

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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Case No. 2012-207028

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**RECEIVED**  
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**SC Court of Appeals**

Elinor Cohen,

Respondent,

v.

Tripp Creech d/b/a Atlantic  
Lawn Service, Inc.

Appellants.

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**FINAL BRIEF OF RESPONDENT**

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### **STATEMENT OF ISSUES ON APPEAL**

- I. Did the lower court abuse its discretion when it declined to overturn the Magistrate's denial of Appellant's request for a new trial on the issue of liability?
- II. Did the lower court abuse its discretion when it declined to overturn the Magistrate's denial of Appellant's request for a jury trial?
- III. Did the lower court abuse its discretion when it declined to overturn the Magistrate's refusal to allow Appellant to amend its answer on the eve of trial?
- IV. Did the lower court abuse its discretion when it made a determination that Tripp Creech remained an individual defendant in the case?
- V. Should Appellant be sanctioned pursuant to Rule 269 of the Appellate Court Rules for filing this frivolous appeal?

### **STATEMENT OF THE CASE**

Respondent Elinor Cohen (“Respondent”) initially filed her Complaint in this matter on November 29, 2010. Appellant Tripp Creech d/b/a Atlantic Lawn Service, Inc. (“Appellant”) filed an Answer on January 5, 2011. Contrary to Appellant’s contention, the parties never reached a settlement of the dispute. *See Affidavit of William H. Creech, III*, at ¶ 4-5; *see Appellant’s Pro Se Motion for New Trial*. Respondent never communicated to Appellant that she would be willing to dismiss this action in exchange for a new yard. Furthermore, no such “free” yard work was ever performed by Appellant. Respondent hired another contractor to remedy Appellant’s unfinished work. No settlement, stipulations of dismissal, or any other documents were ever executed or filed with the Magistrate Court. Appellant did not appear for the scheduled trial on February 9, 2011. As a result, Respondent obtained a judgment for \$7,217.97 in damages by way of a bench trial.

Upon receipt of a copy of the judgment, Appellant requested a new trial on the basis of the supposed settlement. *See Appellant’s Motion for New Trial*. Contemporaneously, Appellant’s counsel requested leave to amend Appellant’s answer to assert additional defenses relating to the supposed settlement and request a jury trial. *See Appellant’s Motion to Amend Answer*. The Magistrate denied Appellant’s Motions, except to vacate the judgment of damages against both Appellants, and to allow Appellant to participate in a new hearing on damages. *See Magistrate’s Return*. At the close of the damages hearing, the Court took the matter under advisement and conferred with counsel. As a result of Appellant’s indication that it would appeal the denial of a new trial, denial of a jury trial, and refusal of a continuance, the Magistrate did not enter any judgment of damages, and appeal was taken to the Court of Common Please (“Circuit Court”). In the appeal, the Circuit Court affirmed the Magistrate’s rulings.

## ARGUMENT

The South Carolina Rules of Magistrate's Court provide that all actions in the magistrate's court "shall be conducted in such a manner as to do substantial justice between the parties according to the rules of substantive law." S.C. R. Mag. Ct., "Scope and Purpose." Respondent argues that justice has been achieved, and Appellant's basis' for this appeal lack merit.

### **I. THE MAGISTRATE AND THE LOWER COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A NEW TRIAL.**

In cases where a party fails to appear before the magistrate for the trial of a case, and subsequently requests a new trial, South Carolina law provides for the following potential relief:

If (a) the appellant failed to appear before the magistrate, (b) it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and (c) the appellant satisfactorily excuses his default, the court may, *in its discretion*, set aside or suspend judgment and order a new trial before the same or any other magistrate in the same county at such time and place and on such terms as the court may deem proper.

S.C. Code § 18-7-150 (emphasis added). The Magistrate correctly denied the motion for a new trial as to liability because Appellant admitted liability in its Answer, and only disputed the alleged damages. Further, Magistrates Court Rule 19 provides a new trial *may* be granted on all or parts of the issues, and the Magistrate properly acted within his discretion by granting the motion as to damages, thereby allowing Appellant to dispute the alleged damages.

To the extent that Appellant argues that Plaintiff promised to dismiss this lawsuit and then mislead the original trial date, Respondent respectfully submits that this account is not factual. Respondent never communicated to Appellant that she would be willing to dismiss this action in exchange for a new yard. Furthermore, no such "free" yard work was ever performed by Appellant. Respondent hired another contractor to remedy Appellant's unfinished work. No settlement, stipulations of dismissal, or any other documents were ever executed or filed with the

Magistrate Court. More importantly, the Magistrate was in the best position to hear argument and testimony regarding this issue, after which it denied the Motion for New Trial as to liability. Based on these circumstances, the lower court properly denied Appellant's motion for a new trial.

## **II. THE MAGISTRATE AND THE LOWER COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A JURY TRIAL.**

Appellant argues that the Magistrate improperly denied its Motion to Amend, which requested a jury trial. Appellant requested a jury trial on April 27, 2011. The original trial date was set for February 9, 2011. Magistrate's Court Rule 13(c) states, "If either party wants a jury trial, it must be requested in writing at least five (5) working days prior to the original date set for trial." See S.C. Mag. Ct. R. 13(c). In South Carolina, untimely requests for jury trials are properly denied. See *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498, 502 (Ct. App. 2009).

As the Magistrate's Return points out, the jury trial request was not timely since it was beyond the requirement of Magistrate's Court Rule 13(c) that such requests be made in writing at least five (5) working days prior to the original date set for trial. It is undisputed that Appellant missed this deadline, as trial was originally set for February 9, 2011. Appellant had an opportunity to demand a jury trial in its initial Answer, but chose not to do so. Should Appellant be allowed to demand a trial by jury at this stage of litigation, it would have worked substantial prejudice upon Respondent considering it was made after judgment for the Respondent had been issued. The lower court properly denied Appellant's motion to amend, and demand for a jury trial.

### III. THE MAGISTRATE AND THE LOWER COURT PROPERLY DENIED APPELLANT'S REQUEST FOR AN AMENDED ANSWER

The South Carolina Rules of Magistrate's Court provide that "[t]he court shall be lenient in the allowance of changes to or amendments to complaints, answers and counterclaims, and in granting continuances for good cause shown when necessary to serve the ends of justice." S.C. Mag. Ct. R. 14.

Allowing Appellant to amend its Answer this late in the game would work a substantial injustice upon Respondent. The original trial date was scheduled for February 9, 2011, wherein Respondent obtained a judgment against Appellant. Appellant did not request the amendment until April 27, 2011. Rule 15, SCRCP, provides that leave to amend shall be freely given when justice requires *and does not prejudice any other party*. See Rule 15, SCRCP (*emphasis added*). It is well established that a motion to amend or supplement is addressed to the discretion of the trial judge. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 558, 521 S.E.2d 153, 156 (1999).

Appellant's entire contention for this appeal rests upon a theory that a settlement was reached and performed. Appellant cites the record, claiming that it has made a sufficient showing, upon the basis of the supposed settlement, that the ends of justice necessitate a new trial, demand for trial by jury, and an amended answer.

"No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record." Rule 43(k), SCRCP. Rule 43(k) is applicable to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995). The purpose of rules such as Rule 43(k) is to prevent

fraudulent claims of oral stipulations, to prevent disputes as to the existence and terms of agreements, and to relieve the court of the necessity of determining such disputes: *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct.App.2000) (citing *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535; 83 *C.J.S. Stipulations* § 4 (1953)).

The only document purporting to evidence a settlement between the parties is the affidavit provided by Mr. Creech wherein he claims Respondent agreed to “cancel court.” See *Affidavit of William H. Creech, III*, at ¶ 4-5. Respondent fervently denies this assertion. The record does not contain a Settlement Agreement that has been duly executed by both parties. No such agreement was reduced to writing, nor was one ever entered in open court. The lower court properly concluded that it was within the Magistrate’s discretion to deny Appellant’s motion for leave to amend, and that it did not abuse its discretion in doing so.

**IV. THE CIRCUIT COURT’S STATEMENT IN ITS ORDER ON APPEAL THAT TRIPP CREECH IS STILL A PARTY TO THIS ACTION WAS CORRECT, AND AS SUCH, SHOULD BE AFFIRMED.**

Appellant complains that the caption should be formally amended to delete Tripp Creech, as the entity Atlantic Lawn Service, Inc. should be the sole defendant. The judgment below, however, is correct based upon the full caption containing both the Defendant individual and entity, and due to the fact that there has been no motion to amend the same.

**V. PURSUANT TO RULE 269 OF THE APPELLATE COURT RULES, RESPONDANT REQUESTS ATTORNEY FEES AND COSTS FROM APPELLANT FOR FILING THIS MERITLESS AND FRIVOLOUS ACTION**

South Carolina Appellate Court Rule 269 provides, “Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice,

impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” Rule 269 SCACR.

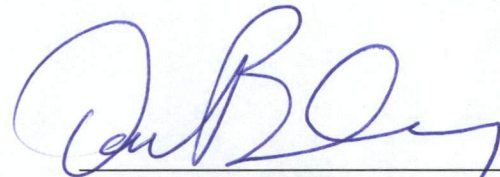
As mentioned above, this appeal is based solely upon Appellant’s contention that the parties reached a settlement. However, the only document purporting to evidence a settlement between the parties is the affidavit provided by Mr. Creech wherein he claims Respondent agreed to “cancel court.” *See Affidavit of William H. Creech, III*, at ¶ 4-5. Respondent fervently denies this assertion. The record does not contain a Settlement Agreement that has been duly executed by both parties. No such agreement was reduced to writing, nor was one ever entered in open court.

This appeal is frivolous, lacking merit, and upon information and belief, was taken solely for the purposes of delay. As such, Respondent respectfully requests that this Court sanction Appellant in a manner it sees fit so as to discourage such conduct in the future.

### **CONCLUSION**

For the reasons stated above, this Court should affirm the order of the Circuit Court, denying Appellant’s motion for a new trial, a trial by jury, motion to amend its Answer, and statement that Tripp Creech is still a defendant in the matter. Pursuant to Rule 215, Respondent requests this appeal be decided without oral argument.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Dan Bradley", is written over a horizontal line.

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