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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.

PETITION FOR REHEARING

The Appellant Waffle House, Inc. petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Bethune v. Waffle House, Inc.*, Op. No. 2016-UP-276 (S.C. Ct. App. filed June 8, 2016).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Bethune v. Waffle House, Inc.*, Op. No. 2016-UP-276 (S.C. Ct. App. filed June 8, 2016); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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June 23, 2016

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MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

The Appellant Waffle House, Inc. has petitioned this Court for a rehearing of the recent decision in *Bethune v. Waffle House, Inc.*, Op. No. 2016-UP-276 (S.C. Ct. App. filed June 8, 2016). Waffle House, Inc. respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

This Court issued an unpublished opinion pursuant to Rule 220(b), SCACR, although the Court does not specify which provision of Rule 220(b)(1) that it found applicable to the issues raised on appeal. More importantly, the three citations included as the supporting authorities for the unpublished decision are not dispositive of the five issues on appeal raised by the Appellant Waffle House, Inc. and fail to provide the litigants with the bases for the Court's decision to affirm the two courts below. In fact, unlike most unpublished decisions issued by this Court, no attempt was made to address each issue raised on appeal separately with applicable citations of authority to each issue. In short, with all due respect, the Appellant has been denied meaningful appellate review in this instance.

II.

It appears that the Court may have concluded that the Magistrate Court acted *sua sponte* in dismissing the case for lack of subject matter jurisdiction. If that is the basis for the Court's decision, it is mistaken and not an accurate reflection of the procedural history of this case. Such a procedural history is not supported in the record and in particular the return filed by the Magistrate which sets forth in detail the chronological procedural history. (R. 33).

The record actually reflects that on February 16, 2012, Bethune filed a negligence action against Waffle House in Magistrate's Court. Then, seventeen

months later, on July 16, 2013, Bethune filed the identical suit in the Court of Common Pleas. Prior to that, on May 22, 2013, Bethune had filed a motion to "transfer" the case to the Circuit Court, which the Magistrate's Court attempted to schedule twice for a hearing. (R. 33). But by letter dated July 22, 2013, Bethune's counsel withdrew that motion. (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).

Then, on August 29, 2013, Bethune's counsel simply mailed 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 that has been overlooked by this Court and should be addressed on rehearing.

III.

This Court has also misapprehended or overlooked the fact that the voluntary dismissal of Bethune's action in Magistrate's Court was never supported by any evidence. Regardless of whether the dismissal was issued *sua sponte* or not, the Magistrate still needed a legal basis for determining that subject matter jurisdiction was lacking. There had to be an evidentiary foundation for such a ruling, and here there was none. This Court overlooked the absence of evidence and did not address that point with any of the citations listed in the unpublished opinion.

In fact, 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. Likewise, in his brief filed with this Court, Bethune pointed to no such evidence. In his brief, Bethune argued 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, 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, which has been overlooked by this Court.

IV.

This Court has also overlooked and failed to address the basic contention by the Appellant Waffle House that a magistrate's court does not lack subject matter jurisdiction where the plaintiff's damages may exceed the jurisdictional limit of $7,500. This is an important issue that quite frankly deserved to be addressed and should not have been disposed of by an unpublished opinion with three citations that have no applicability whatsoever to the issue raised.

Waffle House submits that the Magistrate's Court was not deprived of jurisdiction even though Bethune changed his mind 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 fully supported by the case of *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), which 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. However, and most importantly, the Supreme Court drew a distinction between a claim for the return of property and a claim for money damages. 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 absolutely may bring a claim in Magistrate's Court where his damages exceed the jurisdictional limit. 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. The *Stroy* decision, which was not cited by this Court, fully supports Waffle House's position and should be addressed on rehearing because as indicated above and below this is an important issue to be decided by this Court.

Waffle House's position 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 jurisdictional 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 regretting 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 have been 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. The Court is respectfully asked to reconsider these authorities which fully support Waffle House's position.

V.

In issuing its unpublished opinion, this Court also overlooked or misapprehended the fact that the Magistrate's Court mistakenly believed that Bethune had a "right" to file the identical action in Circuit Court and thus failed to exercise any discretion in deciding whether the action should proceed in Magistrate's Court, which was a clear error of law.

It is obvious from the return that the Magistrate did not believe he had *any* discretion in determining whether a voluntary dismissal should be permitted under the existing circumstances. He wrote: "Magistrate's Court *cannot* deny the plaintiff the right to file his case in Circuit Court when alleged damages exceed Magistrate Court jurisdiction." (R. 34). (Emphasis added). This shows that the Magistrate did not believe he could even exercise discretion; he believed that he was required by law to grant the dismissal. It is, however, well settled that the failure to exercise discretion is itself an abuse of discretion.[1] As the record shows, the Magistrate

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

mistakenly believed that Bethune had a "legal right" to file a separate action in Circuit Court, when in reality, the action in Circuit Court was subject to dismissal as a duplicative action under Rule 12(b)(8), SCRCP, as long as the Magistrate's Court action remained pending simultaneously.[2] The Magistrate also erroneously believed that he was deciding the propriety of Bethune's filing of the Circuit Court action, which in actuality was not and could not be before him and could only be determined by the Circuit Court.

The Court is respectfully requested on rehearing to address this issue and to conclude that the Magistrate committed an error of law in failing to recognize that he could exercise jurisdiction and was not required to dismiss simply because Bethune filed an identical action in the Circuit Court.

VI.

Finally, this Court overlooked or misapprehended the fact that the Magistrate's Court -- as well as the Circuit Court on appeal -- failed to consider or otherwise summarily rejected the legal prejudice demonstrated by Waffle House in opposition to the voluntary dismissal. In fact, on appeal, Judge Macaulay failed to even properly describe the legal prejudice claimed. Judge Macaulay only ruled that "Defendant has suffered no legal prejudice inasmuch as they have the right to present any and all evidence to determine liability and damages, as would have

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

been the case in Magistrate Court or the Court of Common Pleas." (R. 3). That, however, entirely disregards the issue presented.

As Waffle House raised in its Notice of Appeal to the Circuit Court and as argued at the April 15, 2014 hearing as well as before the Magistrate, the dismissal of the action in Magistrate's Court has resulted in Waffle House being denied the monetary cap on damages that is established by the jurisdictional statute for cases commenced in Magistrate's Court. As already stated, Hubert Bethune originally chose to bring the suit in Magistrate's Court which set a cap on his recovery at $7,500. No one made him file in Magistrate's Court. That was a choice that he deliberately and alone made. Waffle House, however, is subjected to legal prejudice by the loss of that cap on damages resulting from the dismissal in Magistrate's Court. That is a defense that Waffle House acquired by Bethune's decision to commence his suit in Magistrate's Court. Bethune should not therefore be permitted to unilaterally seek a different forum that compels Waffle House to lose that defense.[3] In the Circuit Court, the Waffle House will be subjected to unlimited and unqualified liability, and that constitutes clear legal prejudice that should have resulted in the denial of the voluntary dismissal.

[3] 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 many months later.

The case of *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313, 314 (1992), presents a comparable scenario and is thus highly instructive. In that case, the Supreme Court affirmed the denial of a motion for voluntary dismissal. The plaintiff had filed suit in the defendant's county of residence, and the defendant then asserted a counterclaim. The plaintiff later sought a voluntary dismissal, which the defendant opposed on the ground that he would then have to re-file and prosecute his counterclaim in the county of the plaintiff's residence. He would therefore lose the opportunity to have the counterclaim tried in his own county of residence, which importantly was an initial pleading decision made by the plaintiff alone. The Supreme Court affirmed the denial of the motion for voluntary dismissal and "agree[d] that the loss of proper venue in one's county of residence suffices to establish legal prejudice." 426 S.E.2d at 314.

In the case at bar, the loss of a jurisdictional cap on damages, which is based on an initial pleading decision made by the plaintiff alone, should be no different. Clearly, Waffle House has shown legal prejudice consistent with the Supreme Court's decision in *Burry*. However, this Court did not even consider this issue. On rehearing, the Court is respectfully requested to do so.

In close, the Appellant Waffle House submits that this case may not seem important because it deals only with the subject matter jurisdiction of the

Magistrate's Court. However, a majority of South Carolina's civil cases are actually filed in Magistrate's Court, and it is not frequent that cases from the summary courts reach the appellate courts because it is typically cost prohibitive to pursue a Magistrate's Court decision through two levels of appeal. Nonetheless, this Court should recognize that this case raises important issues of jurisdiction and whether a plaintiff can unilaterally decide -- long after filing in Magistrate's Court and accepting the jurisdictional limit for his case -- to simply change fora, which is no different than forum shopping that is contrary to public policy. At any rate, Waffle House's position is fully supported by the case of *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), which this Court did not even cite or address, but there will be benefit to the bar and bench for this Court to fully address the issues raised in this case. *Stroy* is 100 years old and is still good law, but it would be helpful for these issues to be addressed in a more current opinion. The Court is urged to grant reconsideration and further to allow for oral argument before a new decision is issued.

CONCLUSION

Based on the foregoing discussion, the Appellant respectfully requests that the Court rehear its decision in this case. The Appellant 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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BY: _____

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June 23, 2016

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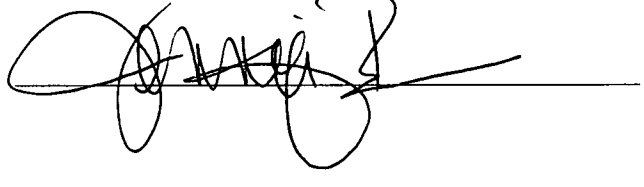
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant, does hereby certify that service of **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 23rd day of June 2016:

Rodney M. Brown, Esquire
Rodney M. Brown, P.A.
210 South Main Street
Fountain Inn, South Carolina 29644



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June 23, 2016

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Hubert Bethune v. Waffle House, Inc.
Appellate Case Number: 2014-002058
Civil Action Appeal Number: 2013-CP-04-2409
Magistrate's Court Number: 2012CV0410100585
Claim Number: BSA-201139877
Our File Number: 326.8936

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's $25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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