

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James R. Barber, III

Civil Action No. 2012-CP-40-06497
Appellate Case No.: _____

Allison Shoemaker.....Appellant,

v.

Neal Chavis.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING THE RELIEF SOUGHT IN RESPONDENT'S MOTION TO CHANGE VENUE, GIVEN THE EVIDENCE AND THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF *SECTION 15-7-30(C)(1)(2), S.C. CODE ANN., (1976, AS AMENDED)*?

- II. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT THE FORUM SELECTION CLAUSE IN THE CONTRACT BETWEEN THE PARTIES WAS AMBIGUOUS AND THAT THE FORUM SELECTION CLAUSE SHOULD HAVE BEEN CONSTRUED BY THE LOWER COURT TO ASCERTAIN AND GIVE EFFECT TO THE INTENTION OF THE PARTIES?

STATEMENT OF THE CASE

This action began with Appellant Allison Shoemaker, (hereinafter as, "Appellant"), filing a Complaint against the Respondent Neal Chavis, (hereinafter as, "Respondent"), (hereinafter together as the, "Parties"), alleging Breach of the Implied Warranty of Fitness for a Particular Purpose, Breach of the Implied Warranty of Merchantability, Breach of the Covenant of Good Faith and Fair Dealings, Fraud in the Inducement, and Breach of Contract, which was filed on September 27, 2012, (*Complaint, R. ____*). The Respondent filed his Answer on October 24, 2012 (*Answer, R. ____*). Appellant later amended her Complaint on November 2, 2012 (*Amended Complaint, R. ____*). The Respondent filed his Answer to the Amended Complaint, dated November 21, 2012, (*Answer to Amended Complaint, R. ____*).

Thereafter, Respondent filed his Motion for Change of Venue, (*Motion, R. ____*). Respondent's Motion for Change of Venue was heard by the Trial Court on January 15, 2013, and granted by Order dated, February 19, 2013, (*Order, R. ____*). The Parties were notified by way of correspondence from the Richland County Clerk of Court dated, February 26, 2013, that this action was transferred to the Lexington County Court of Common Pleas, (*Certificate of Transmittal, R. ____*). Appellant filed her Notice of Appeal on March 1, 2013, (*Notice of Appeal, R. ____*). The transcript of the hearing below, was received by counsel for Appellant on March 19, 2013, (*Transcript, R. ____*). This Appeal follows:

STATEMENT OF THE FACTS

Respondent contacted Appellant and offered to sell, and did later sell and deliver to Appellant, an inoperable Motor Vehicle, (hereinafter as, "Motor Vehicle"). Prior to Appellant entering into the Contract with Respondent, Respondent made numerous, false, material representations to Appellant, to induce Appellant to enter into a written Contract for the sale of the Motor Vehicle.

The Parties to this Appeal entered into a Contract, which contained the following language, "This agreement shall be **governed by the laws of the State of South Carolina and the County of Richland...**" (*Contract, R. ___*), (emphasis not in original).

Respondent herein, filed a Motion to Change Venue from Richland County, to Lexington County, (*Motion, R. ___*). Respondent's Motion was notwithstanding the undisputed fact that the Parties to this Appeal had entered into a Contract, which contained the clause outlined hereinabove.

The applicable Statute is, *Section 15-7-30(C)(1)(2), S.C. Code Ann., (1976, as amended)*, which reads as follows: "(C) A civil action tried pursuant to this section against a resident individual defendant must be brought and tried in the county in which the: (1) defendant resides at the time the cause of action arose;" **or**, (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred" (emphasis supplied).

The Respondent provided no documentary evidence to the Trial Court, concerning his alleged residency in Lexington County, South Carolina. Respondent only provided to the Trial Court, a single Affidavit alleging a Lexington County residence, (*Affidavit of Respondent, R. ___*).

STATEMENT OF THE FACTS, (Cont.)

At the hearing of this matter, the Trial Court in a colloquy with Respondent's counsel, asked Respondent's counsel for evidence that the Respondent lived in Lexington County at the time the action arose, Respondent's counsel was unable to offer any evidence, but Respondent's counsel simply referred back to the Affidavit of Respondent, which was unsupported by any documentary evidence, (*Tr. p. 10, Line 1-3; R. ___*). It is undisputed, that the most substantial parts of the alleged acts were **(i)** the Contract between the parties expressly referenced that the Contract would be governed by the laws of Richland County, (obviously, intended venue for disputes to be in Richland County), (*Contract, R. ___*) **(ii)** the "transaction" complained about, took place in Richland County, (*Answer, R. ___*), (*Order, R. ___*), **(iii)** the physical delivery of the Motor Vehicle took place in Richland County (*Order, R. ___*) and **(iv)** the Respondent was served with this action in Richland County, (*Affidavit of Service, R. ___*).

Summary of Arguments

- I. THE TRIAL COURT ERRED IN GRANTING THE RELIEF SOUGHT IN DEFENDANT'S MOTION TO CHANGE VENUE, GIVEN THE EVIDENCE AND THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF SECTION 15-7-30(C)(1)(2.), S.C. CODE ANN., (1976, AS AMENDED).

Given the evidence in this case and the disjunctive nature of *Section 15-7-30(C)*, the Trial Court erred in applying only one provision of *Section 15-7-30(C)*. Factually, *Section 15-7-30(C)*, also contains a second provision, “defendant resides at the time the cause of action arose,” **or**, “most substantial part of the alleged act or omission giving rise to the cause of action occurred” (emphasis supplied). Because it is admitted that the most substantial parts of the alleged acts occurred in Richland County, South Carolina, the second disjunctive provision of *Section 15-7-30(C)* described hereinabove, controls and venue was proper in Richland County, (see, Garris v. Governing Bd. of South Carolina Reassurance Facility 511 S.E. 2d 48 (1998)).

- II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE FORUM SELECTION CLAUSE IN THE CONTRACT BETWEEN THE PARTIES WAS AMBIGUOUS AND THAT THE FORUM SELECTION CLAUSE SHOULD HAVE BEEN CONSTRUED BY THE LOWER COURT TO ASCERTAIN AND GIVE EFFECT TO THE INTENTION OF THE PARTIES.

As stated, the Contract between the Parties, described hereinabove, contained the statement, “This agreement shall be governed by the laws of the State of South Carolina and the County of Richland...” (*Contract*, R. ____). That statement is ambiguous and it should have been construed by the Trial Court, to ascertain and give effect to the intention of the Parties. Ward v. West Oil Co., Inc., 379 S.C. 225, 241, 665 SE 2d 618 (S.C. Ct. of App. 2008). The Trial Court failed to construe the statement, but instead opined that, “Furthermore, the court is not familiar with what laws of Richland County would be applicable to this dispute.” (*Order p. 2*, R. ____). The Court’s statement is, on its face, support for Appellant’s argument that the reference to Richland County in the venue clause of the Contract between the Parties is ambiguous, and that statement should have been construed by the Trial Court (*Order p. 2*, R. ____), (*Contract*, R. ____).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE RELIEF SOUGHT IN RESPONDENT'S MOTION TO CHANGE VENUE, GIVEN THE EVIDENCE AND THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF SECTION 15-7-30(C)(1)(2), S.C. CODE ANN., (1976, AS AMENDED).

Section 15-7-30(C), Requirements.

On its face, the Trial Court's written Order addresses only provision one of *Section 15-7-30(C), S.C. Code Ann., (1976, as amended), (Order, R. ___)*. The applicable code *Section 15-7-30(C)*, is disjunctive and states that venue should be where a, "(1) defendant resides at the time the cause of action arose. or, (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred" (emphasis supplied).

As for clause (1) of *Section 15-7-30(C)*, the Respondent provided no documentary evidence to the Trial Court, concerning his alleged residency in Lexington County, South Carolina. Respondent only provided to the Trial Court, a single Affidavit alleging a Lexington County residence, (*Affidavit of Respondent, R. ___*).

As for clause (2) of *Section 15-7-30(C)*, it is undisputed that the most substantial parts of the alleged acts in this case were (i) the Contract between the parties expressly referenced that the Contract would be governed by the laws of Richland County, (obviously, intended venue for disputes to be in Richland County), (*Contract, R. ___*) (ii) the "transaction" complained about, took place in Richland County, (*Answer, R. ___*), (*Order, R. ___*), (iii) the physical delivery of the Motor Vehicle took place in Richland County (*Order, R. ___*) and (iv) the Respondent was served with this action, in Richland County, (*Affidavit of Service, R. ___*).

ARGUMENT, (Cont.)

The Trial Court's Order references, Mathis v. Brown & Brown of SC, 389 S.C. 299, 698 SE 2d73 (2010), for the proposition that the Contract is central to the dispute and venue should be in Lexington County, (Order, R. ____). Mathis addresses the contract, or the existence of a contract. Mathis, supra at 321. Unlike Mathis, the Contract itself, or the existence of the Contract, is not an issue in this case, *sub judice*.

At the time the Causes of Action arose against the Respondent, Appellant alleges that both Parties were residents of Richland County, South Carolina, (*Affidavit of Appellant, R. ____*). In September, 2012, Respondent's mother stated that the Respondent did not live at the address in Lexington County, shown on the Contract between the Parties (*Affidavit of Process Server, R. ____*), (*Contract, R. ____*). Also, the physical delivery of the inoperable Motor Vehicle, by the Respondent, occurred in Richland County, (*Order, p. 2, R. ____*). Both the Respondent admitted and the Trial Court found, that the "transaction" herein, took place in Richland County, South Carolina, (*Paragraph "4" of Answer p. R. ____*), (*Order p. 2, R. ____*). The Respondent was served with this action in Richland County, South Carolina, (*Affidavit of Service, R. ____*).

The Disjunctive Provisions of Section 15-7-30(C), Control.

South Carolina case law is clear on the application and importance of the word "or" in a Statute. "The word "or" used in a statute, is a disjunctive particle that marks an alternative." Brewer v. Brewer, 129 SE 2d 736, 738 (1963); K & A Acquisition Group v. Island Pointe, 682 SE 2d 252 (2009). The word "or" used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both, Brewer, supra at p. 738. "Or" generally indicates an alternative corresponding to "either", as "either this or that"; that is to say either one or another" Brewer, supra at p. 739; Harris v. Anderson County Sheriff's Office, 673 SE 2d 423 (2009).

ARGUMENT, (Cont.)

Given the evidence in this case and the disjunctive nature of the two provisions of *Section 15-7-30(C)*, the Trial Court erred in applying only one provision of *Section 15-7-30(C)*, as set forth hereinabove. Factually, *Section 15-7-30(C)*, also contains a second provision, which is also controlling, “or (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred.” Appellant’s counsel specifically called the Trial Court’s attention to the disjunctive nature of *Section 15-7-30(C)*, (*Tr. p. 4, Line 14 – p. 5, Line 1; R. ___*). The Trial Court failed to properly note the second provision of the Statute, and the second disjunctive provision of *Section 15-7-30(C)*, described hereinabove, applies and venue was proper in Richland County. “Where a statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive ‘or,’ application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either” Garris v. Governing Bd. of South Carolina Reassurance Facility, 511 S.E. 2d 48, 52 (1998). Appellant’s position was also argued to the Trial Court by way of Affidavit¹, (*Affidavit of Appellant, R. ___*), (*Tr. p. 4 Line 4 - p. 5 Line 25; R. ___*).

The Contract Between the Parties Referenced Venue in Richland County.

Respondent herein, filed a Motion to Change Venue from Richland County, to Lexington County, (*Motion, R. ___*). Respondent’s Motion was notwithstanding the undisputed fact that the Parties to this Appeal had entered into a Contract, which contained the following language, “This agreement shall be **governed by the laws of the State of South Carolina and the County of Richland...**” (emphasis supplied), (*Contract, R. ___*).

¹ Appellant’s Affidavit was filed of record on January 15, 2013, and also provided to the Trial Judge again in a reference document, which was reviewed by the Trial Judge during oral argument before the Trial Court, (*Affidavit of Appellant, R. ___*), (*Tr. p. 3 Lines 19-22; R. ___*).

ARGUMENT, (Cont.)

The Transaction Between the Parties was in Richland County.

Respondent admitted in his Answer, (*Answer, R. ____*) to Appellant's Complaint, (*Complaint, R. ____*), that the "transaction"² between the Parties took place in Richland County, South Carolina, (*Paragraph "4", of Respondent's Answer, R. ____*). Also, the Trial Court properly found that the "transaction" took place in Richland County, South Carolina, (*Order p. 2, R. ____*). Respondent's counsel failed to appeal the Order containing that finding, and that finding is now the law of this case, Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 711 SE 2d 895, (2011).

The Physical Delivery of the Motor Vehicle Took Place in Richland County.

The Trial Court properly found that the physical delivery of the Motor Vehicle to Appellant, took place in Richland County, (*Order, p. 2, R. ____*). Respondent's counsel failed to appeal the Order containing that finding, and that finding is now the law of this case, *id.*

The Respondent was Served in Richland County.

Finally, the Respondent was served with the Complaint in this matter, at an address located in Richland County, South Carolina, (*Affidavit of Service, R. ____*).

No Need for Statutory Interpretation by This Court.

"Because the statute's language is clear and unambiguous and conveys a clear and definite meaning, there is no need for statutory interpretation by this Court." Mosseri v. Austin's at the Beach, 642 SE 2d 760 (S.C. Ct. of App. 2007). Therefore, consistent with South Carolina case law, the evidence of this case and the second disjunctive provision of *Section 15-7-30* is applicable and controlling.

² The only "transaction" in this litigation was the Contract, the sale, and the delivery of a Motor Vehicle from Respondent to Appellant, (*Contract, R. ____*).

ARGUMENT, (Cont.)

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE FORUM SELECTION CLAUSE IN THE CONTRACT BETWEEN THE PARTIES WAS AMBIGUOUS AND THAT THE FORUM SELECTION CLAUSE SHOULD HAVE BEEN CONSTRUED BY THE LOWER COURT TO ASCERTAIN AND GIVE EFFECT TO THE INTENTION OF THE PARTIES.

The Parties' Contract Contained Clause on Venue.

Respondent has admitted that the Contract between the Parties contained the following verbiage, "This agreement shall be governed by the laws of the State of South Carolina and the County of Richland..." (*Paragraph "4" of Defendant's Answer to Plaintiff's Amended Complaint, R. ____*), (*Contract, R. ____*). That statement is ambiguous and it should have been construed by the Trial Court, to ascertain and give effect to the intention of the Parties. Ward v. West Oil Co., Inc., 379 S.C. 225, 241, 665 SE 2d 618 (S.C. Ct. of App. 2008). The only reasonable interpretation of the Parties' intent is that the word "and" in the Contract clause on venue was meant by the Parties to be the word "in", which means the Parties contracted for venue "in" Richland County, (*Contract, R. ____*).

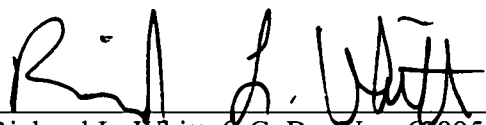
At the hearing in this matter, Appellant's counsel published the Contract clause to the Trial Court, (*Tr. p. 7, Line 25 – p. 8, Line 6; R. ____*). Because the Parties expended the effort to include this clause in an otherwise abbreviated Contract, the clause was obviously important to the Parties and should be honored. However, the Trial Court failed to construe the statement, but instead opined in the Trial Court's Order that, "Furthermore, the court is not familiar with what laws of Richland County would be applicable to this dispute." (*Order p. 2, R. ____*). The Trial Court's statement is, on its face, support for Appellant's argument that the reference to Richland County in the venue clause of the Contract between the Parties is ambiguous, and that statement should have been construed by the Trial Court (*Order p. 2, R. ____*), (*Contract, R. ____*).

CONCLUSION

Based on the foregoing, the evidence in this case, applicable South Carolina case law and the applicable Statute, the decision of the Trial Court granting the Respondent's Motion for Change of Venue, should be reversed because the Trial Court failed to properly apply the disjunctive, controlling provision of *Section 15-7-30(C)*, and the Trial Court failed to note the import of the reference to Richland County, in the venue clause of the Contract, between the Parties, and this matter should be remanded for trial in the Richland County Court of Common Pleas.

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April 18, 2013

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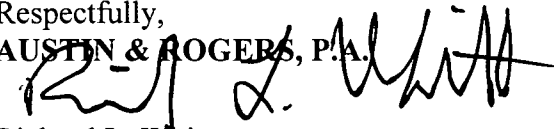
- Re: • Allison Shoemaker v. Neal Chavis
• Civil Action Case Number: 2012-CP-40-06497
• **Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal.**

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find Appellant's Initial Brief, Appellant's Designation of Matter to be Included in the Record on Appeal and Proof of Service.

Please accept these documents for filing and acknowledge receipt of the same by file-stamping the copies enclosed and returning them to me, via our courier. If you have any questions or need additional information, please feel free to contact me. With best regards, I am

Respectfully,
AUSTIN & ROGERS, P.A.


Richard L. Whitt
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Enclosures

cc: Walter M. Riggs, Esquire

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