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**NOV 14 2016**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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

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Hubert Bethune, ..... Respondent,

v.

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

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**REPLY IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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## ARGUMENTS

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

This is an important case. This case asks this Court to determine whether a Magistrate's Court is divested of subject matter jurisdiction many months after suit was first filed in Magistrate's Court simply because the plaintiff takes the position that his damages now exceed the jurisdictional limit of \$7,500 and he wants to proceed in Circuit Court. In other words, this case asks whether a plaintiff can unilaterally decide -- long after filing in Magistrate's Court and accepting the jurisdictional limit for his case -- to simply change the forum, which is no different than forum shopping that is contrary to public policy. The Petitioner Waffle House submits that the Magistrate's Court is not divested of subject matter jurisdiction under those circumstances, which is consistent with this Court's decisions in such cases as *Stroy v. Nicpee*, 105 S.C. 265, 89 S.E. 666 (1916), and *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961). This Court has held that a court that initially acquires subject matter jurisdiction is not divested of jurisdiction by subsequent events in the litigation after jurisdiction attaches. Certainly, a court should not be divested of jurisdiction where a plaintiff -- who chose to commence

suit in Magistrate's Court and accept the jurisdictional limit of 7,500 – months later decides to claim damages in excess of that amount and files the identical suit in Circuit Court.

Throughout his return to the petition for writ of certiorari, the Respondent Hubert Bethune mistakenly claims that a defendant can transfer a case from Magistrate's Court to Circuit Court, and as a result, it is "illogical" and "absurd" that a plaintiff cannot likewise do so. He claims that there cannot be a different standard for a plaintiff from what applies to a defendant. 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 upon filing exceeds the jurisdictional limit.* There is no statute for a scenario, such as in the present case, where the plaintiff contends that his claim exceeds the jurisdictional limit long after the action has been already filed and pending in Magistrate's Court.<sup>1</sup>

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<sup>1</sup> 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).

Thus, contrary to Bethune's understanding, a defendant can only seek to 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 at the commencement of the counterclaim.<sup>2</sup>

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.<sup>3</sup>

Bethune argues that "it is hard to imagine" how Waffle House "can argue that the Magistrate had jurisdiction over the case when the damages exceeded \$7,500.00." (Return, p. 5). That is not hard to imagine at all. Bethune filed his

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<sup>2</sup> However, once the counterclaimant accepts the jurisdiction of the Magistrate's Court, then jurisdiction is established. Section 22-3-30 is not a mechanism for a counterclaimant to decide to seek a transfer to Circuit Court months after the counterclaim is filed and the case had been proceeding in Magistrate's Court.

<sup>3</sup> 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, he is precluded from also filing the identical suit in the Circuit Court.

action in Magistrate's Court, and in doing so, he agreed to the jurisdictional limit of \$7,500. The Magistrate's Court thus acquired jurisdiction over the case *based upon the status of the case at the time of filing*.

This is absolutely consistent with such cases as *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961), where this Court held: "If jurisdiction once attaches to the person and subject matter of the litigation, the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached." 123 S.E.2d at 299. (Emphasis added). That very rule of law has been applied in other cases in favor of the court acquiring jurisdiction first. For example, in the recent case of *Conits v. Conits*, 417 S.C. 127, 789 S.E.2d 51 (Ct. App. 2016), the Family Court continued to exercise jurisdiction over a tract of property despite the fact that a subsequent suit was filed in Circuit Court over the same property. In affirming, the Court of Appeals explained: "In the present case, the parties were properly in family court at the time the brother filed his action in circuit court. Thus, the family court maintained jurisdiction." 789 S.E.2d at 61.

The *Conits* case also cites favorably to *Gilley v. Gilley*, 327 S.C. 8, 488 S.E.2d 310 (1997), wherein this Court ruled that the Circuit Court properly maintained jurisdiction based on the status of the case at the time of filing. In that case, the wife brought an action in Circuit Court to partition property the wife and the husband owned as tenants-in-common. The husband subsequently brought an

action in family court for equitable distribution. This Court nonetheless ruled as follows:

The general rule is that 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. Accordingly, the circuit court properly maintained jurisdiction based on the status of the case at the time of filing.

488 S.E.2d at 312. (Citation omitted).

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.*

In sum, this is an important case – even if it deals with the issue of Magistrate's Court procedure and jurisdiction. This case and the issues asserted have not been given the appropriate level of scrutiny and judicial review to date. Moreover, this case is an excellent candidate for further review by way of a writ of certiorari not only based upon the merit of the issues raised but also based upon the fact that forum shopping is against public policy and should not be permitted in any form. Quite simply, a party should not be able to unilaterally move a case from one court to another months after a case was filed – and certainly not without good reasons and without evidentiary proof to support those reasons and without proper

consideration of the legal prejudice to the other litigants. With all due respect, many errors were made in this case that warrant another look and much closer consideration than what has previously been given.

**CONCLUSION**

Based on the foregoing discussion, the Petitioner Waffle House, Inc. respectfully renews its request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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BY: 

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November 10, 2016

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CERTIFICATE OF SERVICE

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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioner, does hereby certify that service of the **Reply in Support of Petition for Writ of Certiorari** was made upon all counsel of record 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 10th day of November 2016:

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