend as well as many other filed documents which also set forth the client's position and upon which the appeal was taken and upon which the trial court ruling includes clear errors of law and misapprehension of the facts and issues appealed.

The Court of Appeals was provided with the Record on Appeal which demonstrated that the Petitioner opposed the motion which was made by the Respondent which would deny him the jury trial he had demanded. The arguments of the Petitioner raised on appeal, which the Court of Appeals refused to review, have merit and contain a number of issues that upon review the court will find persuasive.

For instance, 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) [App. p.6] and cites Middleton v Eubank, 388 S.C. 8, 14 (Ct.App 2010) for this proposition. The entire order relies upon 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 appellate review so that this court can 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" (emphasis added)[App. p. 6] and that the "Defendant has not **raised** any factual issues". (emphasis added)[App. 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 [App. pp. 35- 48], the Defendant's (Petitioner's) Memorandum in Opposition to that Motion to have the case heard non-jury [App. pp. 58-60] the Defendant's Memo in Opposition to Plaintiff's Motion for Summary Judgment [App. pp. 154-179] and Defendant's Supplemental Memo In Opposition to the Motion for Summary Judgment [App. 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 asserts significant factual allegations which raise defenses that the construction of the contract requires that the Defendant be expelled which would end all obligations [App. p. 36- 38], and that would be total or partial defenses to liability. The Memo in Opposition to Summary Judgement [App. pp. 154- 179] and the Supplemental Memo [App. pp. 244-246] (both of which are in the Record on Appeal) set 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 they clearly evidence that the trial court's holding that the Defendant "did not raise any factual issues" is false and subject to immediate appeal. Again, this alone presents and preserves for Appellate review a clear

error by the trial court in as much as it simply misstates the record in the case, it is preserved and properly appealed.

4. The Court of Appeals erred in concluding that the appealing party failed to present the court with an adequate record to review whether the appealed from Order exceeded the scope of the motion to have the matter heard non-jury where the Petitioner provided for review, among other things, the motion, the opposing and supporting memorandum, and the Order?

The Court of Appeals also ruled at point two of its Order that the Petitioner failed to present the Court with an "adequate record on appeal for review" as to the issue of whether the Trial Court's Order of July 17, 2013 went beyond the scope of the motion to transfer the matter to the non-jury roster upon which it ruled [App. pp. 5-6]. It is unclear as to what else the Court of Appeals would believe necessary to review the matter where, in this instance, the record shows the motion [App. pp. 50-57], the opposition [App. pp. 58-60] and the Order [App. pp. 3-6] resulting. The trial court ruling that there are no "triable issues of fact" clearly went beyond the scope of the motion (to transfer the matter to non-jury) upon which the Order itself indicates it is based [App. p. 5]. 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 [App. pp. 5-6]. Furthermore, in this case, a review of the Record on Appeal, quickly dispels any notion that this matter has no "triable issues of fact"[1]. 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 [App. p. 5]. The Order is completely devoid of any supporting evidence and is beyond the scope of the motion upon which it purports to rule. As to the factual details of the appeal, which the Court of Appeals refused to review, the Petitioner refers to the Final Brief on Appeal and incorporates those arguments and evidence herein by reference, but in an effort to keep this petition concise will not recite each and every factual and legal argument but also refers to those items set forth herein at argument in support of the petitioner's number one argument above.

CONCLUSION

The Court of Appeals ruling that the Petitioner failed to preserve the issues appealed and/or failed to present a sufficient record for appellate review is erroneous. The harm to the Petitioner in this matter is substantial and involves the fundamental and

[1] 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.

constitutionally recognized right to a jury trial. The decision of the Court of Appeals conflicts with prior decisions and is not supported by the record in the case.

For the foregoing reasons, Arthur Applegate respectfully requests that this Court GRANT his petition for writ of certiorari.

Respectfully Submitted,

LAW OFFICE OF BRIAN MCDANIEL, LLC

Brian McDaniel
2015 Boundary Street, Suite 216
PO Box 2085
Beaufort, South Carolina 29902
SC BAR # 68618
843-379-5117
ATTORNEY FOR PETITIONER
ARTHUR APPLEGATE

Beaufort, South Carolina
June 12, 2015

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PROOF OF SERVICE

PETITION FOR WRIT OF CERTIORARI
And APPENDIX

I certify that I have served the Petitioner's Petition for Writ of *Certiorari* and Appendix upon the Respondent, The Callawassie Island Members Club, Inc. by depositing a copy of the document in the United States Mail, postage prepaid, on June 16, 2015, addressed to its attorneys of record, Ehrick K. Haight, Jr., Esquire, P.O. Drawer 6067, Hilton Head Island, SC 29938; Howell, Gibson & Hughes, P.A., Stephen P. Hughes, Esquire, P. O. Drawer 40, Beaufort, SC 29901-0040.

I further affirm that on this same date, I placed one copy of the Petition for Writ of Certiorari in the mail for filing with the Clerk of Court of the South Carolina Court of Appeals.

Brian McDaniel
Law Office of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellant-Petitioner

Beaufort, South Carolina
June 16, 2015