

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 2016-UP-276
(S.C. Ct. App. filed June 8, 2016)

RECEIVED

SEP 19 2016

S.C. SUPREME COURT

Hubert Bethune, Respondent,

v.

Waffle House, Inc., Petitioner.

PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Petitioner
Waffle House, Inc.*

TABLE OF CONTENTS

Certificate of Counsel	2
Questions Presented	3
Statement of the Case	4
Arguments	6
I. The Court of Appeals erred in failing to rule that the Magistrate's Court is not divested of civil jurisdiction when a plaintiff decides after the action is initially filed in Magistrate's Court that he wants to seek in excess of \$7,500 in damages and thus unilaterally re-files the identical action in the Circuit Court.	6
II. The Court of Appeals erred in failing to reverse the Magistrate's Court which had erroneously believed that the Respondent had a "right" to file the identical action in Circuit Court and thus failed to exercise any discretion in deciding whether the action should nonetheless proceed in Magistrate's Court.	11
III. The Court of Appeals erred in concluding that the Magistrate Court acted <i>sua sponte</i> in dismissing the case for lack of subject matter jurisdiction and in failing to consider that the Respondent filed no motion to dismiss, did not present any evidence to support his contention that his damages exceeded the jurisdictional limits and that the Petitioner Waffle House made a showing of legal prejudice.	12
Conclusion	18

CERTIFICATE OF COUNSEL

Counsel for the Petitioner Waffle House, Inc. certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 18, 2016. (App. 3).

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in failing to rule that the Magistrate's Court is not divested of civil jurisdiction when a plaintiff decides after the action is initially filed in Magistrate's Court that he wants to seek in excess of \$7,500 in damages and thus unilaterally re-files the identical action in the Circuit Court?

- II. Did the Court of Appeals err in failing to reverse the Magistrate's Court which had erroneously believed that the Respondent had a "right" to file the identical action in Circuit Court and thus failed to exercise any discretion in deciding whether the action should nonetheless proceed in Magistrate's Court?

- III. Did the Court of Appeals err in concluding that the Magistrate Court acted *sua sponte* in dismissing the case for lack of subject matter jurisdiction and in failing to consider that the Respondent filed no motion to dismiss, did not present any evidence to support his contention that his damages exceeded the jurisdictional limits and that the Petitioner Waffle House made a showing of legal prejudice?

STATEMENT OF THE CASE

This is an appeal from a decision of a Magistrate's Court to dismiss a personal injury lawsuit filed by the Respondent Hubert Bethune in Magistrate's Court against the Petitioner Waffle House, Inc. On February 16, 2012, Bethune filed a negligence action against Waffle House in Magistrate's Court in Anderson County. Bethune alleged that Waffle House was negligent in serving him food that contained a shard from a broken plate that caused him personal injury. (R. 9-10). Then, seventeen months later, on July 16, 2013, Bethune filed the identical suit in the Court of Common Pleas, which was subject to dismissal under Rule 12(b)(8), SCRCP. (R. 14-15). However, Bethune's counsel then sent an Order of Dismissal, without the consent of the parties, to the Magistrate who dismissed the Magistrate's Court action. The Magistrate signed the Order of Dismissal, and later issued an Amended Order of Dismissal, after Waffle House objected and was given a hearing. (R. 6-7).

Waffle House appealed to the Circuit Court. (R. 28-31). Circuit Judge Alexander S. Macaulay affirmed the dismissal by the Magistrate's Court, but he never addressed the procedural errors made by the Magistrate nor the legal

prejudice asserted by Waffle House. (R. 1-3). A subsequent Rule 59(e) motion was denied. (R. 4-5).¹

Waffle House thereafter filed a timely appeal to the Court of Appeals which affirmed the lower courts by an unpublished opinion issued on June 8, 2016. The memorandum opinion gives no explanation of the Court's decision.

Waffle House petitioned for rehearing, and that petition was summarily denied. No substitute opinion was issued. (App. 3). Waffle House now seeks review in the Supreme Court by way of a petition for writ of certiorari.

¹ A more detailed procedural history of the case is set forth in the Arguments below.

ARGUMENTS

- I. The Court of Appeals erred in failing to rule that the Magistrate's Court is not divested of civil jurisdiction when a plaintiff decides after the action is initially filed in Magistrate's Court that he wants to seek in excess of \$7,500 in damages and thus unilaterally re-files the identical action in the Circuit Court.**

The Petitioner Waffle House, Inc. contends on appeal that the Magistrate's 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. On appeal, the Circuit Court affirmed the ruling by the Magistrate's Court, but the Circuit Court failed to address the issues actually raised on appeal by Waffle House. The Court of Appeals likewise did not address the issues raised on appeal.²

The lower courts, including the Court of Appeals, have failed to recognize the basic contention by 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

² The Court of Appeals issued an unpublished opinion pursuant to Rule 220(b), SCACR, although the Court did 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 Waffle House and fail to provide the litigants with the bases for the Court of Appeals' decision to affirm the two courts below. In fact, unlike most unpublished decisions issued by the Court of Appeals, no attempt was made to address each issue raised on appeal separately with applicable citations of authority to each issue.

deserved to be addressed and should not have been adjudicated by the Court of Appeals in an unpublished opinion with three citations that have no applicability whatsoever to the issue raised. While Waffle House fully recognizes that not many civil decisions from Magistrate's Court get appealed to the highest appellate courts of the State, the issues raised in such cases are no less important. This case presents this Court with the opportunity to address an important issue related to Magistrate's Court's civil jurisdiction. In addition, the decisions of the lower courts, including the Court of Appeals, are inconsistent with a previous decision of this Court in *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916). For these reasons, this case is clearly deserving of the issuance of a writ of certiorari.

Waffle House submits that the Magistrate's Court was not deprived of jurisdiction even though Bethune changed his mind and claimed many months after filing suit that his damages exceeded the jurisdictional amount. The Magistrate's Court thought it was divested of subject matter jurisdiction. That is certainly not the case. The Magistrate's Court retained jurisdiction and should have tried the case instead of dismissing it.

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, this Court reversed and found that the Magistrate's Court lacked jurisdiction because the property sought by the claim and delivery exceeded the jurisdictional limit. This 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, this Court held in *Stroy* that the value of the property claimed governs the jurisdiction of the Magistrate's Court. However, and most importantly, *this Court drew a distinction between a claim for the return of property and a claim for money damages.* This 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 this Court made 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 even cited by the Court of Appeals, fully supports Waffle House's position.

Waffle House's position is also supported by this Court's decision in *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961), where this 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. (Emphasis added). 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 or the Court of Appeals was in error as this Court's decision in *Stroy* demonstrates.

Bethune is 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 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. The Court is respectfully asked to grant a writ of certiorari on this important issue of Magistrate's Court jurisdiction which apparently is misunderstood by the bench and bar.

II. The Court of Appeals erred in failing to reverse the Magistrate's Court which had erroneously believed that the Respondent had a "right" to file the identical action in Circuit Court and thus failed to exercise any discretion in deciding whether the action should nonetheless proceed in Magistrate's Court.

The Magistrate's Court also erroneously 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 his 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.³ As the record shows, the Magistrate mistakenly believed that Bethune had a "legal right" to file a separate action in

³ 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").

Circuit Court, when in reality, the action in Circuit Court was subject to dismissal as a duplicative action under Rule 12(b)(8), SCRCPP, as long as the Magistrate's Court action remained pending simultaneously.⁴ 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.

III. The Court of Appeals erred in concluding that the Magistrate Court acted *sua sponte* in dismissing the case for lack of subject matter jurisdiction and in failing to consider that the Respondent filed no motion to dismiss, did not present any evidence to support his contention that his damages exceeded the jurisdictional limits and that the Petitioner Waffle House made a showing of legal prejudice.

It appears that the Court of Appeals concluded that the Magistrate Court acted *sua sponte* in dismissing the case for lack of subject matter jurisdiction. That, however, is 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).

⁴ Waffle House, in fact, filed a motion to dismiss the Circuit Court action under Rule 12(b)(8), SCRCPP, as well preserved that issue in its Answer. (R. 18, 19-20).

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 was disregarded in error by the Court of Appeals.

Moreover, 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. The Court of Appeals disregarded 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 the Court of Appeals, 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 was disregarded in error by the Court of Appeals.

Finally, the Court of Appeals disregarded 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 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.⁵ 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.

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

⁵ 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.

instructive. In that case, this 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. This 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 this Court's decision in *Burry*. However, the Court of Appeals did not even consider this issue. This Court is respectfully requested to issue a writ of certiorari to consider whether the Magistrate's Court case should have been dismissed in light of the legal prejudice shown by Waffle House.

CONCLUSION

The Petitioner Waffle House submits that this case may not seem particularly 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 or three levels of appeal.

Nonetheless, this Court is urged to 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 the forum, which is no different than forum shopping that is contrary to public policy.

Moreover, Waffle House's position is fully supported by this Court's decision in *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), which the Court of Appeals did not even cite or address. Undoubtedly 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. Waffle House therefore respectfully requests that this Court grant its petition for a writ of certiorari.

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 Petitioner Waffle House, Inc.

Columbia, South Carolina

September 19, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioner, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record (minus the briefs and Record filed with the Court of Appeals) by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 19th day of September 2016:

Hand Delivered

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

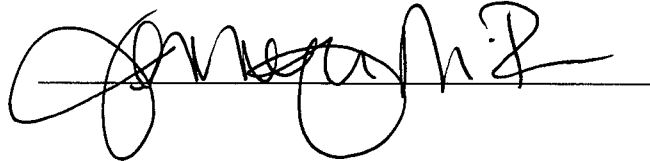
Via U.S. Mail

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

RECEIVED

SEP 19 2016

S.C. SUPREME COURT



A handwritten signature in black ink, appearing to read "Rodney M. Brown", is written over a horizontal line.