

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Gernaris Hamilton, Appellant,

v.

Henry Scott, Sr., Respondent

RECEIVED

APR 24 2017

SC Court of Appeals

PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County

Circuit Court Judge

J.C. Nicholson, Jr.

2015-cp-10-3372

Appellant Case No. 2015-002039

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STATEMENT OF ISSUES ON APPEAL

- Did the Court of Appeal erred in the statue finding abandonment and Access?
- Did the Court of Appeals erred in decision on Preservation Rule Conflicting with the Supreme Court decision on preservation Ruling. SCRCP Rule 59(e)?
- Did the Magistrate Court committed "State Action" on jury selection violating constitutional rights?
- Did the Waiver for non-jury trial meet constitutional or statutory right requirements?
- Did the court of appeals erred in fact findings on the merit of the Circuit Court and magistrate court?

STATEMENT OF CASE

On February 6, 2015 Appellant filed in Small Claims Court. That the respondent violated his contract (lease by entering his dwelling and threw his personal property out, without a Writ of Eviction. Respondent claims that he sent a letter of vacate the property because of a dog on property violated the lease. The lease was under North /Charleston Housing Authority HCV. The Respondent demanded a jury trial several times, Appellant was represented by Attorney William Thrower and Respondent retained Attorney Bruce Berlinsky. ON May 27, 2015 the date of trial Attorney Thrower told the judge he had to be in Federal court and left. The judge then dismiss the jurors and had a non-jury trial, without any evidence submitted by Respondent or attorney.

On June 1, 2015 Appeal was filed June 16, 2015 Appellant file pleadings and exhibits on June 29, 2015. Was placed on hearing docket on July 16, 2015 Respondent filed a late answer on July 13, 2015 Appellant file, a motion to answer August 6, 2015. The hearing was on August 14, 2015 and denied on August 14, 2015. SCRCR Rule 59(e). Motion to amend to a written order was respectfully denied on September 16, 2015. Appellant filed appeal in the Appellant's court on September 25, 2015. The question is legally and constitutional can the landlord enter into the property without a court order Writ of Eviction, \$7,500 in which the complaint was filed. The Constitution questions a jury trial notice is due process to be informed (when did the waiver come in) Waiver on record or in court. The jurors were in court seated waiting like Appellant was for jury selection, the judge comes in and said I will not be needing you all today and they left. The judge continued with a non-jury trial after all of this, no attorney, no jury, and no evidence or Exhibits from the Respondent only what he thought was legal. Appellant would like to recover for his losses in the amount of \$7,500 plus court cost. Therefore only what is in the transcript and Magistrate's return to file this appeal; Attorney William Thrower who did not do his job.

Factual / Procedural Back Ground

Petitioner enter into a lease with Henry Scott on November 1, 2013 under North Charleston Housing Authority HCV program for one year. Petitioner complained to North Charleston Housing about the kitchen and the Floor. North Charleston Housing Fail the inspection on the property July 4, and sent the letter that Scott would not receive the payment as of September 1, 2014. Scott then sent a letter to Petitioner on August 30, 2014, that as of September 1, 2014 his lease will not be renewed and had to be out by October 1, 2014 and would have to pay for any damages, Scott realized that he would have to break the lease, and did not File a Writ of ejection but on October 29 came to Petitioner unit after his sister in Law Shirley Washington Petitioner's next door neighbor called Scott and told Scott petitioner left. Scott came and was throwing out the Petitioner's clothing, food, shoes, and small, appliance's. Petitioner came back and found Scott and a painter and another women in the house, later ID as Emily Hamilton.

Petitioner enter into the Charleston Center for treatment and upon release Filed a Civil Action Suit on February 6, 2015. The Action was timely filed.

Scott on March 3, 2015 filed that He desire a jury trial "All necessary document will be brought to court"---- on March 4, 2015 a Jury Trial was granted Scott did not have Counsel, Attorney William Thrower was counsel for Petitioner, Scott later retain Bruce Berlinsky for counsel whom VIA Hand Deliver a letter to William Thrower that he was ready for trial on April 22, 2015. Hamilton did not hear from counsel, and called the Clerk of Court and was in form that Court was on May 27, 2015 Petitioner show up for the jury trial counsel came in and stated that (Attorney Thrower and counsel Berlinsky talk with the judge) Attorney Thrower came out and said these are your papers and gave them to Petitioner said he had to be in Federal Court Judge Tuner came out and release the jurors that was in court, And had non-jury trial and the outcome was for Scott Pursuant to S.C. Code Ann & 27-40-730 Abandonment could not be found 15 days did not accumulated in either statute 27-40-530 (d) (4) Therefore abandonment was and err of the court findings.

CONFLICT OF OPINIONS: COURT OF APPEAL AND THE SUPREME COURT

“PRESERVATION RULE”

There are two conflicting Rulings from the court of appeal on Preservation

- 1 Non-Jury trial without “Notice” OR a Waiver from a Jury trial demand and granted. (Recorders on appeal) Pleading and June 29 pg. 20. The court of appeal held that the rule 59 (e) Filed by Petitioner was not granted (Records on appeal page 3 Filed August 26, 2015....Denied September 16, 2015 on a Form order). The court cited Talley V.S.C. Higher Educ. Tuition Grants comm. 269S.C. 483,487,347S.E.2d,101 (1986) and Tupper V. Dorchester Cty. 326.S.C.318.324n.3 487S.E.2d187, 190.173 (1997).
- 2 Should the Court (Magistrate) continued the matter (trial) after Petitioner’s attorney left before Commencement of the trial. (Constitutional issues, like most others must be raised to and rule on by trial court to be Preserved for appeal). (Records on appeal.. Amendment Pleading and Exhibits June 29, 2015 pages 20-24 Respondent and attorney ready for trial) (No Waiver from Counsel Berlinsky) cited case In re care and treatment of Corley 365 S.C.252.258, 616 SE2d 441, 444 (S.C.Ct.App.No.2011-14P-059 filed January 25, 2017)

This Court (S.Ct.) has held that post – trial motions are required in two primary circumstance; to preserve issues that have been raised to the trial court but not yet ruled upon or when the court grants relief not requested, or rules on all issues never raised at trial.

(Jean Hoefer Toal, etal, Appellate Practice in South Carolina 59-60)
(2d.ed 2002)

Issues are preserved for appeal even where a JURY Motion is denied in a form order. If the issues have been adequately raised and argued to the court and the [Record on appeal contains transcript of the Court proceeding] Bailey V. Segars 346S.C. 359,550 SE2d 910 (ct. App 2001) State V. Stahlnecker 386, S.C. 609, 690 S.E.29 565 (2010) citing State V. Wise 359 S.C. 14, 596 S.E.2d 475 (2004). Party must file a Rule 59(e) SCRCF Motion to preserve an issue that trial Court fails to rule on Elam V. S.C. Dept of Tran Sp. 361 S.C. 9, 602 S.E. 2d at 782 (2004) Johnson V. Lloyd. (Op. No. 27383) (S.C. Sup. Ct. Filed April 23, 2014)

By the err of the court of appeals petitioner should be heard on these two issue’s by the supreme court on the Matter of Jury trial (Notice or Waiver) Constitutional and statutory requirements. U.S.C.A. Const. Amend.14 and U.S.C.A. Const. Amend 6.

COURTS RULING ON ABANDONMENT IS UNFOUNDED

S.C. code Ann & 27-40-730

Respondent did need to have access to the unit, respondent had fail the inspection on July 9, 2014 and had (30) thirty days to have it completed (M.R. 41-42 Records on Appeal) respondent never did the requirements so respondent held petitioner accountable for that and was upset about not getting paid. Respondent sent the letter to petitioner on August 30, 2014 that he was not going to renew the lease (M.R. PAGES 44 LETTER PGS 41-43 Failed inspection). Respondent held that petitioner could get out any time, respondent, "he" would break the lease, when respondent thought petitioner had left, respondent enter the dwelling and started to throw out petitioner belongings. Now to say that S.C, Code Ann & 27-40-730 gave respondent to claim abandonment is unfound 530(d), (4) still not enough time had accumulated for the respondent to claim abandonment. Fifteen days for abandonment not (24) twenty-four hour between petitioner going to storage and to fathers house, the next day respondent had put out petitioners belongings. For the court to rule on 27-40-530 (d), (4) without proof 27-40-730 is abandonment.

WRIT OF EJECTMENT

Court of Appeals Ruling on Writ of ejectment: The Magistrate erred in the conclusion Respondent had a right to enter the premises without a writ of ejectment: S.C. code Ann & 27-40-530 (d) (4) unless the tenant had abandoned or surrendered the premises: unpublished opinion NO. 2017-up-059 (Filed January 25, 2017) The Court of Appeal (erred in that S.C. Code Ann & 27-40-530 Access (a) a tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling in order to inspect the premises.

The Statute for abandonment S.C. Code Ann & 27-40-730 the section Defines abandonment as. (A) The unexplained absence of a tenant from a dwelling unit for a period of (15) fifteen days after default in payment of rent must be construed as abandonment of the dwelling unit. (M.R.1 Hearing) open doors does not give any one permission to enter dwelling: Respondent had petitioner's phone number (Trans. Pg. 3 Line 5-25 pg. 4 Line 1-25) (Records on appeal Amendment to conform to the evidence on motion to Dismiss pg. 42 North Charleston House (Trans. Pg. 11 Lines 1-25 and pf. 12. Lines 1-7). S.C. Code Ann & - 27-40-730 (B) If the tenant has voluntarily terminated the utilities and there is an unexplained absence of tenant after a default in payment of rent abandonment is consider immediate' and the Fifteen day rules as described in (a) apply. (Records on appeal=Pleading and Exhibit June 29, 2015 page 25 Charleston Water System "Service established" Garnaris Hamilton, November 1, 2013 until November 4, 2014 = New customer signed November 5, 2014). The new customer signed on November 5, 2014 (M.R. 3 conclusion) additionally, the court found that although the security deposit was withheld it was not wrongfully withheld. The ruling was that expenses incurred by the landlord exceed the deposit and that damage could not

be recovered under S.C. Code of law section 27-40-410. (Itemized statement)

A New Tenant signed on 3 days after the petitioner was ouster, there was no itemized statement that aloud in allowed deposit to be taken. The courted in its finding and ruled on the Wrong Statute.

WAIVER

Because the court error in the constitutional requirement to due process and equal protection of the law, the procedural step before any waiver, (M.R. pg1) (Trans. Pg. 5, line 10-25 and pg. 12 line 8-10). Magistrates Court Rule's. Rule (13A) Conduct of Trial; Jury Trials; Witnesses; Subpoenas. (A) Trial should be conducted in an informal manner and the South Carolina Rules of Evidence Shall apply but shall be relaxed in the interest of Justice. In the trial of a civil action, in which one or both parties are unrepresented by legal counsel, the court shall question the parties and witnesses in order to assure that all claims and defenses are fully present. (Exhibit and pleading pg.24) (M.R. pg.1) While the court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits. "But" because the circuit applied the wrong standard of review to the magistrate's judgment. The circuit Court error in concluding that there was "Sufficient evidence" in the records to support the magistrate's finding of fact and conclusions set out in Burns V. Wannmaker .281 S.C. 352.375,315S.E2d.179,183 (ct. App. 1984), (See Records on Appeal M.R. 3 Conclusions)(MR1) jury trial demand was waived: Before any waiver can become effective, the consent of government and sanction of the court must be had, in addition to the express and intelligent consent of the defendant: And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion with eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with caution increasing in degree as the offenses dealt with increase in gravity. [Emphasis supplied]. State v. Patterson 278, S.C. 319,322,295 S.E2d264.265 (1982) state v. Reed 293 S.C. 515,517,362 S.E. 2d 13, 14 (1987) Patton V. United States 281 U.S. 276, 276.312-13, 50 S.Ct. 253, 263, 74 L.Ed.854, 870 (1930):

There is no underlying distinction between the function of a Criminal Jury or Civil Jury. CHAVOUS V. BROWN 385s.e.2d 206 (1989). We are at 18-7-170 whether the evidence support the magistrate's ruling.

State concedes that waiver of a constitutional or statutory right requires a showing on the record that the defendant made the waiver knowingly and intelligently (statutory provision regarding person entitled to trial by magistrate jury) (Trans pg. 12 Lines 8-12). Acceptance of a jury trial waiver must be based upon written records clearly demonstrating that it was made knowingly and voluntarily: State v. Arthur 374 S.E.2d 292 (1988) S.C. code Ann 22-2-150 (1976)

State v. Arthur [27A] Jury trial waiver must be based upon a written record. Clearly demonstrating that it was made knowingly and voluntarily. This can be accomplished only through a searching interrogation of the accused by trial court itself. (M.R.1, 2, and 3) Records on appeal) and also Here, the determination made upon a patently insufficient inquiry. There is none. A search of the magistrate's return does not name William Bill in Thrower as Counsel for petitioner, civil, or criminal, a jury trial is a Jury trial. This Case should be Reversed.

JURY

Did the magistrate proceed with a non-jury trial after the court dismissed the jury which was in court to be selected (Records on Appeal: Amendments pleading and Exhibits pages 21-23). The court respondent requested a jury trial in his answer but demand was waived after he obtained counsel. (Trans. Pg. (5) L (10-25). Due Process: Procedural [d]ue process requires adequate notice. Notice at time of trial is not adequate opportunity for a hearing at what point in this proceeding did the waiver happen: If it happen in Chamber with counsel William Thrower before counsel left his client it is still not on record. [An Attorney who under takes the representation of a client in a cause impliedly agree to see through to its termination and is not at liberty to abandon it Floyd v. KOSKO 329S.E2d at 460] The South Carolina Constitution provides "the right of trial by jury shall be preserved inviolate" S.C. Const. art. I & 14 (1868) The legislature may not abrogate the right to jury trial simply by designating a proceeding as civil action without a jury (1985 Ford F-150 Pickup 308 S.C. at 72 417 SE2d at 87) (Trans. Pg. 10 Line 24-25 Trans. Pg. 11 Line 1-11.

JURY DISMISSAL AND WAIVER

S.C. Code Ann & 22-2-150

The Appellant argue that (Scott) Respondent asked for a Jury Trial (S.C. Code Ann & 22-2-150) March 3, 2015 in respondent answer, on the date of trial the Magistrate Court claim that Jury Trial was waived after he obtained counsel. (M.R. pg.1) and (M.R. pgs. 14-15). There is nothing on the record of when he obtained counsel or waiver of rights by respondent (or pursuant to provision of 22-2-150) affirmative waiver by defendant of his right. Boykin V. Alabama 395 U.S.238 S.Ct. 1709.23 L.E.d.2d 274 (1969). Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows that counsel, but intelligently and understandingly rejected the offer anything less and not a waiver. All notice send out was for a Jury Trial alone with the jurors list. The jurors were in court awaiting selection. The respondent did not and could not release Jury pool only the court has that authority to call jurors or release them. Chavous V. Brown 385S.E.2d206At209. Because the trial judge makes the determination as to the impartiality of a select jury, we hold his involvement in the selection process is substantial enough to be considered "State Action" under South Carolina Constitution Art. 14 Jury trial shall be a preserved in violate "All persons to be treated alike under like circumstances and conditions both in privileges conferred and liabilities imposed." "The function" of jury in South Carolina the Appellant would asked that the court made a decision on relief, for the Appellant. The outcome of a new hearing would not see justice. (Exhibit and pleading pg.24) Before the trial of the issue the judge stop the case by dismissing the juror's (M.R. pg. 27-33), and continued on with a non-jury trial. The United States Supreme Court has

stated that (Peremptory Challenge) has always been consider a necessary part of trial by jury [and] one of the most important rights secured to the accused Swain V. Alabama, 380 U.S. 202, 219, 85 S. ct. 824,835,13L. Ed.2d 759 (1969) quoting Pointer V. United States, 151 U.S. 369, 408, 14 S. ct. 410,414,38L.Ed.208 (1984). Peremptory Challenges in civil case in this state are provided by statue, section 14-7-1050 Code if Laws of South Carolina, 1976 as amended. The intent of the code section is to give litigants a fair and impartial jury. Chavous V. Brown 385 S.E.2d 206 because the trial judge made that determination as to the impartiality of dismissing the jurors that were mandates of the fourteenth Amendment.

Trial Judge may excuse jurors from sitting on particular case, but not to determine constitutional challenges to select a jury. (Exhibit and pleading pg.24 M.R.pg.1)

APPEAL AND ERROR

S. C. Code Ann & 18-7-170 contemplate's The magistrates's fact finding and conclusion of law. SCRPC Rule 52 (a)

In all actions tried upon the facts without a jury or with an advisory jury, the courts shall find the facts specially and a state separately if's conclusions of law thereon, and judgment shall be entered.

The Circuit Court applied the wrong standard of review to the magistrate's judgement, the circuit court erred in concluding that there was sufficient evidence in the record to support the magistrates finding of fact. Where there is no facts finding of the magistrate (M.R. 1,2, and 3 Records on appeal). The process of considering the evidence presented to determine the truth about disputed points of facts. The conclusion a judgment arrived at by no reason. 'You have only the conclusion with no fact. Pettioner can cite every case all with the same out come erred the fact findings. (Trans. Pg.14 Lines 23-25 and pg. 15 Lines 1-8) The Circuit Court concluded the same not wanting to do the fact findings and conclusion of law) Dingle V. North Western R.CO. 112 S.C. 390.99 S.E. 828 (1919): Redfearn V. Douglass 35 S.C.569,15, S.E.244 (1982) cf: Vacation Time of Hilton Head Island INC.V. Kiwi Corp. S.C. 312SE2d2o(App.1984) Where the Circuit Court reversed a Magistrate's findings of Fact in an ejectment action.

Where as here it clearly appears that the circuit court applied an erroneous standard of review and failed to accord the conclusion was influenced by error of law in which section 18-7-170 contemplate evidence in the records as a fact.

The trial courts, sitting without juries in an action at law, writ their findings specially and separately: to allow a reviewing court to determine from the record whether the judgment and legal conclusions which underline it represent a correct application of the law. The requirements for appropriately detailed findings is thus not a mere formality findings is thus not a mere formality or a rule of empty ritual: it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper Functions the judicial system. (IN RE CARE AND TREATMENT OF CORLEY 616SE2d441 (2005)) The court noted in Atkinson v. Atkinson 279 S.C. 454, 456, 309 S.E. 2d 14, 15 (ct.App. 1983)

Proper appellate review is extremely difficult, if not impossible, where a lower court order omits specific findings of the fact to support its legal conclusions.

We appreciate the problems which Family Court judges may have from time to time in meeting the requirements of [Rule 26 (a)]. Unremitting workloads and arduous responsibilities ham string even most dedicated Nonetheless, we believe that strict compliance with the rule promotes the administration of justice at every judicial level. We echo the sentiments of the court in Atkinson, and recognize that a trial courts specific findings of fact and conclusion of law are critical to meaningful appellate review. We do not intend to unnecessarily appellate review. We do not intend to unnecessarily increase our trial courts, substantial existing burdens, but instead our goal is to seek greater efficiency in the "administration" of justice " by facilitating proper appellate review. In RE CARE AND TREATMENT OF CORLEY 616 S.E.2d441 (S.C. app.2005)

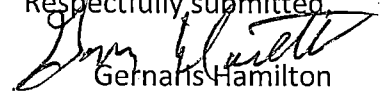
CONCLUSION

Petitioner should be granted equitable relief from this judgments, the records are clear that there are unexplained omitted specific fact findings to support its legal conclusion Respondent did not have a writ of ejectment in which respondent claim in is answer. "There" was no jury trial as "notice" from court S.C. Code Ann & 14-7-1050 and S.C. Code Ann & 22-2-150. There is no explanation as to petitioners counsel Floyd V. KOSKO 329 SE2d 460. The jury was in Court to be selected but was dismissed "ONLY" the Court Could dismiss the on Panel jurors Swain V. Alabama 380 U.S.202, 219 85 S.ct. 824,835, 13 L.Ed.759 (1969). Const. Amend 14 Jury trial shall be preserved in violate. The Court did not have the Waiver on records as required State V. Arthur 374 SE2d.292 (1988) Acceptance of a jury trial waiver must be on record. The Court findings on Abandonment is not founded S.C. Code Ann & 27-40-530 (d) (4) or S.C. Code Ann & 27-40-730 the time in which respondent enter dwelling was 24 hours not 15 day and there was no rent due.

SCRCP Rule 59(e) which was filed in the court Elam V. S.C. Dept. Of Trans. And (op.NO.27383 SC Sup.Ct. Filed April 23, 2014) A party must file a Rule 59 (e) SCRCP Motion to preserve an issue that trial court Fail to rule. Court of Appeals erred in its findings that the issue's were not preserved. Atkinson V. Atkinson 279 S.C. 454, 456, 309 SE2d14, 15 (Ct. App 1983) Proper appellate review is extremely difficult, if not impossible. Where a lower court order omits Specific finding of the fact to support its legal conclusions.

A review of the lower court and the Circuit Court without Fact findings Of law, and the Standard review applied by the court of appeal was in error. This court should grant this petition, there are no Facts to support the courts findings, equitable relief should be awarded.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA SUPREME COURT

J.C. Nicholson, Judge

2015-CP-10-3372

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APR 24 2017

SC Court of Appeals

Gernaris Hamilton.....Appellant

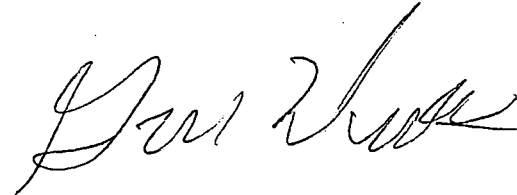
V

Henry Scott, SrRespondent

Appellant No. 2015-002039

CERTIFICATE OF COUNSEL

The undersigned certified that this Writ Certiorari to the Court of Appeals Rule 242



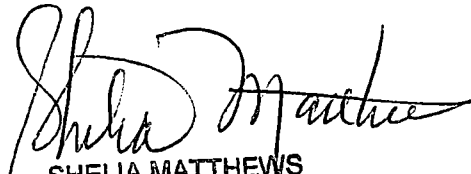
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SHELIA MATTHEWS
Notary Public, State of South Carolina
My Commission Expires 3/24/2018

Sworn to and subscribed
before me this
20 day of Apr 20 17

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CERTIFICATION OF SERVICE

I have serve this Petition for Writ Certiorari to Bruce A. Berlinsky, P.A. at One Carriage Lane, Bldg. F, Charleston, S.C. 29407 by U.S. Mail.



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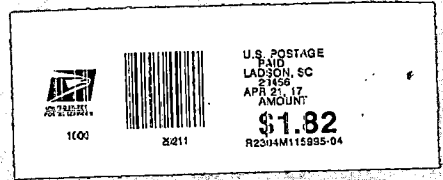
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SHELIA MATTHEWS
Notary Public, State of South Carolina
My Commission Expires 3/24/2018

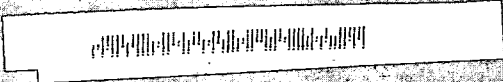
Sworn to and subscribed
20 before me this
day of Apr. 2017

Bernaris Hamilton
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