

March 19, 2008

The Honorable C. Ryan Johnson
Magistrate, Greenwood County
528 Monument Street, Room 100
Greenwood, South Carolina 29646

Dear Magistrate Johnson:

In a letter to this office you questioned whether a defendant in a restraining order hearing has the right to a jury trial. You particularly referenced the provisions of S.C. Code Ann. §§ 16-3-1750 through 16-3-1800. In particular, Section 16-3-1750 states that "...the magistrates court has jurisdiction over an action seeking a restraining order against a person charged in harassment in the first or second degree or stalking." An action for a restraining order may be initiated pursuant to that provision. Section 16-3-1760 allows for an emergency hearing "for good cause shown" in circumstances where "the plaintiff...(must)...prove his allegation by a preponderance of the evidence." Subsection (D) of such provision states that "[t]he court shall hold a hearing on a motion for a restraining order within fifteen days of the filing of a complaint and motion, but not sooner than five days after service has been perfected upon the defendant." Section 16-3-1780 states that

(A) A temporary restraining order remains in effect until the hearing on the Rule to Show Cause why the order should not be extended for the full one-year period. The temporary restraining order must be for a fixed period in accordance with subsection (B) if the court finds the defendant in default at the hearing.

(B) In cases not provided for in subsection (A), a restraining order must be for a fixed period not to exceed one year but may be extended by court order on a motion by the plaintiff, showing good cause, with notice to the defendant. The defendant is entitled to a hearing on the extension of an order issued pursuant to this subsection within thirty days of the date upon which the order will expire.

These provisions were first enacted by Act No. 94 of 1995.

As set forth in 28 C.J.S. Domestic Abuse and Violence, Section 13, "[a] protective order is historically an equitable remedy." An opinion of this office dated March 22, 1995 stated that this

State's constitutional provision guaranteeing a right to a jury trial "...was long ago determined by the Courts to be inapplicable to cases within the equitable jurisdiction of our courts." The opinion cited the decision in Miller v. British America Assurance Co., 238 S.C. 94, 104, 119 S.E.2d 527 (1961) where the court stated:

...for purposes of trial, legal and equitable issues must be distinguished ..and only those should be determined by the jury which are properly triable by jury, while those which are properly triable in equity, must be determined by the Judge in the exercise of his chancery powers.

See also: Collier v. Green, 244 S.C. 367, 373-374, 137 S.E.2d 277 (1964) (because the matter was equitable, the parties were not entitled to a jury trial "...as a matter of right...."); 12 S.C. Jurisprudence, "Equity", § 5, p. 95 ["[t]his privilege of a jury trial does not extend to equity in South Carolina."]. Moreover, that opinion stated that

...for purposes of determining if a jury trial is compelled, our Court has usually looked to whether or not a particular action or its equivalent existed at common law at the time of the adoption of the Constitution. If the action is one in equity, then, by definition, it did not exist at common law.

See also: Op. Atty. Gen. dated May 16, 1989 ("[t]he State Supreme Court has determined that the State Constitutional provisions establishing the right to a jury trial are applicable only in cases in which the right to a jury trial existed at the time the State Constitution was adopted in 1868."); Op. Atty. Gen. dated March 17, 1981 ("...the right of trial by jury is only applicable to those cases in which a jury trial was required at the time of the adoption of the Constitution."). As noted, the provisions providing for the restraining order referenced by you were enacted in 1995.

Cases in other jurisdictions have specifically held that a defendant does not have the right to a jury trial in a matter seeking a protective order, such as anti-stalking. See, e.g., Delgado v. Souders, 46 P.3d 729 (Or. 2002). In Wisconsin v. Ameritech Corp., 517 N.W.2d 705, 706 (Wis.App. 1994), the court recognized that "[t]he only right of trial by jury guaranteed by the constitution is the right as enjoyed at the time the constitution was adopted." That court cited the earlier decision in Schramek v. Bohren, 429 N.W.2d 501 (Wis.App. 1988), a domestic abuse case, where the respondent sought a temporary restraining order and an injunction. In that case, the court stated that "[h]istorically, injunctive proceedings have been deemed actions in equity...[B]ecause the TRO and injunction...(provided in the domestic abuse statutes)...are equitable in nature, there is no right to a jury trial..." 429 N.W.2d at 506. See also: Camden-Clark Memorial Hospital Corp. v. Turner, 575 S.E.2d 362, 370 (W.Va. 2002) ("Both the federal and state constitutional jury trial provisions grant the right to a jury trial 'in suits at common law.' Suits in equity were tried without juries.").

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Consistent with the above, in the opinion of this office, a defendant involved in a restraining order hearing pursuant to the provisions to S.C. Code Ann. §§ 16-3-1750 et seq. has no right to a jury trial.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General