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.

BRIEF OF APPELLANT

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V. Did the Magistrate's Court and the Circuit Court err in dismissing the Magistrate's Court Complaint filed by the Respondent Hubert Bethune when those courts failed to consider or otherwise summarily rejected the legal prejudice demonstrated by the Appellant Waffle House in opposition to the dismissal?

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 Appellant 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 he 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 which 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]

[1] A more detailed procedural history of the case is set forth below.

ARGUMENTS

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

The Appellant 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 raised on appeal by Waffle House.

According to South Carolina law, in applying Rule 41(a)(2), SCRCP, "the plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless legal prejudice is shown by the defendant or important issues of public policy are present." *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313, 314 (1992). "Once legal prejudice is found, the granting or denial is within the discretion of the trial court." *Id.* An appellate court is required to reverse the trial court's decision upon an abuse of discretion. *In re Miller*, 393 S.C. 248, 713 S.E.2d 253, 257 (2011). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id., citing Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439, 445 (2009). *See also, South*

Carolina Department of Social Services v. Pritcher, 329 S.C. 242, 495 S.E.2d 242 (Ct. App. 1997).

Waffle House contends that the Magistrate's Court committed errors of law and abused its discretion in several particulars: First, the Magistrate's Court granted a voluntary dismissal of Bethune's Complaint although no motion was filed requesting that dismissal, and no grounds for the voluntary dismissal were ever cited. Second, Bethune did not support his "motion" or request with any evidence to support any basis for a voluntary dismissal. Third, 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. Fourth, the Magistrate's Court failed to consider or otherwise summarily rejected the legal prejudice demonstrated by Waffle House in opposition to the voluntary dismissal. These same errors were made by the Circuit Court by rejecting Waffle House's appeal.

A. Procedural Background

On February 16, 2012, Hubert Bethune filed a negligence action against Waffle House, Inc. in Magistrate's Court in Anderson County. (R. 8-9). Bethune alleged that Waffle House was negligent in serving him food that contained a shard from a broken plate that he caused him personal injury. Bethune included a prayer for an unspecified amount of actual and punitive damages. Bethune voluntarily

filed this action in Magistrate's Court, subject to that jurisdictional limit of $7,500, as establish by Section 22-3-10 of the Code of Laws. *See*, S.C. Code Ann. § 22-3-10. By filing in Magistrate's Court, Bethune represented that the amount in controversy was $7,500 or less.

On May 22, 2013, *after the case had been pending for over fifteen months*, Bethune filed a motion to transfer the case to Circuit Court. Bethune states in the motion that "[t]he Plaintiff has determined that his damages exceed the jurisdictional amount of Seven Thousand Five Hundred Dollars ($7,500.00) for Magistrate's Court." (R. 25). That motion, however, was withdrawn by Bethune on July 22, 2013. (R. 58).

On July 16, 2013, exactly seventeen months after the filing of the action in Magistrate's Court, Bethune filed a Complaint in the Circuit Court. *See*, *Bethune v. Waffle House, Inc.*, Civil Action Number 2013-CP-04-1658. (R. 14-15). The Complaint filed in the Circuit Court is *word-for-word identical* to the Complaint filed in Magistrate's Court. That Complaint likewise includes a prayer for an unspecified amount of actual and punitive damages. There are no new allegations of damages, nor any averments that suggest any newly discovered evidence or changes from the original suit.

Therefore, as of July 16, 2013, Bethune had pending two identical lawsuits, one in Magistrate's Court and one in Circuit Court. Bethune, however, did not file any subsequent motion seeking the dismissal of either action. Instead, on August

29, 2013, Bethune's counsel sent an Order of Dismissal to the Magistrate which dismissed that action without prejudice. On September 3, 2013, without giving Waffle House an opportunity to be heard, the Magistrate signed the Order of Dismissal. (R. 6).

On September 9, 2013, Waffle House filed an objection to the proposed Order of Dismissal. (R. 26-27). The Magistrate subsequently held a hearing on October 3, 2013. As a result of that hearing, the Magistrate issued an Amended Order of Dismissal, on which he handwrote as follows: "Dismissal only applies as to Magistrate's Court and is Dismissal with prejudice as to the Magistrate's Court." (R. 7). (Emphasis in original).

Waffle House subsequently appealed the dismissal of the Magistrate's Court action to the Circuit Court. In his Order filed May 16, 2014, Circuit Judge Alexander S. Macaulay found "that the Magistrate Court did take the proper action in dismissing the case pending in Magistrate Court and denies the Defendant's request to overturn the dismissal ordered by the Magistrate." (R. 3). He also concluded that "the Magistrate, *ex mero motu*, dismissed the action pursuant to their [sic] duty and authority to control the docket in their Court" upon learning that "there were two identical actions pending in different Courts." (R. 2). Judge Macaulay also 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).

Waffle House filed a Rule 59(e) motion, which was denied, thereby leading to the filing of this appeal. (R. 4-5, 35-37).

B. Procedural Errors

As indicated above, this Court is required to overturn the voluntary dismissal of the Magistrate Court's action if the Magistrate's Court committed errors of law or otherwise abused its discretion. An abuse of discretion "occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *In re Miller*, 393 S.C. 248, 713 S.E.2d 253, 257 (2011).

Here, the Magistrate's Court dismissed Bethune's Complaint without prejudice when no motion pursuant to Rule 41(a)(2) was even filed or pending. Bethune had earlier filed a motion to transfer the case to Circuit Court, but then on July 22, 2013, that motion was withdrawn. (R. 58). Later on August 29, 2013, Bethune's counsel sent the Magistrate a proposed Order of Dismissal, which was signed and filed without even giving Waffle House an opportunity to be heard.

Bethune had submitted the proposed Order of Dismissal without complying with Rule 7(b), SCRCP, or Rule 41(a), SCRCP. He submitted the proposed Order of Dismissal without first filing a motion seeking that relief. Rule 7(b) provides that "[a]n application to the court for an order shall be by motion which ... shall be in

writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 7(b), SCRCP. Yet, Bethune failed to file *any* written motion seeking the voluntary dismissal of this action. The proposed Order of Dismissal did provide as follows: "The Plaintiff has gone ahead and filed this action in Anderson County Common Pleas listed as case number 2013-CP-04-1658 due to his damages being in excess of $7,500.00." (R. 6). However, Bethune never filed any affidavits or other evidentiary support for the voluntary dismissal granted by that proposed order. In fact, even after Waffle House raised its objections, Bethune still made no attempt to submit any affidavits or evidentiary support for his claim that the damages then exceeded the jurisdictional limit of $7,500.

In his return, the Magistrate cites no such evidence that was submitted and on which he relied. (R. 32-34). A representation by a party in a proposed order (which is no substitute for a motion) is not evidence. Likewise, it is well-established law 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.* However, that is precisely what occurred here. The Magistrate accepted the unsupported assertion by Bethune's counsel that his client's damages exceeded $7,500. It is also important to recognize that Bethune, as the Plaintiff, chose Magistrate's Court as its forum in the first place. By filing in Magistrate's Court, he agreed that the amount

in controversy was $7,500 or less. Bethune made no allegation or showing that any original allegations or circumstances had changed. In fact, the Complaint filed in Circuit Court shows no change in allegations or circumstances; that Complaint is word-for-word identical to the one filed in Magistrate's Court. Thus, given this scenario, it was clear error for the Magistrate to accept and rely on an unsupported, bald assertion by Bethune and his attorney that the damages exceeded the jurisdictional limit.

Thus, there should be no reasonable doubt that the Magistrate abused his discretion. There is *absolutely no evidentiary support* for the conclusion that Bethune's damages exceeded $7,500, when clearly those damages did not exceed that amount when the suit was initially filed in Magistrate's Court on July 16, 2012. There is no evidentiary basis for the Magistrate's Court's conclusion, and thus, clearly the ruling constitutes an abuse of discretion.

In addition, the Magistrate clearly did not understand the nature of the decision before him. At the October 3, 2013 hearing, he amended the Order of Dismissal to make the dismissal "with prejudice as to the Magistrate's Court," which is an obvious error of law. (R. 7). The case cannot be dismissed "with prejudice" in one court and allowed to proceed in another court.

Moreover, 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.[2] As the record shows, the Magistrate 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.[3] 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. Accordingly, as amply shown, the legal errors committed by the Magistrate were numerous and significant.

On appeal to the Circuit Court, Judge Macaulay compounded the procedural errors committed by the Magistrate. He ruled that "the Magistrate, *ex mero motu*,

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[2] *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").

[3] 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).

dismissed the action pursuant to their duty and authority to control the docket in their Court" upon learning that "there were two identical actions pending in different Courts." (R. 2). Judge Macaulay cited the case of *Crestwood Golf Club v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997), as authority for the action taken by the Magistrate and for the proposition that a court has the authority to control its docket in this manner. The *Crestwood Golf Club* case, however, does not stand for the proposition for which it is cited. Moreover, there is no authority that allows a court to *sua sponte* or *ex mero motu* dismiss a pending action *for any reason other than a party's failure to prosecute.* In short, contrary to Judge Macaulay's erroneous conclusion, the Magistrate's Court lacked the authority to *sua sponte* or *ex mero motu* dismiss the action on the basis that Bethune chose to file an identical action in the Circuit Court and have two identical actions pending simultaneously.

Therefore, on the procedural errors alone, the dismissal of Bethune's action in Magistrate's Court must be reversed and the case remanded for trial in Magistrate's Court.

C. Substantial Showing of Legal Prejudice

Waffle House also submits that the Magistrate Court failed to consider and address the legal prejudice that it has shown. Likewise, on appeal, Judge Macaulay failed to even properly describe the legal prejudice claimed. Judge Macaulay, in fact,

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 the Waffle House raised in its Notice of Appeal 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. 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

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*. Therefore, on this additional basis, the Appellant Waffle House requests that the dismissal of Bethune's action in Magistrate's Court be reversed and the case remanded for trial in Magistrate's Court subject to the $7,500 cap on damages.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

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

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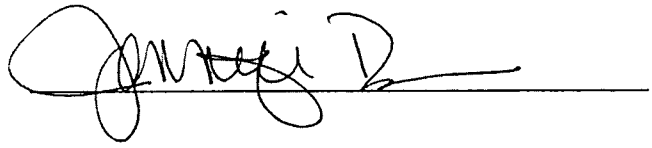

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Alexander S Macaulay, Circuit Court Judge

Case No. 2013-CP-04-2409

Hubert Bethune, Respondent,

vs

Waffle House, Inc , Appellant

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STATEMENT OF THE CASE

This case arises from the Magistrate Court dismissing the case pending in that Court because the Plaintiff/Respondent had filed an action involving the same set of facts and circumstances in Circuit Court

The Plaintiff/Respondent, Hubert Bethune, initially filed a negligence action in Magistrate Court in 2012. The Plaintiff/Respondent alleges that the Waffle House was negligent in serving him food that contained parts of a broken plate which caused him to cut his mouth and his tongue The Plaintiff/Respondent subsequently determined that the injury was more serious than he thought and that he had a permanent impairment to his tongue Accordingly, the Plaintiff/Respondent filed a Motion with the Magistrate's Court to transfer this matter to Circuit Court since his damages now exceeded the jurisdictional limit of Magistrate Court

That Motion had been set a number of times and had never been heard by the Magistrate Court Therefore, the Plaintiff/Respondent filed a separate action in Common Pleas Court

The Magistrate's office then called to schedule the Motion to Transfer and Plaintiff/Respondent's counsel informed the Magistrate Court that an action was already filed in Common Pleas Court The Magistrate Court directed Plaintiff/Respondent's counsel to send him an Order of Dismissal for it was appropriate for him to dismiss the case given that the case was pending in Common Pleas Court The Order was filed

Waffle House subsequently filed an objection and was given a hearing Waffle House presented all the arguments to the Magistrate that they are presenting to the Appellate Court herein Their objection was denied and an Amended Order of Dismissal was filed

Waffle House then appealed the dismissal to the Circuit Court The Appellant filed a Notice of Appeal outlining why the Magistrate Court dismissal was inappropriate and the Plaintiff/Respondent filed a Return to the Notice of Appeal A hearing was held in front of Judge Alexander S Macaulay After full argument and discussion regarding all the issues raised herein, the Judge affirmed the Magistrate Court's dismissal. Waffle House then filed a Rule 59 Motion which was denied

ARGUMENTS

I. The Magistrate Court was correct in dismissing the Magistrate's action.

A. Sole issue before the Appellate Court

There is but one issue to be decided by the Court of Appeals. Namely, was the Magistrate Court correct in dismissing the Magistrate action when the Plaintiff/Respondent had another action pending in the Court of Common Pleas concerning the same facts

A good deal of the Appellant's argument as cited on Pages 3 and 4 of their brief is completely irrelevant to the issue before the Court The Plaintiff/Respondent's right to voluntarily dismiss their case and whether the motion was supported by any evidence, is irrelevant These motions were never filed and/or heard

The only issue is whether the Court upon its own motion was correct in dismissing the case There wasn't a motion pending by the Plaintiff/Respondent to have the case dismissed

Accordingly, this Court is asked to decide whether there was an abuse of discretion in dismissing the Magistrate case An abuse of discretion "occurs when the conclusions of the Trial Court are either controlled by an error of law or based upon unsupported factual conclusions". In re Miller, 393 S C. 248, 713 S.E 2d 253, 257 (2011) In this case there was absolutely not an abuse of discretion, and the Magistrate Court was completely correct in dismissing the Magistrate Court action The Respondent

submits that the Magistrate Court actually was required to dismiss the Magistrate Court action, and it doesn't rise to the level of an abuse of discretion

B. Plaintiff has a right to have his case in any Court of his choosing

The Plaintiff/Respondent certainly has the right to file his action in a Court of his choosing There is no statute, rule, regulation or case that prohibits a Plaintiff from choosing the Court they want to file a civil action

Furthermore, there is no statute, rule, regulation or case prohibiting the Plaintiff/Respondent from transferring a Magistrate Court case to Common Pleas Court when it is determined that the damages exceed the jurisdictional limits of the Magistrate Court

The legislature determined that Magistrate's have "concurrent civil jurisdiction with the Court of Common Pleas in certain factual situations" Section 22-3-10 of the Code of Laws of South Carolina as enumerated Section 22-3-10 of the Code of Laws of South Carolina provides as follows.

> "Magistrates have concurrent civil jurisdiction in the following cases (2) in actions for damages for injuries to rights pertaining to the person or personal or real property, if the damages claimed do not exceed $7,500 00;"

Therefore, it is clear that this legislature has specifically provided that a Plaintiff may file a civil action for damages in Common Pleas or Magistrate Court as long as the damages don't exceed $7,500 00 However, the Magistrate Court is a Court of limited jurisdiction and does not have jurisdiction in cases where the damages exceed $7,500 00 See, Section 22-3-10 of the Code of Laws of South Carolina and Section 22-3-30 of the Code of Laws of South Carolina

The Plaintiff/Respondent could have filed his original action in Common Pleas Court or Magistrate Court and the Defendant/Appellant could not have objected It is further clear that when the damages exceed $7,500 00 Magistrate Court does not have jurisdiction

In this case, the Respondent determined after his suit was filed that his injury was more severe since he had a permanent injury and his damages were greater than the jurisdictional limit of the Magistrate Court The Respondent filed a Motion to have it transferred to Common Pleas Court, but it was never heard (RoA 25) The Magistrate Court appropriately determined that two actions could not be pending in two Courts and dismissed the Magistrate Court action due to a lack of jurisdiction The Court of Common Pleas also determined that decision was correct and affirmed the Magistrate Court (RoA 1) They both essentially found that since there was a separation action in Common Pleas Court and that damages exceeded the Magistrate Court jurisdiction, the Magistrate Court action should be dismissed

It is interesting to note that half of Appellant's arguments supports this position The Appellant goes to great lengths to convince this Court that the Plaintiff/Respondent cannot have two actions pending in two Courts regarding the same matter involving the same set of facts and damages. That is exactly the reason the Magistrate Court dismissed their case. (RoA 6-7)

The Respondent maintains that the Magistrate Court was correct in determining the Plaintiff/Respondent had the right to have his action pending in the Court of Common Pleas

C. The Magistrate was correct to dismiss the Magistrate's action.

As noted above and further discussed herein, the Magistrate was correct in dismissing their case. (RoA 6-7) Furthermore, the Common Pleas Court acting as an Appellate Court was correct in affirming this decision (RoA 1)

Magistrate Court is a Court of limited jurisdiction, and it is uncontradicted that when damages exceed $7,500 00 they do not have jurisdiction See, Code of Laws 22-3-10 and 22-3-30 of the Code of Laws of South Carolina In fact, the most authoritative rule of law regarding this issue is found in Section 22-3-30 of the Code of Laws of South Carolina This section provides that

> "when a counterclaim is filed which if successful would exceed the Magistrate's 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".

It is clear that the Magistrate Court has no jurisdiction when the damages exceed the jurisdictional limits The legislature provides that the action must be transferred to the Court of Common Pleas

It can hardly be argued that since the Magistrate Court must transfer the Counterclaim pursuant to Statute 22-3-30 that it would not be required to transfer the Plaintiff's action if damages exceed the jurisdictional limits This would be an absurd conclusion

Judge Macaulay in the Court of Common Pleas Order denying Waffle House's Motion for Reconsideration appropriately determined·

> "that the Appellate Court must always take notice of the lack of subject matter jurisdiction Amisub

> of S. C., Inc. vs. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994). The lack of subject matter jurisdiction can be raised at any time. It can be raised for the first time on appeal, and can be raised sua sponte by the Court. See e.g., Lake vs. Reeder Construction Company, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. of App. 1998) (Holding issues relating to subject matter jurisdiction would be raised at any time.) The acts of a Court with respect to a matter as to which it has no jurisdiction are void. State vs. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 311-312 (Ct. of App. 2002). (RoA 4-5)

That is exactly the case herein. The Court raised sua sponte the issue of subject matter jurisdiction herein when the Magistrate Court determined that there were two actions pending in Common Pleas and Magistrate Court. The Magistrate Court was informed that the Plaintiff/Respondent's action exceeded the limited jurisdictional limits of Magistrate Court and wanted their matter transferred to Common Pleas Court. Since the transfer did not happen in a timely fashion, then the Plaintiff/Respondent filed the action in Common Pleas Court.

Therefore, it is not only appropriate, but required of the Magistrate Court to dismiss the Magistrate Court action since it did not have jurisdiction over this matter any longer. That is exactly what the Court of Common Pleas determined. In fact, that Court stated it correctly when they said "where the actual value of damages claimed exceed its jurisdictional amount, Magistrate Court is without jurisdiction to try the case." Story vs. Nicpee, 105 S.C. 265, 89 S.E. 666 (1916). (RoA 4)

In this case, the Magistrate Court had lost jurisdiction over the case since the damages claimed exceeded its jurisdictional amount just like Judge Macaulay

determined Therefore, the Magistrate Court was required to dismiss the case since it no longer had jurisdiction over the matter

The Respondent does not believe that the Appellant's argument that they sustained legal prejudice is even pertinent or appropriate to this argument since it is a question of jurisdiction of the Courts Whether the Appellant suffered any prejudice is not an issue to be determined by this Court since the Magistrate Court was without jurisdiction to maintain this case An abuse of discretion did not occur because the conclusion of the Magistrate Court was not controlled by an error of law or based upon unsupported factual conclusions See In re Miller, supra

But the Respondent will address it briefly to show the Appellate Court that there was no legal prejudice received by the Appellant anyhow The Appellant in fact has more legal rights in the Court of Common Pleas than they would have in Magistrate Court They have the right (not required) to engage in discovery. They can obtain summary judgment They can engage in depositions and have the full use of all rules of civil procedure that they did not have in Magistrate Court The Appellant has lost no legal rights but only gained more legal opportunities and arguments

The Appellant maintains that they were legally prejudiced by having the case transferred to a Court without a cap of damages This is required by the statutes when the damages exceed $7,500 00 and cannot be considered to be prejudice

If the outcome of this case creates legal prejudice then there is legal prejudice with every determination made by a Court which adversely affects a party A party could easily claim legal prejudice if they lose a motion to dismiss, a motion for summary

judgment or an evidentiary issue presented at trial The Appellant is in the same position as any party would be when they receive an adverse decision by the Court. It cannot be considered to be legal prejudice when someone simply loses in a motion or argument pursuant to the Rules of Civil Procedure or even evidentiary questions If that were the case then there would be legal prejudice in every ruling the Court made

The facts presented to the Magistrate in making this decision was that there were two actions pending regarding the same matter and that the damages exceeded the jurisdictional limits of the Magistrate Court The Magistrate Court actions are required and mandated when they lose jurisdiction of a case to transfer it to the Court of Common Pleas and it cannot be even considered an issue of an "abuse of discretion"

D. Judicial economy would not be served by granting the Appellant's relief.

In this matter if the Appellant would be successful, they would merely be defeating every concept of judicial economy known to our Courts. If the Appellant is successful then the matter would be returned to the Magistrate Court in same posture that it was prior to the dismissal Accordingly, there would be an action pending in two Courts, and there would be a Motion to Transfer pending since the jurisdictional limit of the Magistrate Court was exceeded in this case (The Respondent didn't withdraw their motion as alleged by the Appellant)

Accordingly, the parties would be back to the exact same position they are today if the Appellant is successful The Magistrate would have to transfer the case or to dismiss the case since there would be two cases pending and the damages exceed the jurisdictional limit of Magistrate Court We would be back in the Court of Common

Pleas which is exactly where we are now waiting for trial Absolutely nothing would be accomplished other than a long delay of the trial and denying the Plaintiff/Respondent's right to the relief, if any he is entitled to, as determined by a jury

CONCLUSION

The Respondent maintains that the Magistrate Court was absolutely correct in dismissing the Magistrate Court action for a lack of jurisdiction and that the Court of Common Pleas was correct in affirming that in determining that the Magistrate Court did not have subject matter jurisdiction The Magistrate Court is a Court of limited jurisdiction and once that jurisdiction is exceeded, they no longer have jurisdiction over the case

Therefore, the Magistrate Court was required to transfer the case to Common Pleas Court or in this case dismiss the Magistrate Court case since they no longer had jurisdiction Accordingly, the Respondent respectfully requests this Appellate Court to deny the Appellant's relief As noted above, judicial economy would be lost if the Appellate Court were to grant the Appellant's relief and we ended up in the same place a year or a year and a half from now

Respectfully submitted

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April 14, 2015

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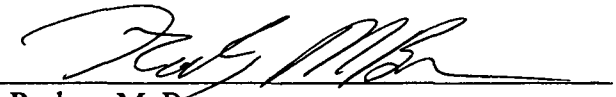
BY 

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Alexander S Macaulay, Circuit Court Judge

Case No 2013-CP-04-2409

Hubert Bethune, . . Respondent,

vs

Waffle House, Inc , . Appellant

CERTIFICATE OF SERVICE

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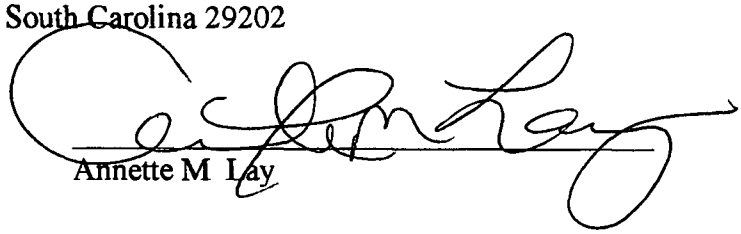

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2013-CP-04-2409

Hubert Bethune, ... Respondent,

v.

Waffle House, Inc., ... Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

claim exceeds the jurisdictional limit.[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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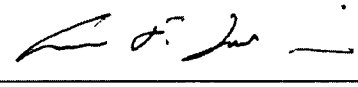
BY: 

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