THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2013-CP-04-2409

Hubert Bethune, ... Respondent,

v.

Waffle House, Inc., ... Appellant.

REPLY BRIEF OF APPELLANT

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

The Respondent Hubert Bethune contends in his response brief that a majority of the arguments made by the Appellant Waffle House, Inc. are "completely irrelevant." Bethune contends that the Magistrate's Court "on its own motion" dismissed the case for lack of subject matter jurisdiction. *See*, Respondent's Brief, p. 4.

Bethune relies on a revisionist history of the proceedings in Magistrate's Court. The procedural history he proposes is unsupported in the record and is in certain respects inconsistent. For example, in his brief, Bethune argues that he filed a motion to transfer the case to Circuit Court, which is correct. Bethune insists, however, that "[t]he Respondent never withdrew their [sic] motion as alleged by the Appellant." *See*, Respondent's Brief, p. 10. That is clearly wrong. The Court is referred to the July 22, 2013 letter sent by Bethune's counsel to the Magistrate's Court stating: "Please be advised that I am withdrawing the Motion previously filed on the above-referenced case to have this matter referred to Common Pleas Court." (R. 58). This is also reflected in the Magistrate's return at the entry for

July 22, 2013: "Plaintiff withdrew motion to transfer to Common Pleas Court." (R. 33). Therefore, the motion to transfer was withdrawn by Bethune on July 22, 2013.

Remarkably, despite Bethune arguing that the motion to transfer was never withdrawn, he nonetheless argues that there was no motion pending and the Magistrate *sua sponte* dismissed the case. He is correct that no motion pursuant to Rule 41(a)(2) was ever filed seeking the voluntary dismissal of the Magistrate's Court case. However, it is patently false to suggest that the Magistrate acted *sua sponte*. Instead, on August 29, 2013, Bethune's counsel sent the Magistrate a proposed Order of Dismissal, which was immediately signed and filed without even giving Waffle House an opportunity to be heard. There is no evidence in this record, or indication in the Magistrate's return, that the proposed Order of Dismissal was requested by the Magistrate. Indeed, if that had occurred, it would have been an improper *ex parte* communication. In short, the Magistrate's signing of an unsolicited Order of Dismissal sent by plaintiff's counsel is not acting *sua sponte*. Moreover, from his return, it is clear that the Magistrate did not believe he was acting *sua sponte*. The return refers to the adjudication of "Plaintiff's Motion to Dismiss due to damages exceeding Magistrate's Court limit of $7500.00." (R. 33). Thus, the Magistrate thought he was acting on Bethune's motion, but he was in error because there was no such motion ever filed or pending. The Magistrate

did not rule on a pending motion, but he likewise did not rule *sua sponte* either. Clearly, there should have been a motion for voluntary dismissal filed pursuant to Rule 41(a)(2) which was supported by affidavits or other evidentiary support. That, however, was not done and constitutes part of the reversible error.

In addition, the voluntary dismissal of Bethune's action in Magistrate's Court was never supported by any evidence. At no time did the Magistrate cite to any evidence that was submitted and on which he relied in deciding that Bethune's damages exceeded $7,500, when those damages did not exceed that amount when the suit was initially filed in Magistrate's Court on July 16, 2012. Likewise, in his brief, Bethune points to no such evidence. In his brief, Bethune argues that the Magistrate's Court (and the Circuit Court on appeal) "essentially found" that the damages exceeded the $7,500 jurisdictional limit. *See*, Respondent's Brief, p. 6. But, he cites to no evidence supporting that "finding." Later, Bethune explains that "[t]he Magistrate Court was *informed* that the Plaintiff/Respondent's action exceeded the limited jurisdictional limits," but again he cites to no evidence supporting that "finding." *See*, Respondent's Brief, p. 8. (Emphasis added). At best, this is a concession that the Magistrate's Court acted only on the argument of counsel and no substantive evidence. However, as Waffle House has previously pointed out in its opening brief, the law is well settled that "counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."

Ex Parte Morris, 367 S.C. 56, 624 S.E.2d 649, 653 (Ct. App. 2006). A court "may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments. *Id.* Yet, that is precisely what occurred here.

Despite these clear and reversible procedural errors, Bethune makes what is in essence a harmless error argument. Bethune insists that the action taken by the Magistrate was correct because the Magistrate's Court did not have jurisdiction. Remarkably, he makes that argument despite the fact that Bethune himself commenced the case in Magistrate's Court thereby making the representation that the Magistrate's Court did have subject matter jurisdiction at the commencement of the action. Bethune's position is further flawed because he cites to Section 22-3-30 as "the most authoritative rule of law regarding this issue." *See*, Respondent's Brief, p. 7. Section 22-3-30 provides as follows:

> When a counterclaim is filed which if successful would exceed the magistrates' civil jurisdictional amount as provided in Section 22-3-10, then the initial claim and counterclaim must be transferred to the docket of the common pleas court for that judicial circuit.

S.C. Code Ann. § 22-3-30. Section 22-3-30, however, is inapposite. It applies only to situations where a counterclaim is filed which exceeds the jurisdictional limit. There is no corresponding statute for a scenario where the plaintiff's original

claim exceeds the jurisdictional limit.[1]

That does not dissuade Bethune, who relies on Section 22-3-30 nonetheless to argue that there must be a mechanism whereby the Magistrate's Court may transfer a case without counterclaims to the Circuit Court given that the General Assembly provided such a mechanism for cases with counterclaims. Bethune, however, ignores the "canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius exclusio alterius*' [which] holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" *City of Rock Hill v. Harris*, 391 S.C. 149, 705 S.E.2d 53, 55 (2011). Clearly, the General Assembly intended to provide for the transfer of a case to Circuit Court *only where a counterclaim exceeds the jurisdictional limit.* The reason for that is obvious. As this case ably demonstrates, a plaintiff controls the choice of forum or jurisdiction from the outset. If the plaintiff commences an action in Magistrate's Court, he represents that the damages claimed do not exceed the jurisdictional limit. In contrast, a counterclaimant did not choose the forum and hence did not make the representation at the outset of the action that his damages claim does not exceed the jurisdictional limit. Hence, the counterclaimant cannot be held to the

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[1] Not surprisingly, Bethune has not cited a single case where the appellate courts have allowed for the transfer of a case with no counterclaim from Magistrate's Court to Circuit Court. The only reported decisions addressing the transfers of cases to Circuit Court all involved counterclaims exceeding the jurisdictional limit. *See e g , Judy v Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009); *Mosseri, Mosseri, Castro v Austin's at the Beach, Inc* , 372 S.C. 593, 642 S.E.2d 760 (2007).

Magistrate's Court jurisdictional limit. The plaintiff is clearly in a different position. Because he chose to commence his case in Magistrate's Court, despite having the option to file in Circuit Court, the plaintiff cannot simply transfer the case to Circuit Court when he changes his mind and wants a different forum. This is no different than a type of "forum shopping" which is typically found to violate public policy. *See*, *Nash v. Tindall*, 375 S.C. 36, 650 S.E.2d 81, 84 (Ct. App. 2007) (describing forum shopping as "an act that violates public policy"). In fact, this is worse than typical forum shopping because the plaintiff originally chose the Magistrate's Court as his forum and then experienced some type of buyer's remorse or second thoughts.

Bethune, nonetheless, insists that the Magistrate properly dismissed the action "since it did not have jurisdiction over this matter any longer." *See*, Respondent's Brief, p. 8. The use of the words "any longer" suggests an admission by Bethune that the Magistrate's Court did have jurisdiction at one time. Bethune then claims that the Magistrate's Court "lost jurisdiction" because the damages exceeded the jurisdictional limit. *See*, Respondent's Brief, p. 8. However, Bethune points to no evidence to support this contention. There is no evidence cited that the Magistrate could have relied on to conclude that the Magistrate's Court did, in fact, lose jurisdiction -- assuming that the court can lose jurisdiction under these circumstances, which as discussed below, it cannot.

Interestingly, Bethune cites to the case of *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), for the proposition that "where the actual value of damages claimed exceed its jurisdictional amount, Magistrate Court is without jurisdiction to try the case." *See*, Respondent's Brief, p. 8. Bethune, not surprisingly, excludes any pinpoint cite because that verbatim quote does not appear in the *Stroy* opinion. In actuality, Bethune is guilty of editing the actual quote from *Stroy*, which entirely changes the meaning from the Supreme Court's actual holding in *Stroy*.

Stroy was a claim and delivery action to recover the possession of a mule. The jurisdictional limit for Magistrate's Court at that time was $100. In order to acquire jurisdiction, the plaintiff represented at the commencement of the action that the mule was worth $95; however, at trial, he testified that the mule was worth $150. As a result of the trial, the magistrate awarded possession of the mule to the plaintiff or alternatively $99. On appeal, the Supreme Court reversed and found that the Magistrate's Court lacked jurisdiction because the property sought by the claim and delivery exceeded the jurisdictional limit. The Supreme Court explained as follows:

> A party cannot put a fictitious value on property in order to give the magistrate's court jurisdiction; but *where the actual value of the property sued for is over $100 the magistrate's court is without jurisdiction to try the case.* The burden is on the party suing to show that the property does not exceed in value the sum of $100. He cannot limit the value of the property sued for to less than $100, in order that the magistrate's court may have

> jurisdiction. The test is the value of the property; if it is upwards of $100 in value, the magistrate's court is without jurisdiction.

89 S.E. at 666. (Emphasis added). Thus, in a claim and delivery action, the Supreme Court held in *Stroy* that the value of the property claimed governs the jurisdiction of the Magistrate's Court.

The highlighted language from the quote above shows the creative editing that was done by Bethune. Bethune substituted the words "actual value of damages claimed exceed its jurisdictional limit" for the words "actual value of the property sued for is over $100." *See*, Respondent's Brief, p. 8. In essence, Bethune confuses and interchanges two distinct concepts – "actual value of property" versus "amount of damages claimed." The *Stroy* decision explains why the difference is significant. The Supreme Court proceeded to hold:

> It is different as to the amount claimed by a party; he can forego part of his claim so as to ask for less than $100, but where the plaintiff reduces the amount then past due, for the purpose of making his claim for a sum not exceeding $100, so as to bring it within the jurisdiction of a magistrate's court, he cannot afterwards bring an action for amounts omitted.

89 S.E. at 666-667. In effect, as the Supreme Court makes clear, there is a definitive difference between "actual value of property" and "amount of damages claimed." A plaintiff may bring a claim in Magistrate's Court where its damages exceed the jurisdictional limit; however, when that occurs, the Magistrate's Court

may properly exercise jurisdiction, but the plaintiff's recovery is limited to the jurisdictional amount. In effect, the Magistrate's Court is not without jurisdiction to try a damages case.

Therefore, in the present case, as the *Stroy* decision clearly holds (notwithstanding the creative editing by Bethune), the Magistrate's Court was not deprived of jurisdiction even though Bethune had a change in position and claimed months after filing suit that his damages exceeded the jurisdictional amount. The Magistrate's Court may certainly try Bethune's case. It has jurisdiction. Bethune chose to file suit in Magistrate's Court and should be held to that choice.

This conclusion is also supported by the Supreme Court's decision in *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961), where the Court held:

> In determining the question of jurisdiction, our first inquiry is whether the Court had jurisdiction initially to entertain the action brought by respondent, for the general rule is that the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. If jurisdiction once attaches to the person and subject matter of the litigation, the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached.

123 S.E.2d at 299. In applying this rule of law to the present case, the Magistrate's Court, as Bethune readily concedes, had proper jurisdiction when the suit was brought. However, contrary to Bethune's position, the Magistrate's Court does not lose jurisdiction once it is acquired. There is one limited exclusion – where a

counterclaim is subsequently filed that exceeds the jurisdicitional limit, and in that one instance, the General Assembly has provided for a procedural remedy, i.e., the transfer of the case to the Circuit Court. *See*, S.C. Code Ann. § 22-3-30. However, in all other instances, including the case at bar, the Magistrate's Court retains jurisdiction. The Magistrate's Court may try Bethune's case; any ruling to the contrary by the Magistrate or Judge Macaulay was in error as the decision in *Stroy* demonstrates. Bethune is simply limited to the recovery of the jurisdictional limit, but that was a choice that he deliberately made when he decided to commence his action in Magistrate's Court rather than Circuit Court. Bethune chose his forum, and despite now second-guessing or regreting that decision, he should not be permitted to go forum shopping and select a different forum, particularly given the legal prejudice shown by Waffle House. The decisions by the courts below should be reversed, and this case should be scheduled for trial in Magistrate's Court, where the action was brought by Bethune and where there clearly does exist subject matter jurisdiction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

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

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