

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Court of Common Pleas
Honorable Edward W. Miller, Circuit Court Judge

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JUN 19 2015

S.C. Supreme Court

Appellate Case No. 2013-001812

The Callawassie Island Members Club, Inc., Respondents

v.

Arthur H. Applegate, Appellant-Petitioner

APPENDIX

Volume II

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

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

Howell, Gibson & Hughes, P.A.
William T. Young, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Respondent

Jennifer I. Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant

Brian D. McDaniel
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117
Attorney for the Petitioner

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Callawassie Island Members Club, Inc., Respondents

v.

Arthur Applegate, Appellant

FINAL BRIEF OF APPELLANT

Brian D. McDaniel
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117
Attorney for the Appellant

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

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

Jennifer I. Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Judge erred in ordering that the case be heard by the Master in Equity thereby denying the Appellant the right to a jury trial, where the Appellant properly requested a jury trial and where the case is a breach of contract claim for money damages, an action at law, to which the Appellant is entitled to a jury trial.

- II. Whether the Trial Judge, in ordering that the Appellant could not have a jury trial, exceeded the scope of the motion by finding facts and conclusions of law based upon documents and information not in evidence and where the finding and conclusions had the affect of granting judgment and making finding of fact, particularly where such findings and conclusions had been previously ruled upon and denied in the same case.

STATEMENT OF THE CASE

This appeal arises from a civil action filed by the Callawassie Island Members Club, Inc. filed in Beaufort County Common pleas in which the Respondent/Plaintiff alleged five instances of breach of contract against the Appellant/Defendant. The claims arise from what the Respondent claims are five memberships owned by the Appellant in the Respondent 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 trial in the action the Appellant 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 [R. p. 13] (Stip. of Dismissal Order of May 9, 2013).

Based upon the Appellant'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, the Honorable Edward W. Miller, 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 [R. pp. 50-57] (Plaintiff's Mot. For Non-Jury Trial). The discussions were conducted in Judge Miller's chambers without a court reporter or transcript being made. Judge Miller was also provided Appellant's memorandum in opposition to the Respondent's motion. [R. pp. 58-60] (Def. Memo in Opposition) Over the objection of the Appellant, Judge Miller appeared to grant the Respondent's motion and ordered that the case be referred

to the Honorable Marvin Dukes, Master in Equity for Beaufort County [R. pp. 3-4] (Order of May 14, 2013). 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.

Subsequently, the Appellant 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 sought to have the case immediately restored to the jury trial roster. Secondly, if the Judge refused to deny the Respondent's motion, then the Appellant 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 Appellant, to protect the Appellant's ability to appeal the same. [R. pp. 61-66] (Mot. To Alter or Amend dated June 6, 2013)

Judge Miller denied the Appellant's motion to alter or amend signing that Order on July 17, 2013, filed July 23, 2013 [R. pp. 5-6] (Order Miller dated July 17, 2013). In his Order of July 17, 2013, Judge Miller did note that the Appellant was denied a jury trial based upon the motion of the Respondent, but he did not alter the order to note the Appellant's objection to having the matter removed from the jury trial roster. In addition, Judge Miller issued new findings including finding that the Appellant only raised legal issues and raised no factual issues in the case which would warrant a jury trial. Judge Miller 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. None of these findings were in the Order of May 13,

2013 nor does Appellant's counsel recall them being voiced by Judge Miller in the pretrial in- chambers conference upon which such Order is understood to have been based.

Appellant timely filed a Notice of Appeal in the instant case on August 19, 2013 seeking to have both the Order of May 13, 2013 denying the Appellant a jury trial, and the Order of July 23, 2013 which denied the Appellant's Motion to Alter or Amend and made new findings and conclusions, be reversed and the matter returned to the jury trial roster for a trial on the merits.

ARGUMENT

- I. The Appellant is entitled to a jury trial in this matter as protected by the South Carolina Constitution Article I, § 14, South Carolina Rules of Civil Procedure 38, case law since the current case is one based upon breach of contract seeking money damages, and where the Appellant requested a jury trial and did not consent to having the case heard non-jury.**

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 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 in their Motion for Non-Jury Trial [R. p. 51] (Mot. Non-Jury Trial p.2). Prior to the scheduled jury trial date, on or about April

26, 2013, the Appellant 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 [R. pp. 13-14] (Stip. Dismissal Order of May 9, 2013).

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 Appellant, 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. The Appellant 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.

The Respondent has argued that the Appellant should be denied a jury trial because one issue raised in this case is whether the contract documents in this case are ambiguous. In his Order of July 23, 2013 Judge Miller adopted the Respondent's argument in which it relied up the case of Middleton v. Eubank, 388 S.C. 8 (S.C.App. 2010) to support the proposition that only if the contract is ambiguous would the Appellant have a right to a jury trial. However, in making this argument the Respondent and the court not only ignore the numerous other issues and defenses in the case they also confuse a *question of law* arising in a case with the very nature of the case itself as an *action at law*. In fact, it is quite

common that jury trial cases would have issues of law to be determined by the court, but such determinations would not change the nature of the case from being an action at law. Likewise, such determinations would not change the nature of the case to justify denying the Appellant's right to a jury trial in this case. Unlike the instant action, the Middleton case was a declaratory judgment action in which the parties consented to having the case heard by the Master in Equity. In the Middleton case the parties, in fact, all asserted that the contract was unambiguous, and the Judge heard the testimony and weighed the evidence in a two day trial. In this case, where no evidence or testimony was presented, and where the action is one at law, the Middleton case simply does not stand for the proposition for which it was relied upon by the Respondent and the Court. In fact, this court has held that even an action to construe an unambiguous contract is an action at law. Ward v. West Oil Company, Inc., 379 S.C. 225 at 238, (S.C.App. 2008). Therefore, even if the Court accepts the Respondent's argument, the case remains an action at law, such that it is rightly subject to be determined by a jury.

Furthermore, the Appellant 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 Appellant, if any [R. pp. 35-48] (Amended Answer Counterclaims). The Order and the Respondent's assertion that there are no other issues for determination by the jury is completely refuted not only by these numerous

defenses but also by the simple denial made to the Respondent's breach of contract allegations.

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.

II. The Order denying Defendant's Motion to Alter or Amend filed July 23, 2013 is a violation of the right of the Appellant in as much as it exceeds the scope of the motions by finding facts and conclusions of law based upon documents and information not in evidence and where the finding and conclusions has the affect of granting judgment and making finding of fact, particularly where such findings and conclusions had been previously ruled upon and denied in the same case and where the ruling is upon informal and off record proceeding conducted in chambers.

In his Order signed July 17, 2013 Judge Mille finds and rules that 1) The Defendant only raised legal issues- (alleged to be only the interpretation of various statutes) – in contesting the Plaintiff's motion to transfer to the non-jury trial roster, 2) that the Defendant has not raised any factual issues in opposing the

Plaintiff's motion, 3) that the documents at issue are unambiguous and 4) that there is no question of fact in the case.

No only are each of these findings wholly unsupported by the record in the case, but it was improper for the Judge to make these ruling in this circumstances given since the ruling exceeded the scope of the motion before it and contradicted previously made rulings in the case.

"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 trial court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law. Such impermissible findings of fact and conclusions of law should be reversed if they are prejudicial to the Appellant in this case. (Id at 500 citing Watts v. Bell Oil Co. of Ocean Drive, Inc., 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976)).

The order of July 23, 2013 on which the instant appeal is taken, has the effect of granting summary judgment and making findings of fact based on information not admitted or decided by the pleadings. In fact the Order wholly ignores the numerous defenses raised by the Appellant [R. pp. 35-48] (Amended Answer Counterclaims). Second the Order rules upon whether the five contracts upon which the Respondent's claims are based are ambiguous and then makes the finding and conclusion that there exists no issue of fact in the case. These finding

are beyond the scope of the Respondent's motion¹ to have the matter heard non-jury, were not presented to Judge Miller, and had been previously ruled upon in Orders received on motions previously argued by Respondent for Summary Judgment in the case, which were denied.

First, it is incorrect for the Respondent to assert (and for the Court to adopt the argument) that the Appellant has raised only the single issue of ambiguity of the contracts. In fact, although the ambiguity question is the only one upon which the Respondent based its motion, it is plainly obvious that the Appellant has asserted that he does not owe the amounts demanded for numerous reasons set forth in the Answer and as further evidenced by discovery in the case. For instance, the Defendant has argued in one defense that under the terms of the parties agreement that he owes no more than 4 months of past dues and fees due to the provisions in the agreement requiring expulsion after 4 months of unpaid dues and fees. [R. pp. 37. lines 11-20] [R. pp.40-41, lines 37-44] [R. p.42 lines 45-47] (Amended Answer at p.3 lines 11-20 p. 6 lines 37- 44, p. 8 lines 45 – 47) In fact, the Appellant has in the course of defending summary judgment motions in the case provided a record of meritorious defenses. For instance, the Appellant in fact received a letter from the Respondent, prior to litigation indicating that he was going to be expelled in 10 days from the letter, which would effectively terminate his obligations. [R. p. 158 and Suppl R. 2] (Appellant Memo. in Opposition to Sum. Judg. May 8, 2013 p.5 & Exhibit E) These are but two

¹ The Respondent's motion to have the matter heard non-jury, upon which Order the instant appeal is taken, was served by regular mail upon the Appellant's counsel on Friday May 10th prior to the May 13th trial date. The motion was also served by email at 4:33 pm on Friday May 10th 2013.

examples out of many which are clear from the pleadings, filed memorandum and documentary evidence presented in the case that present defenses to the claims made against the Appellant, and any indication that Respondent is unaware or not on notice of such claims is untenable since these are filed documents of record.

In addition, the Respondent's reliance (and the Court's adoption of the argument) that Appellant failed to include a full rebuttal of all points and arguments made by the Respondent in Appellant's written response memorandum to the motion to have the matter heard non-jury is unpersuasive given the fact that the Respondent waited until the eve of trial to make its motion and to notify the Appellant of its motion in this case. In fact, the motion of the Respondent to have the matter heard nonjury was filed and served on May 10, 2013, the Friday prior to the Monday trial date, and was delivered to counsel by email at 4:33 pm on that same day [R. p. 273] (Email of Respondent counsel of May 10, 2013). Although the Appellant did respond [R. pp. 58-60] (Def. Memo in Opp. to Plaintiff Mot.), he would ask the court to consider the lack of proper notice of Respondent's making the motion upon which the court relied to deny the Appellant a jury trial.

Most compellingly, the Respondent has made these same arguments on two separate occasions during the course of this case in motions requesting the court grant summary judgment, and in both instances the court denied the motions. [R. pp. 67-68 and pp. 184-243] (Respondent Motion for SJ of April 26, 2013 and June 2, 2010). On June 7, 2011 Judge Carmen Mullen heard the same issues as set forth in the Respondent's Memo in Support of its Motion for Summary Judgment and denied the motion as set forth in the Order of June 10,

2011 noting that there “exists questions of fact in dispute.” [R. pp. 11-12] (Order of June 10, 2011). Again in a Memo in Support of its renewed Motion for Summary Judgment dated May 7, 2013, the Respondent presented these same arguments to Judge Kinard, who issued a May 9, 2013 Order noting that “obviously facts are disputed.” [R. pp. 7-8] (Order of May 9, 2013) The Respondent filed a motion for Judge Kinard to Alter his Order and on June 28, 2013 Judge Kinard denied that motion.²[R. pp. 9-10] (Order dated June 28, 2013)

In the instant appeal the Appellant notes that in denying the Appellant’s motion to reconsider the Order of May 14, 2013 the court took the extraordinary step of making new findings of fact and conclusions of law far beyond the scope of the informal in chambers conference held in the case, and made ruling which would only be properly made in a duly noticed and held summary judgment hearing, like the previous two in which the matters were fully presented and denied. By doing so, the court exceeded the scope of the Respondent’s last minute motion to have the matter heard non-jury and exceeded the scope of the Appellant’s motion to Alter or Amend. The July 17, 2013 Order in fact makes findings and conclusions upon evidence and testimony not before it, and effectively grants summary judgment on specific issues which had twice been ruled upon and denied in the case in hearings in which the parties presented memorandum and supporting documentation.

² In his Order of June 28, 2013 Judge Kinard makes note of the fact that many of the same issues had been previously argued and denied in the Order of Judge Carmen T. Mullen.

For these reasons the Appellant requests that the Orders of Judge Miller or May 14, 2013 and July 17, 2013 be reversed and the case be returned to the common pleas jury trial on all issues.

CONCLUSION

For the reasons set forth herein and as may be raised in any supplemental or reply brief, and as allowed in oral arguments, 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



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

Beaufort, South Carolina
March 26, 2014

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

THE CALLAWASSIE ISLAND MEMBERS CLUB, INC. Respondent

vs.

ARTHUR APPELEGATE Appellant

FINAL BRIEF OF RESPONDENT

Stephen P. Hughes
William T. Young III
HOWELL GIBSON & HUGHES, P.A.
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorneys for Respondent

Enrok K. Haight, Jr.
Stacey S. Collins
MINOR, HAIGHT & ARUNDELL, P.C.
Post Office Drawer 6067
Hilton Head Island, SC 29938
(843) 785-3040
Attorneys for Respondent

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial court properly transfer a breach of contract action to the non-jury trial roster after determining the subject documents were unambiguous and therefore no triable issues of fact existed, and where opposition to the motion to transfer was premised solely upon issues of law?

STATEMENT OF THE CASE

This is a breach of contract action commenced on behalf of Respondent; The Callawassie Island Members, Club, Inc. ("CIMC"), seeking recovery of approximately six years of unpaid dues, fees, and assessments owed to it by the Appellant, Arthur Applegate, in connection with the five memberships he holds in CIMC. (R.pp. 15-34). The Complaint initially requested the matter be heard nonjury. (R.p. 19). However, Applegate requested a jury trial and asserted counterclaims against CIMC in his Answer, alleging a breach of fiduciary duty, negligent misrepresentation, and seeking an accounting. (R.pp. 35-48). Applegate also asserted third party claims against individual directors, which were dismissed. A jury trial was originally scheduled for May 13, 2013. Applegate dismissed his counterclaims on May 9, 2013, leaving only CIMC's original breach of contract claims. (R.p. 13). There no longer existing any triable issue of fact, CIMC moved to transfer the matter to the nonjury roster. (R.pp. 50-57). The Honorable Edward W. Miller, presiding judge, agreed, and filed a Form 4 Order on May 15, 2013, transferring the matter to the Honorable Marvin H. Dukes III, Beaufort County Master in Equity and Special Circuit Court Judge. (R.p. 3). Upon receipt of the Form 4 Order, Applegate filed a motion to alter or amend. (R.pp. 61-64). The Court issued an Order denying the motion to alter

or amend, and in so doing, explained that no issue of fact existed to be considered by a jury. (R.pp. 5-6). Applegate then filed a Notice of Intent to Appeal. (R.pp. 247-248).

FACTS

Callawassie Island is a private, members-only island, located between Beaufort and Hilton Head Island in Beaufort County. Its members enjoy many amenities on the island, including tennis and golf facilities, as well as a clubhouse and dining facilities. These amenities are owned, managed, and maintained by The Callawassie Island Members Club, Inc., a 501(c)(7) mutual benefit nonprofit corporation registered with the State of South Carolina.

In order to associate a membership with every parcel of property on Callawassie Island, the Callawassie Island Property Owners Association ("CIPOA"), through a vote of its membership, amended its Declaration (covenants), to require each parcel purchased after December 1, 2001, to be also accompanied by a purchase of a membership in CIMC:

Section 2. Callawassie Island Members Club Membership. Every Person or entity who purchases property on Callawassie Island after December 1, 2001 shall thereupon be required to purchase an Equity Membership ("Membership") in the Callawassie Island Members Club, Inc. ("Club") and remain an Equity Member in good standing in such Club for each property purchased or transferred after the approval date of this amendment for so long as such person or entity owns the subject property.

(R.p. 355).

Within the same section, the Declaration states, "Each owner, by acceptance of a deed or other conveyance pursuant to purchase of a Lot or Dwelling after the approval date of this amendment consents and agrees to the obligations of an

Equity Member of the Club.” (R.p. 355). The Declaration is filed with the Beaufort County Register of Deeds at Book 1505 and Page 850. (R.p. 274).

In 2003, The Callawassie Island Company, L.P.¹ (“CIC”), the developer and previous owner of the club’s assets, conducted an auction of real estate it owned on Callawassie Island. The auction was independent of CIMC, and CIMC neither controlled, funded, nor operated the auction, and was otherwise unrelated to the auction proceedings. Applegate, a real estate investor and developer from Charleston, with over 25 years in the real estate business, purchased eight Callawassie lots at the auction. (R. pp. 70, 87). The sales contract executed for each parcel Applegate purchased states:

43. PURCHASER’S ACKNOWLEDGMENT: Purchaser acknowledges that Purchaser has received a copy of the Covenants...It is expressly understood and agreed by the Purchaser that the Property shall be conveyed subject to the recorded Plat and all easements as shown thereon and subject to the general easements, equitable restrictions, limitations on use and affirmative obligations to pay charges and the covenants and restrictions relating to Callawassie Island, all as specified in the Covenants, as amended from time to time, a copy of which has been provided to Purchaser simultaneously with the execution of this Agreement, the receipt of which is hereby acknowledged [Applegate’s initials are entered here]. Seller urges Purchaser to read said Covenants...

44. CALLAWASSIE ISLAND MEMBERS CLUB: Purchaser acknowledges that the Callawassie Island Members Club (“the Club”) on Callawassie Island is a private, equity club pursuant to the Callawassie Island Club Plan (“the Club Plan”). As a condition to Purchaser’s purchase of the Property, Purchaser is required (a) to purchase a golf Equity Membership in the Club for a Membership Contribution Fee of \$45,000.00, which Membership Contribution Fee is included in the Purchase Price, and (b) to remain an Equity Member in good standing in the Club for so long as Purchaser owns the Property. (R.pp. 92-93).

¹ The Callawassie Island Company, L.P. and The Callawassie Island Members Club, Inc., are unrelated entities.

The CIMC governing documents (in addition to the CIPOA covenants, to which Applegate is also bound) include the CIMC Plan for Offering of Membership, Club Bylaws, and General Club Rules, and all amendments to each. All contain similar provisions requiring a member to remain in good standing until the associated real property is sold and the membership is reissued.

In particular, Article X of the CIMC Bylaws of June 29, 2001 (effective at the time Applegate purchased property and obtained memberships), requires the CIMC Board of Directors to "adopt, and administer as appropriate, a Plan of Membership for the Club," which is to include "membership transfer provisions" and "dues fees, charges and assessment rules and procedures." (R. pp. 415-416). Article XI of the Bylaws authorizes CIMC to pursue legal action against its members for unpaid dues, fees, charges, or assessments. (R.p. 416). This provision is repeated in Section 5.5 of the Plan for Offering of Membership. (R.pp. 400) (*See also* R.p. 118).

The Plan for Offering of Membership contains the following representations (all caps and bold print are included in original):

1.7 CAREFULLY REVIEW ALL DOCUMENTS

This plan is a summary of the membership opportunities offered by the Club and is qualified by the definitive information set forth in the attached exhibits. Every person who desires to purchase a membership in the Club should carefully read the Plan and all of the attached documents and should consider seeking professional advice to evaluate these documents.

1.8 RELY ONLY ON INFORMATION IN THIS MEMBERSHIP PLAN

No person has been authorized to give any information or make any representation not contained in the Plan and, if given or made, such information or representation must not be relied upon as having been authorized by the Club.

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1.9 MEMBERSHIPS OFFERED ONLY FOR RECREATIONAL PURPOSES

MEMBERSHIPS ARE BEING OFFERED EXCLUSIVELY FOR THE PURPOSE OF PERMITTING PERSONS ACQUIRING MEMBERSHIPS TO OBTAIN RECREATIONAL USE OF THE CLUB FACILITIES. MEMBERSHIPS SHOULD NOT BE VIEWED OR ACQUIRED AS AN INVESTMENT AND NO PERSON PURCHASING A CLUB MEMBERSHIP SHOULD EXPECT TO DERIVE ANY ECONOMIC PROFITS FROM MEMBERSHIP IN THE CLUB. NO FEDERAL OR STATE AUTHORITY HAS PASSED UPON OR ENDORSED THE MERITS OF THIS MEMBERSHIP PLAN.

(R.p. 394).

The Plan further provides, in pertinent part:

2.2.4 PURCHASERS OF A RESIDENTIAL UNIT OR LOT IN CALLAWASSIE²

Every person or entity which purchases or takes legal title to a Lot or Dwelling on Callawassie Island shall be required to purchase an Equity Membership in the Club and remain an Equity Member in good standing for so long as such person or entity owns a Lot or Dwelling on Callawassie Island.

(R.p. 405)

2.4.9 PAYMENT OF DUES BY RESIGNED EQUITY MEMBERS

An equity member who is on the waiting list to sell their Club membership will be obligated to continue to pay all Charges to the Club until his or her equity membership is reissued by the Club...A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all Charges on the resigned membership.

(R.p. 398)

3.4 MEMBERS' RIGHTS TO USE THE CLUB FACILITIES GOVERNED ONLY BY THE PLAN

If approved for membership in the Club, the candidate agrees to be bound by the terms and conditions of the Plan and irrevocably agrees to fully substitute the membership privileges acquired pursuant to the Plan for any present or prior rights in or to use the Club Facilities. All new members and their spouses will be required to sign an acknowledgement that they have been provided a copy of, read and

² This provision is found in "Attachment B 6/21/01" to the Plan, and is identified as a "Conditional Addendum to Membership Plan." In accordance with Attachment B, Paragraph 2.2.4 became effective in December 2001 upon the enactment of a similar provision within the CIPOA covenants.

agree to abide by the Club's By-Laws, the Plan and the General Club Rules.

(R.p. 399)

The CIMC General Club Rules, adopted by the Board of Directors on August 8, 2001, also addresses a member's ongoing obligation to pay dues, fees, assessments, and other charges until the membership is reissued:

14.2.1 Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for Offering of Club Memberships. Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums).

(R.p. 429)

14.2.3 Notwithstanding any termination or suspension of membership, the member shall remain liable for any unpaid club account or membership dues, fees, charges, and assessments, and such member shall not be entitled to a refund of any part thereof paid by a member to the Club.

(R.p. 429)

Regardless of other amendments to the governing documents during Applegate's time of membership in CIMC, they have consistently maintained the requirement that a member is obligated to pay dues, fees, assessments, and other charges to the Club until the member's property is sold and that membership is reissued (R.pp. 97-149).

Although Applegate originally purchased 8 lots on Callawassie Island and obtained 8 memberships to CIMC, Applegate continues to own only four lots on Callawassie, holding five memberships to CIMC. (R.pp. 30-34).

As part of the purchase agreement between CIC and Applegate, the first two years' dues to CIMC were paid by CIC. However, after CIC's obligation to pay dues ended, Applegate failed to make any payments to CIMC for the subject

memberships. CIMC then commenced this action, seeking recovery of the fees it is owed. (R.pp. 18-34).

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). An appellate court may decide questions of law with no particular deference to the trial court. Verenes at 15, 690 S.E.2d at 773.

ARGUMENT

The trial court properly found that the unambiguous documents at issue in this matter do not present a question of fact for a jury to consider, and properly transferred the matter to the master in equity for a bench trial.

I. The Court correctly determined that an action at law presenting no triable issue of fact must be tried by the court.

Generally, whether a right to a jury trial exists is determined by the nature of the action, either in law or in equity. Verenes at 16, 690 S.E.2d at 773. Only actions at law may be heard by a jury. Id. The Appellant erroneously contends that an action at law is automatically subject to a trial by jury. The South Carolina Rules of Civil Procedure, by their plain language, demonstrate that an action at law may only be tried by a jury when a triable issue of fact exists.

Rule 38(b), SCRPC, states, "any party may demand a trial by jury of any issue triable of right by a jury..." (Emphasis added). Therefore, even though the Rule also states that the right to a jury trial "shall be preserved to the parties inviolate," such a right **only** extends to those matters which are subject to a jury

determination. This recognition is buttressed by Rule 39, SCRCP: "The trial of all issues so demanded shall be by jury, unless... (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist." Rule 39 further provides: "issues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court or may be referred to a master as provided in Rule 53...." Therefore, the trial court, upon determining no triable issue of fact existed, was within its authority to transfer the instant action to the master.

This matter involves contract interpretation. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (quoting Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). A contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. Id. Importantly, whether the contract is ambiguous is a question of law for the court. Id. An unambiguous contract may not be varied or contradicted by evidence drawn from sources other than the contract itself. Walters v. Summey Building Systems, Inc., 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct. App. 1993).

Accordingly, in a contract dispute, if the contract is determined to be unambiguous, there is no triable issue of fact for a jury. ESA Services, LLC v. South Carolina Dept. of Revenue, 392 S.C. 11, 707 S.E.2d 431 (Ct. App. 2011). Correspondingly, the court itself is required to interpret the contract and apply the plain and ordinary meaning of its terms. Id. Even though the matter may arise out of

a contractual dispute, and is therefore an action at law, a jury trial is not appropriate when the contract is unambiguous.

In addition to the clear and consistent requirement that a member pay dues, fees, and other charges until the membership is reissued, it is equally important to note that the governing documents fail to relieve a member who is suspended, terminated, or expelled from that ongoing liability. After giving due consideration to the plain meaning of the relevant provisions, the trial court correctly determined that no triable issue of fact exists.

Despite Applegate's contention that numerous issues of fact remain, the purported issues he raises within his brief are questions of law. First, Applegate raises the interpretation and applicability of certain statutes within the South Carolina Nonprofit Corporations Act as grounds for a jury trial. However, statutory interpretation is a matter of law for the court. Centex Intern., Inc. v. S.C. Dept. of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). The second issue he asserts in support of a question of fact are what he deems "clear provisions" within the documents that relieve him of ongoing obligations to CIMC. As previously established, unambiguous language is to be interpreted by the court. Therefore, Applegate's reliance upon clear language in the documents subjects the documents to a court's interpretation. In short, despite representations to the contrary, Applegate offered no triable issues of fact to the trial court, and has presented none in the instant appeal.

Finally, Applegate is incorrect in his contention that the trial court went beyond the scope of the motion and ruled on issues not before it. By the plain

language of its motion to transfer, CIMC cited the unambiguous nature of the governing documents, offering specific provisions within the documents as support. (R.pp. 50-57). The trial court was presented with those issues, and therefore the court was correct in ruling upon them. Moreover, whether an ambiguity exists in the subject documents is a threshold matter that had to be addressed prior to trial. Until the appealed-from Order was filed, the court had never before ruled whether an ambiguity existed in the subject documents, and if an ambiguity existed, what it was. (R.p. 7, R.p. 11). Accordingly, not only was it a requirement that the court address that specific issue, the court did not contradict any prior ruling in the case when it found the documents to be unambiguous.

II. Applegate's purported lack of notice regarding the motion to transfer this matter to the nonjury roster is not properly before this Court.

Applegate argues that he was not afforded proper notice of the motion to transfer this matter to the nonjury roster. However, this objection was raised for the first time on appeal. Therefore, because it was neither raised to nor ruled upon by the trial court, it is not preserved for appellate review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Moreover, given the fact that the trial court could not proceed without first deciding the motion to transfer, and in light of Applegate's dismissal of his counterclaims only days before the trial was scheduled to commence, it was proper for the court to make such a determination in an abbreviated time period. Although CIMC concedes the circumstances in the instant matter are unusual, its only options

were to seek a transfer to the nonjury roster or proceed with a jury trial that presented no questions of fact. Accordingly, the motion to transfer was appropriate.

III. Prior rulings denying summary judgment are irrelevant to the trial court's determination that no triable issues of fact exist.

Applegate argues that the trial court ruling was improper because it contradicted prior orders denying CIMC's motion for summary judgment. This contention is misplaced.

Ignoring the plain fact that a motion for summary judgment is different than a motion to transfer, an order denying summary judgment does not establish the law of a case, and summary judgment may be raised again by subsequent motion. Ballenger v. Bowman, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Therefore, a trial court is not bound by a prior order denying summary judgment.

Moreover, the prior orders do not address the issue presented to Judge Miller. Although trial courts previously denied motions for summary judgment, those orders do not find that the subject documents contain an ambiguity. (R.p. 7, R.p. 11). In fact, one order is silent as to the issue (R.p. 7) and the other specifically refuses to find an ambiguity. (R.p. 11). Consequently, even assuming the court here is bound by prior rulings, nothing in the prior rulings precluded the trial court from determining the documents are unambiguous.

Interestingly, Applegate contends that the transfer of the matter to nonjury "effectively grants summary judgment." This appears to be a concession that, upon a proper review and determination by the trial court, CIMC will prevail. If so, this concession only underscores the unambiguous nature of the documents. However,

irrespective of his intent, Applegate can present his legal defenses, and the master may make his own determination regarding the governing documents.

CONCLUSION

For the reasons discussed herein, the trial court's order was appropriate and its decision should be affirmed.

Respectfully submitted,

HOWELL, GIBSON & HUGHES, P.A.

By: 

Stephen P. Hughes
William T. Young III
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400

AND:

Ehrick K. Haight, Jr.
Stacey S. Collins
MINOR, HAIGHT & ARUNDELL, P.C.
Post Office Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Respondent

Beaufort, South Carolina
March 31, 2014

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

FINAL REPLY BRIEF OF APPELLANT

Brian D. McDaniel
Law Office Of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
SC Bar # 68618
(843) 379-5117
Attorney for the Appellant

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

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SC Court of Appeals

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

Jennifer I. Campbell, Esquire
2008 Spectable Street
Beaufort, South Carolina 29902
Attorney for the Defendant

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The Appellant submits this Reply Brief responding to the Brief of the Respondent making objections to “factual” allegations set forth in the Respondent’s Brief and replying to the arguments of the Respondent.

Respondent’s Brief alleges facts without support

First, in its Brief the Respondent sets forth alleged “Facts” (Respondent’s Brief pp. 2 -6), which are contested, and in making those allegations the Respondent fails to provide a reference to the record in support of those facts in violation of Rule 208(b) SCACR. Rather than summarizing the contentions of the Respondent, per the Rule, the Respondent’s Brief attempts to present to the appeals court what it alleges are “facts”, for which there is either no evidentiary or testimonial support, or there is no reference given to the record from where those alleged “facts” are being derived. For instance, the Respondent asserts that “*In order to associate a membership with every parcel of property on Callawassie Island, the Callawassie Island Property Owners Association (‘CIPOA’)... amended its Declaration (covenants)...*” (emphasis added), but the Respondent fails to provide any factual support for this allegation purporting to explain why CIPOA amended its Declaration. In fact, there is no testimony in this case from any representative of CIPOA nor are there are references in the Brief that would demonstrate that this allegation was even presented to the trial court. Likewise, Respondent’s references to depositions of Applegate and CIMC on page 3 of the Respondent’s Brief are improper since those documents were not filed in the underlying action nor presented to the trial court. While it is believed that there

are some excerpted passages of the Applegate deposition referenced in previous court filing, the Appellant has found no previous introduction of the CIMC deposition cited nor most of the Applegate deposition references. Therefore, the introduction of these depositions is improper material for appellate review because they are not filed in the case and/or were not presented in argument to Judge Miller. The inclusion of these matters not previously filed and made part of the courts record would violate Rule 210(c) SCACR.

Likewise, the Respondent's brief improperly references and cites to various documents it alleges are the governing documents of the Respondent (see pages 4, 5, 6 of Respondent's Brief) including reference to the CIPOA covenants (p.4), CIMC Bylaws (p.4), CIMC Plan for Offering of Membership (p.4, 5), and CIMC General Club Rules (p.6) without reference to the record in the case. In fact in their brief Respondent recites select excerpts from some of the various versions of these documents whereas in the Designation of Matter to be included on the Record on Appeal the Respondent does not limit or specify which version of those documents it is referencing. Likewise, the Designation seeks to include the entire document not just select pages which might be referenced in their Brief (See Designation of Respondent (m), (n) and (o)). Simply put, the Respondent can not now seek to introduce evidence and opinions which have not been presented to the trial court and those materials and related arguments should be stricken or disregarded for that reason.

However, even if the court were to believe that these matters are properly presented for its review, even those "facts" would support that the Appellant is

entitled to a jury trial. Again, the Respondent does not deny that a jury trial has been demanded. The matter was in fact prepared for a jury trial on May 13, 2013, when in a pre-trial conference discussing the basic facts of the dispute and whether settlement was possible, Judge Miller said that the case sounded like one better heard by the Master in Equity. Judge Miller momentarily left counsel for both parties in his chambers and upon returning to counsel stated that the matter had been moved to the Master in Equity. At that time the Appellant objected to the transfer but was not given any basis for the ruling [R. p. 3-4] (See Form 4 of May 14, 2013). Having not formally argued any motions before Judge Miller, it was not until the parties filed opposing motions to reconsider the Form 4 Order transferring the case that the Court provided some basis for its ruling [R. p. 5-6] (see Order of July 17, 2013) claiming to grant the Respondent's motion to transfer to non-jury, from which the current appeal is taken. Those Orders exceed the limit and scope of the motion to transfer to non-jury filed by the Respondent and should be reversed. Wells Fargo Bank NA v. Smith, 398 S.C. 487 at 499 (S.C.App. 2012).

Reply to Arguments of the Respondent

The Respondent relies upon two unsupported arguments to contest this appeal 1) that there are no factual issues remaining in the case, which is simply an untenable claim, and 2) the proposition that "if the contract is determined to be unambiguous, there is no triable issue of fact for a jury." (Respondent's Brief p. 8) a legal conclusion for which the Respondent provided no citation nor any direct

legal support. As referenced in the Appellant's Brief, Ward v. West Oil Company, Inc., 379 S.C. 225 at 238 (S.C. App. 2008) refutes the assertion upon which the Respondent's entire argument is built, indicating that even an action to **construe** an **unambiguous** contract is an action at law. While Appellant disagrees that the Respondent has proven the contract is unambiguous, if they had, the effect would only be to limit what information the jury can review as they "construe" the contract documents to determine the intent of the parties, it does not require that the Appellant no longer be entitled to a jury, nor does it mean that the jury would construe the contract in the Respondent's favor. The Appellant in fact has cited numerous provisions in the "governing" or "contract" documents which would refute the claims alleged in the case, as set forth in the Amended Answer at p.3 lines 11-20; p.6 lines 37-44, and p.8. Lines 45-47 [R. p 37-38, p.40-42] (Amended Answer reference to General Club Rules requirement for expulsion of members after 4 months of delinquency). These matters along with other questions of fact, such as, was the Defendant expelled from the Club, can the Club allow some members to concede memberships while refusing to allow other members of the same class to concede their memberships back to the Club, did the Appellant resign from the Club, and does the Appellant owe money to the Club, all demand that the Appellant be allowed a jury trial in this matter.

Previous Orders in the Case on the same issues:

In its Brief the Respondent asserts at p. 9 and 11 that the issue of ambiguity has not been previously ruled upon by the Court. This is contradicted

by the record in this case in which the Respondent has argued and lost its summary judgment motions on multiple occasions. In fact judge Mullen's order of June 7, 2011 specifically states that "the Court finds that **amongst the governing documents** under which the Plaintiff is seeking Summary Judgment in this case there **exists questions of fact in dispute** to warrant denying the current motion for Summary Judgment." (Emphasis Added) [R. p.11-12] These are the same governing documents to which the Respondent in its brief to this court continues to assert that there exists no question of fact in dispute, despite Judge Mullen's ruling. The Respondent's brief refuses to acknowledge the plain language of these past rulings in which these summary judgment motion issues were heard on the record (not in chambers), were based upon the presentation of the memorandum and arguments of counsel, and were all denied. In fact, two circuit court judges have fully heard the Plaintiff's Summary Judgment motions and have found that there exists questions of fact in dispute [R. p.7-8] [R. p.9-10] [R. p. 11-12] (Order J. Ernest Kinard May 9, 2013, Order J. Ernest Kinard June 28, 2013, Order of Judge Carmen T. Mullen dated June 10, 2011). The Appellant has a right to a jury trial as those questions of fact. Also please note that Judge Miller did not hear summary judgment motions in the case and made his findings of his July 17, 2013 Order without oral arguments and in response to Respondent's motion to Reconsider the Form 4 Order transferring the matter to the Master in Equity.

Issue of Notice not provided to the Appellant:


In its brief the Respondent contends that the issue of notice was not raised prior to the current appeal and was not ruled upon by the trial court and is therefore not preserved. Further, the Respondent claims that dismissal of the Defendant's counterclaims somehow justifies the lack of notice. However, because the causes of action of the Respondent against the Appellant in this case are actions at law, to which a jury trial is a matter of right, this argument is unpersuasive. Furthermore, it was not until the Court issued the July 17, 2013 Order, denying the Appellant's Motion to Reconsider the Form 4 Order of May 14, 2013, and granting the Respondent's Motion to reconsider that the Appellant was aware of any basis upon which he was being denied a jury trial. Although an objection to the order denying the jury trial was made by counsel for the Appellant at the time of the pre-trial conference, and subsequently in writing, the Appellant contends that the manner in which the Order was issued effectively denied him the ability to create a record by which his objections could be made. By providing the motion for non-jury trial so late in the evening on the Friday before Monday jury trial and because the trial judge made his ruling after an in-chambers pre-trial conference in which the parties discussed the case in general terms but did not fully present any particular motions, the Appellant was put in a position where, after seeking some clarification for the basis of the denial of the jury trial, the current appeal was his only option.

Response to claims of a Concession

At page eleven of the Respondent's Brief the Respondent claims that the Appellant's Brief concedes that Respondent will prevail in the case. This is incorrect and the Appellant makes no such concession now or in any previous filings in this case or Appeal.

Conclusion

For these reasons and as set forth in the Initial Brief of the Appellant the Orders of the May 14, 2013 and July 17, 2013 should be reversed and a jury trial should be ordered.


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

Attorney for the Appellant

March 26, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The Callawassie Island Members Club, Inc., Respondent,

v.

Arthur H. Applegate, Appellant.

Appellate Case No. 2013-001812

Appeal From Beaufort County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2015-UP-203
Heard March 4, 2015 – Filed April 15, 2015

AFFIRMED

Brian D. McDaniel, of Law Office of Brian McDaniel,
LLC, of Beaufort, for Appellant.

Ehrick K. Haight, Jr., of Minor Haight & Arundell, PC,
of Hilton Head Island; and Stephen P. Hughes, of Howell
Gibson & Hughes, PA, of Beaufort, for Respondent.

PER CURIAM: In this breach of contract action brought by The Callawassie Island Members Club, Inc. (CIMC) against Arthur Applegate, Applegate appeals a circuit court order referring the matter to the Master-in-Equity, arguing (1) the

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order of reference improperly denied him a jury trial on an action at law and (2) the order denying his motion to alter or amend the order of reference improperly contradicted two prior orders denying summary judgment to CIMC, went beyond the scope of CIMC's motion to have the matter heard without a jury, and made new findings of fact and conclusions of law. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Applegate's right to a jury trial: Rule 210(h), SCACR (stating that subject to exceptions that are not applicable to this case, "the appellate court will not consider any fact which does not appear in the Record on Appeal"); Rule 39(a)(2), SCRCR (stating that even though a party has demanded a jury trial, the court may find the right to a jury trial on some or all of the issues in the case does not exist); *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000) (stating "motions must be made on the record to be preserved," but also allowing "an oral motion that is later reduced to writing [to] preserve an issue for appeal"); *id.* at 57, 529 S.E.2d at 306-07 (stating appellants "bear the burden of providing the court with a record sufficient to allow appellate review").

2. As to whether the order denying Applegate's motion to alter or amend exceeded the scope of the motion: *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007) ("South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review."); *Ballenger v. Bowman*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case . . ."); *Mains v. K Mart Corp.*, 297 S.C. 142, 145, 375 S.E.2d 311, 313 (Ct. App. 1988) ("A trial lawyer must, with all deference to the court, preserve his client's position in order to lay a foundation for appeal.").

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

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

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SC Court of Appeals

Callawassie Island Members Club, Inc., Respondents

v.

Arthur Applegate, Appellant

APPELLANT'S PETITION FOR REHEARING

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

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 basis¹ 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 arguments² 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 Judgment (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 withdrawn 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



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

Beaufort, South Carolina
April 24, 2015

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

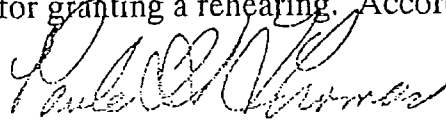
v.

Arthur H. Applegate, Appellant.

Appellate Case No. 2013-001812

ORDER

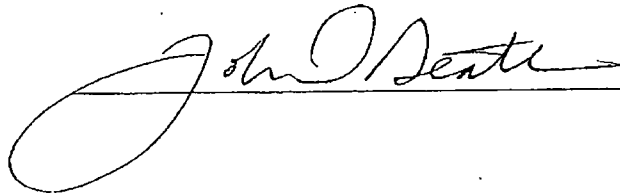
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:
Brian D. McDaniel, Esquire
Ehrick K. Haight, Jr., Esquire
Stephen P. Hughes, Esquire
The Honorable Edward W. Miller

FILED
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