

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

JUL 25 2016

Case No. 2013-CP-04-2409

SC Court of Appeals

Hubert Bethune, Respondent,

v.

Waffle House, Inc., Appellant.

**REPLY TO RESPONDENT'S RETURN TO
APPELLANT'S PETITION FOR REHEARING**

The Appellant Waffle House, Inc. has petitioned this Court for a rehearing of its recent decision in *Bethune v. Waffle House, Inc.*, Op. No. 2016-UP-276 (S.C. Ct. App. filed June 8, 2016). The Respondent Hubert Bethune has now filed a return to which a brief reply is warranted.

I.

In his return, the Respondent Bethune states incorrectly that the Magistrate's Court *sua sponte* dismissed the case for lack of subject matter jurisdiction. In taking that position, Bethune relies on a revisionist history of the proceedings in Magistrate's Court. In particular, Bethune insists that the Magistrate's Court "requested that this action be dismissed." *See*, Return to Petition for Rehearing, p. 2. There is no evidence to support that. The record reflects only that 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. However, there is no indication in the Magistrate's return that the proposed Order of Dismissal was requested by the Magistrate. (R. 33). 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.

II.

Throughout his return, Bethune mistakenly claims that a defendant can transfer a case from Magistrate's Court to Circuit Court, and as a result, it is "ludicrous" and "incomprehensible" that a plaintiff cannot likewise do so. Bethune simply misunderstands Section 22-3-30, which 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 applies only to situations where a counterclaim is filed which exceeds the jurisdictional limit.* There is no corresponding statute for a scenario, such as in the present case, where the plaintiff contends that his claim exceeds the jurisdictional limit after the action has been already filed and pending in Magistrate's Court.¹

Thus, contrary to Bethune's understanding, a defendant can only seek to

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).

transfer a case to Circuit Court where a counterclaim has been filed that exceeds the jurisdictional amount. A defendant cannot seek a transfer of the case absent that one condition precedent. Thus, in the case at bar which does not include a compulsory counterclaim, Waffle House did not have the option of seeking a transfer of the case to Circuit Court, if it chose, just as the Bethune does not have that option.

Bethune, nonetheless, still insists that there must be a mechanism whereby the Magistrate's Court may transfer a case without a counterclaim to the Circuit Court given that the General Assembly provided such a mechanism for cases with a counterclaim. 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 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.²

III.

Bethune also continues to insist that there is a "factual basis" for the Magistrate's Court to conclude that the damages exceeded the \$7,500 jurisdictional limit. Not surprisingly, Bethune fails to cite to any evidence in the record to support that claim. There is none. In his previous brief to this Court, Bethune explained that "[t]he Magistrate Court was *informed* that the Plaintiff/Respondent's action exceeded the limited jurisdictional limits," but again he cited to no evidence

² Based on the same rationale, Bethune contends that he has a "right" to file an action in Circuit Court. That is not correct. A plaintiff does not have a "right" to file the same suit in two different courts. Because Bethune had filed in Magistrate's Court, it is precluded from also filing the identical suit in the Circuit Court.

in support thereof. *See*, Respondent's Brief, p. 8. (Emphasis added). This was 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, 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.

Nonetheless, for the reasons already addressed by Waffle House, when Bethune chose Magistrate's Court as his forum, he became bound by the \$7,500 jurisdictional cap. The Magistrate's Court cannot lose jurisdiction once it is acquired even if there is an alleged change in the facts of the case.³ Instead, the Magistrate's Court must proceed to adjudicate the case within its jurisdiction and cap the damages at \$7,500. That is entirely consistent with prior Supreme Court case law, including *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), which is discussed at length in prior filings and is not surprisingly ignored by Bethune in his return.

IV.

In his return, Bethune also challenges Waffle House's claim of legal

³ There is only one exception, and that is where a defendant files a compulsory counterclaim and seeks a transfer under S.C. Code Ann. § 22-3-30.

prejudice. Bethune claims that a party cannot claim legal prejudice from just any adverse ruling. However, in this case, Waffle House is not claiming legal prejudice simply because of just any adverse ruling. Instead, as Waffle House has made clear, 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. That constitutes clear legal prejudice that should have resulted in the denial of the voluntary dismissal. In fact, as Waffle House has shown, its position is fully supported by the decision in *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313, 314 (1992), in which the Supreme Court affirmed the *denial* of a motion for voluntary dismissal in an analogous situation.

CONCLUSION

Based on the foregoing discussion, the Appellant respectfully renews its request 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,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Waffle House, Inc.

Columbia, South Carolina

July 25, 2016

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
David A. DeMasters
Steven R. Spreeuwiers
Brandon M. Briggs

July 25, 2016

*Also Admitted In North Carolina
†Certified Mediator

Of Counsel
Kenneth P. Woodington

RECEIVED
Writer's Email: alindemann@dml-law.com

JUL 25 2016
SC Court of Appeals

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 **Motion to Accept Filing Out of Time and Reply to Respondent's Return to Appellant's 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: Rodney M. Brown, Esquire (w/ Enclosures)