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
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S.C. SUPREME COURT

Hubert Bethune ..... Respondent,

v.

Waffle House, Inc. ..... Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hubert Bethune, Respondent,

v.

Waffle House, Inc., Appellant.

Appellate Case No. 2014-002058

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2016-UP-276
Submitted March 1, 2016 – Filed June 8, 2016

AFFIRMED

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Appellant.

Rodney M. Brown, of Rodney M. Brown, P.A., of Fountain Inn, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 22-3-10(2) (2007) ("Magistrates have concurrent civil jurisdiction in . . . actions for damages for injury to rights pertaining to the person or personal or real property, if the damages claimed do not exceed seven

thousand five hundred dollars . . . ."); *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court."); Rule 41(a)(2), SCRCP ("[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.").

AFFIRMED.[1]

HUFF, A.C.J., and SHORT and THOMAS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

Hubert Bethune, Respondent,

v.

Waffle House, Inc., Appellant.

Appellate Case No. 2014-002058

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.

Thomas E. Huff J.

Paul G. Short, Jr. J.

Paul D. Clement J.

Columbia, South Carolina

cc:
Andrew F. Lindemann, Esquire
Rodney M. Brown, Esquire

FILED
August 18, 2016

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

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.

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

[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.

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[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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June 23, 2016

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
Appellate Case No. 2014-002058

Hubert Bethune, ... Respondent,

vs.

Waffle House, Inc., ... Appellant.

MEMORANDUM OPPOSING THE APPELLANT'S MOTION FOR REHEARING

I.

The Respondent believes the Court of Appeals was absolutely correct in their decision in Hubert Bethune vs. Waffle House, Inc.

II.

With regard to the Appellant's suggestion that the Appellate Court did not sua sponte dismiss the case in Magistrate Court is incorrect. After the Respondent filed a Motion to have the action transferred, the Court did call the Respondent and request an

Order dismissing the case. It was the Court's suggestion. An Order was sent to them and they filed it.

The Magistrate Court was correct in doing so. A previous Motion to Transfer had been filed and not acted on by the Magistrate Court. An action had been subsequently filed in the Court of Common Pleas regarding the same matter prior to the Court's dismissing the action. When the Magistrate Court found out the other action had been filed, they requested that this action be dismissed. The Magistrate Court was correct in doing so because the damages exceeded the jurisdictional amount of the Magistrate Court.

III.

The Appellant is again stating that there is no support that the dismissal of the action was proper. There was another action pending in Common Pleas Court because the damages exceeded $7,500, and the Respondent had requested that the Court transfer the Magistrate Court case because the damages exceeded $7,500. This is a proper legal and factual basis for the decision.

The Appellant's position is a ludicrous position to take. They are saying that a Defendant can transfer the case to Common Pleas Court when the damages exceed $7,500 but the Court and the Plaintiff are not allowed to transfer the case to Common Pleas Court when damages exceed $7,500.

IV.

In Section 4 of the Appellant's Motion, they again say it was improper to dismiss the case and allow the case in Common Pleas Court to go forward because the Respondent "chose to file suit in Magistrate Court". This is not the first time that a party

determined that the damages were greater than they were when the case was filed. Bethune realized that he had a permanent injury to his tongue after the case was filed and determined that the damages would clearly exceed the jurisdictional limit of the Magistrate Court, being $7,500. It is proper to raise the issue of subject matter jurisdiction at any time. It is also proper to have the case transferred or dismissed and allow the Common Pleas Court action to move forward when it is determined the damages may exceed $7,500.

Again a Defendant may ask that the case be transferred to the Court of Common Pleas pursuant to Section 22-3-10 of the Code of Laws of South Carolina when "the damages claimed exceed $7,500". There is no requirement, as the Appellant alleges that it be proven, but only claimed. Again, the Plaintiff should have every right the Defendant has.

It is also a questionable position for the Appellant to take that if the damages are determined to exceed the jurisdictional limit after the case is filed that it cannot be transferred. Cases and facts change, and it is often the case that damages increase or even possibly decrease during the pendency of the lawsuit before it comes to trial. Just because Bethune chose Magistrate Court to begin with does not mean the damages cannot be determined to exceed $7,500 later.

V.

Again the Appellant takes an implausible position in Section V when they say that Bethune did not have a "right" to file an action in Circuit Court. How could it be claimed by anybody that a party does not have a right to file an action in Circuit Court? The Magistrate Court was correct in dismissing the case when they learned that the same case

was filed in Circuit Court with damages exceeding the jurisdictional limit of Magistrate Court. There is no need to exercise discretion as alleged by the Appellant but only have the case dismissed in Magistrate Court when it is pending in Circuit Court and the damages exceed $7,500.

VI.

The Appellant also claims that they suffered legal prejudice by the action of the Magistrate Court. Any party can claim prejudice at any time when an adverse ruling is made. When a case is dismissed pursuant to Civil Rule 12(b)(6) or judgment is granted pursuant to Rule 56 or any other procedural motion, a party can claim prejudice.

The Court made the appropriate determination on the facts and law and this is not legal prejudice but an appropriate judicial determination.

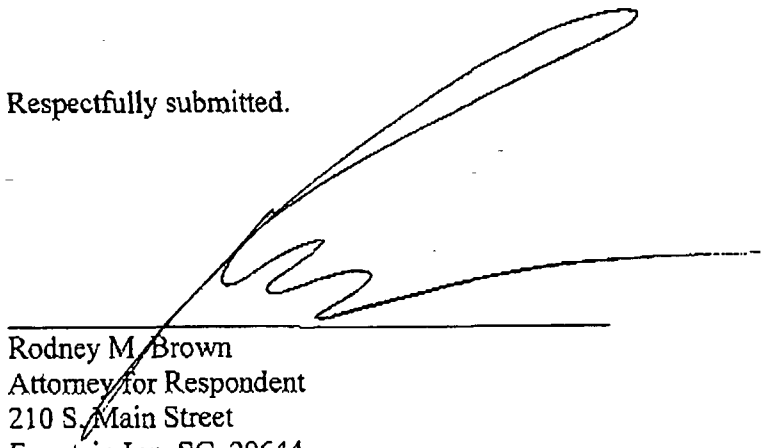
Also with regard to the prejudice, any and all rights the Defendant had in Magistrate Court they have in the Court of Common Pleas to defend the action.

CONCLUSION

Accordingly, it is clear that the Appellant's position is ill-founded. It is illogical to think that a Magistrate Court could not dismiss a case when the same case is pending in the Court of Common Pleas. It is further incomprehensible to think that a Defendant can transfer the case to Common Pleas Court from Magistrate Court and a Plaintiff or the Court cannot. Furthermore, it is without reason to suggest that the Appellant was prejudiced by the ruling when any ruling rendered adverse to a party's position is "prejudicial to their position" but not legal prejudice. The Court of Appeals was correct in determining the case should continue in Common Pleas Court, and the Magistrate was correct in dismissing the Magistrate Court action. The Defendant has every right, every

defense and every position available to them to defend the action in Common Pleas Court. In fact, they probably have more opportunities in Common Pleas Court than they had in Magistrate Court. It is clear that when the jurisdictional limit of $7,500 is exceeded in Magistrate Court that it should be transferred to the Court of Common Pleas. Herein, the case was already filed in Common Pleas Court so it was proper for the Magistrate Court to dismiss this case and allow the case in Common Pleas Court to continue. Respondent respectfully requests the Court to deny the Appellant's petition for rehearing.

Respectfully submitted.



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July 14, 2016

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 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

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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).

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,

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