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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2022-UP-314 (S.C. Ct. App. filed July 27, 2022)

Ronald L. Jones and Gayle Langley Jones, Thomas Huguenin Gaillard, as Trustee of The Thomas Huguenin Gaillard Revocable Trust, Dated April 3, 2007, and Thomas W. Cone, Jr. as Trustee of The Thomas W. Cone, Jr. Revocable Trust, Dated April 3, 2007, Respondents,

v.

Rogers Townsend & Thomas, P.C. Lisa Hostetler; Alexander C. Peabody; and Peabody & Associates, Inc., Defendants,

Of Which Rogers Townsend & Thomas, P.C. and Lisa Hostetler are Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioners certifies that a Petition for Rehearing was made and finally ruled upon by order of the Court of Appeals on September 13, 2022.

A handwritten signature in black ink, appearing to read 'C.J. Clark', written over a horizontal line.

Chelsea J. Clark, Esquire
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding the Trustees were properly dismissed.
2. Whether the dominant estate holders of an easement are necessary parties to a determination of the validity of an easement.
3. Whether the lower courts misconstrued the Declaratory Judgments Act.
4. Whether the order of one circuit court judge may override that of another circuit court judge where there was no material change in circumstances.
5. Whether the lower court relied on facts and allegations not in evidence.
6. Whether an appealed order can override an unappealed order for purposes of interpreting a conflict in results.

STATEMENT OF THE CASE

This matter is before the Court upon a petition for writ of certiorari to the Court of Appeals by Rogers Townsend & Thomas, P.C. and Lisa Hostetler (“Petitioners”). In 2010, Ronald L. Jones and Gayle Langley Jones (“Plaintiffs”) purchased a marsh-front house in Berkeley County following a foreclosure. (*See* R. at 0131, ¶ 9.) Rogers Townsend handled the closing on the house, which is located at 145 Memes Way. (R. at 0131, ¶ 10.) In its legal description, the house is located on “Lot 6B.” (R. at 0131, ¶ 9.) Forming a semi-peninsular U-shape, Lot 6B is marsh front on approximately two and a half sides. (R. at 0101 (plat showing lots)). Meanwhile, the lot behind 145 Memes Way is Lot 6A and is both closer to the highway and marsh-front on one side. (*Id.*) As it progresses eastward, the marsh transitions into the Wando River, near where the Highway 41 bridge crosses to Mt. Pleasant.

In 2018, Plaintiffs sued the attorneys and surveyor who were involved in their closing.¹ They alleged that the attorneys and surveyors missed an easement that granted the owners of Lot 6A the right to promenade or walk around the marsh front portions of Lot 6B, so as to form a U-shaped right of way that began and ended on Lot 6A. (*See generally* R. at 0132–33.) Plaintiffs also alleged that the owners of Lot 6A refused to relinquish the easement but would execute a modified, or reduced easement. (R. at 0135, ¶¶ 30–32.) Upon examination of the claims against them in the suit, Petitioners determined that they would be challenging the validity of the easement asserted by the owners of Lot 6A. (R. at 0034–36 (asserting defenses relating to easement).) In order to join all parties necessary for a determination of the rights of the dominant and servient estates as to the asserted easement, Petitioners moved to join Thomas Huguenin Gaillard, as Trustee of The Thomas Huguenin Gaillard Revocable Trust, Dated April 3, 2007, and Thomas W.

¹ The captioned Peabody defendants, sued over the survey, are not participants in this appeal.

Cone, Jr., as Trustee of the Thomas W. Cone, Jr. Revocable Trust, Dated April 3, 2007 (“Trustees”) to the suit. (R. at 0056–57.)

The motion to join the Trustees to the suit was heard by the Honorable Perry M. Buckner. (R. at 0495.) Judge Buckner grasped the necessity of joining the dominant estate holders to the suit for a determination as to whether they held a valid easement which allegedly damaged Plaintiffs. (R. at 0499, ll. 9–18; 0504, ll. 14–19.) However, Plaintiffs’ counsel argued to Judge Buckner that Petitioners had no right to challenge the validity of the easement if Plaintiffs believed it to be enforceable. (R. at 0501, ll. 8–13.) This proposition was rejected by Judge Buckner, who joined the Trustees as involuntary plaintiffs. (R. at 0501, ll. 17–25; 0001–02.) Frustrated by being added to the suit, even though their required participation would be minimal, the Trustees went forward with their previously pleaded plan to modify the easement. On March 15, 2019, the Trustees and Plaintiffs executed an agreement they called the “Access, Maintenance and Joint Dock Use Agreement.” (R. at 0067.) This plan purportedly reduced the size of the allegedly pre-existing easement but also added a detailed plan for the owners of Lots 6A and 6B to build and maintain a dock stemming from the edge of Plaintiffs’ property out to the Wando River. (R. at 0068, ¶ 2 (“On or before April 15, 2018, Jones and Gaillard and Cone . . . agree to commence construction or cause the commencement of construction of the Joint Dock . . .”).²

As soon as the purported “new easement” was recorded, the Trustees demanded to be let out of the suit, conditioning their cooperation in their agreed-upon depositions upon dismissal from the suit. (R. at 0172 (Trustees providing amenable dates for deposition); 0199 (Trustees wanting to postpone depositions until after dismissal); 0187 (Trustees refusing to sit for depositions unless

² The dock appears to have been completed during the pendency of this appeal and is visible in the most recent aerial photographs publicly available on Google Earth and the Berkeley County GIS Mapping site.

dismissal is stipulated.) The Trustees filed a motion for “non-joinder,” which was heard by the Honorable Deadra L. Jefferson. (R. at 0061–64; 0508.) The motion was heard concurrently with Petitioners’ motion to amend their answer to include a claim against the dominant and servient estate holders for declaratory judgment on the rights of the parties as to the easement. (R. at 0082–83; 0508.) In two Form 4 orders, Judge Jefferson granted both motions—one allowing amendment for a declaratory judgment claim and one dismissing the previously joined Trustees. (R. at 0003–08.) Following a motion for reconsideration, Petitioners appealed the order dismissing the Trustees under Rule 21, SCRPC. (R. at 0009; 0558.) The other order, granting the motion for amendment of Petitioners’ answer, is unappealed.

Once before the Court of Appeals, the Trustees moved to dismiss, arguing that the order dismissing them from the case was interlocutory and not immediately appealable. (Aug. 21, 2019 Mot. to Dismiss.) The Court of Appeals denied the motion after briefing but allowed the issue to be included in the appellate briefs. (Dec. 13, 2019 Order.) Following briefing and oral arguments, the Court of Appeals ruled that the order in question was immediately appealable but affirmed Judge Jefferson’s order in an unpublished *per curiam* opinion. *See Jones, et al. v. Rogers Townsend & Thomas, P.C., et al.*, Op. No. 2022-UP-314 (S.C. Ct. App. filed July 27, 2022) (hereinafter, “Opinion”). A petition for rehearing was submitted and denied. (Pet. for Rehearing; Sept. 13, 2022 Order.) This petition follows. While Petitioners do not dispute the procedural holding of the Court of Appeals on appealability, Petitioners do dispute the substantive holdings of the opinion. Therefore, Petitioners request that this Court grant this petition to issue a writ of certiorari to the Court of Appeals.

STANDARD OF REVIEW

The Court has the power to grant a writ of certiorari for any special or important reason, but typically consider factors such as whether there is a novel question of law presented by the case or whether the decision of the Court of Appeals is in conflict with prior precedent. *See* Rule 242(b), SCRCP.

ARGUMENT

Real property rights often endow property owners with the belief that they have complete control over their land. But upon closer inspection, there are numerous cracks and fissures in the sticks that form the bundle of property rights discussed in first-year law classes. Any number of things—from judgment liens to a fraudulent seller—can cloud a title or limit an owner’s rights. To bring some order to the process of establishing and conveying property rights, documents are recorded with the register of deeds or the clerk of court. By recording, the persons involved in the transaction put the world on notice of the relevant event. *See Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006) (the proper recording of documents asserting an interest or claim in real property gives constructive notice to the world and alerts all future grantees of the rights of the recorder). If a promise or declaration stated by any given owner to a third party is not included in the public record, it will not typically bind a later owner because that later owner has no notice.

In this case, Petitioners are being sued for the alleged failure to disclose a purported easement in the public record to the purchaser of the purported servient estate. In order to resolve the question of whether the purported easement was ever valid or mattered at all, Petitioners seek a ruling by a court of competent jurisdiction. In order to bind the purported dominant estate holders to this ruling, Judge Buckner brought in the Trustees as involuntary plaintiffs under Rule 19, SCRCP. The Trustees protest that they are not needed for a determination of the validity of the easement and that they have disclaimed a present-day interest in the purported easement.

Ultimately, however, it does not matter a great deal whether the Trustees protest in court filings that they have no interest in the easement because their protests are not part of the recorded chain of title.³ What matters is a final court order determining the rights of the parties as to the easement that becomes part of the public record. A recorded judgment would prevent any future owner of the Trustees' property seeking to resurrect the easement on the basis there is no notice that the easement was ever invalidated, should that happen. All that is required of the Trustees is that they remain nominal parties in this case and sit for depositions. However, the Trustees have fought tooth and nail to escape their nominal status and have conditioned their submission to their depositions upon dismissal from this case, despite having previously agreed to the deposition dates. (R. at 0172 (Trustees providing amenable dates for deposition); 0199 (Trustees wanting to postpone depositions until after dismissal); 0187 (Trustees refusing to sit for depositions unless dismissal is stipulated).) Petitioners herein argue that the Court of Appeals was wrong to affirm the dismissal of the Trustees from this case for several reasons.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRUSTEES WERE PROPERLY DISMISSED AND APPLIED THE WRONG RULE.

This case presents a somewhat unusual procedural scenario. The Trustees were joined by Judge Buckner and then un-joined by Judge Jefferson. The Trustees' filed a motion for "non-joinder," but have since acknowledged that this was not the proper terminology for the relief they were seeking. (Opinion, p. 5.) Nonjoinder is the failure to join a necessary party to a suit, which is the argument Petitioners made to Judge Buckner. *See Nonjoinder, Black's Law Dictionary* (11th ed. 2019). What the Trustees were seeking from Judge Jefferson is disjoinder—that is, undoing Judge Buckner's ruling on nonjoinder. *See Disjoinder, Black's Law Dictionary* (11th ed. 2019).

³ At this point the only renouncement of the easement in Plaintiffs' complaint by the Trustees is in a footnote in their appellate filings which was later quoted in their brief. *See* Final Br. of Trustees, p. 14 (citing to a footnote in the Trustees' reply in support of their motion to dismiss the appeal).

However, the South Carolina Rules of Civil Procedure do not directly address the concept of undoing joinder that was already done. *See* Rules 18–21, SCRCP.

Rather, misjoinder is addressed in Rule 21, SCRCP. Misjoinder is “the improper union of parties in a civil case.” Misjoinder, *Black’s Law Dictionary* (11th ed. 2019). Rule 21 is quite short and does not shed much light on the situation presented in this case.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 21, SCRCP. The most common usage of Rule 21 is to realign parties, particularly in the federal system where realignment can cure certain jurisdictional defects. *See* Realignment of parties, *Trial Handbook for South Carolina Lawyers* § 2:16 (5th ed.). This instant case does not concern realignment; rather, the Trustees requested to be completely dismissed from the case. While this is a relatively novel phenomenon, there is one prior case that sheds some light on this circumstance. The Court of Appeals did not address much of the analysis from the case in their opinion. (*See* Opinion, pp. 5–7 (citing *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), only once).)

In the *Farmer* opinion, Judge Hill, writing for the Court of Appeals, addressed a situation where the circuit court had allowed the dismissal of a party under Rule 21. The question presented involved a complex issue of insurance liability. *See Farmer*, at 582–84, 819 S.E.2d at 143–44. Ruling on the issue in favor of the party seeking an out from the case, the circuit court dismissed the party under Rule 21. *Id.* at 584, 819 S.E.2d at 144–45. Judge Hill’s opinion explored whether that was an appropriate use of Rule 21 and concluded that it was not. The opinion noted that there is very little South Carolina case law on Rule 21 and none that provided any guidance. *Id.* After reviewing federal precedent related to Rule 21, Judge Hill wrote that it was inappropriate to use

the misjoinder rule to resolve the novel legal issue of whether a voluntarily dissolved business trust could be sued. *Id.* at 586, 819 S.E.2d at 146.

This analysis by Judge Hill is key in this case. There is a novel issue in this case that the undersigned have not been able to find authority to resolve. The issue in this case is an easement. In all known case law construing easements in South Carolina, the purported dominant estate holder and the purported servient estate holder are both parties.⁴ The implication of the Court of Appeals' order is that the validity of an easement can be determined without the party who, according to public record, holds the property rights to the purported dominant estate. Making this decision based on a Form 4 order for a motion for "non-joinder" and an unpublished appellate opinion goes against the *Farmer* opinion, which made it clear that dismissal under Rule 21 is not a mechanism for considering novel issues of law. This is not a mere matter of realigning parties. This is a matter of finding an entire category of party is not necessary. A motion under Rule 56, SCRPC, would be a more appropriate vehicle to resolve a novel legal issue, if not trial. The simple facts of this case show that there is disagreement regarding whether the dominant estate holders should be parties—Judge Buckner ruling them in while Judge Jefferson ruled them out—should be enough to demonstrate that Rule 21 is not the appropriate vehicle for this question and it was an abuse of discretion to dismiss the Trustees.

Rather than rely on the *Farmer* case, the Court of Appeals reviewed a case from 1963. (*See* Opinion, p. 6 ("This situation is not meaningfully different from *Hardwick v. Liberty Mutual Insurance Company*, which was a dispute between the driver of a rental car involved in an accident

⁴ *See, e.g., Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015); *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578 (2009); *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 633 S.E.2d 136 (2006); *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); *Williams v. Tamsberg*, 425 S.C. 249, 821 S.E.2d 494 (Ct. App. 2018); *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012); *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012).

and the rental company's insurer. 243 S.C. 162, 133 S.E.2d 71 (1963).") The questions in that case are meaningfully different than the circumstances here.⁵ The *Hardwick* case was in a different procedural posture. The *Hardwick* opinion arose before the rules of civil procedure were enacted and ruled upon a demurrer, which is certainly more akin to a Rule 12 motion than a Rule 21 motion. The demurrer alleged, *inter alia*, a defect in the parties. *Hardwick* at 166–67, 133 S.E.2d at 72. Here the issue of whether there was a defect in the named parties was already ruled upon by Judge Buckner, well before the order appealed in this case. In addition, the *Hardwick* case actually illustrates Petitioners' contention that without an underlying judgment determining the rights of the parties to the easement, the dominant estate holds must be parties to this case.

II. A DETERMINATION OF THE VALIDITY OF AN EASEMENT REQUIRES THAT THE DOMINANT ESTATE HOLDER BE BOUND TO THE JUDGMENT.

Plaintiffs have argued numerous times in this case that Petitioners do not have the right to argue that the easement they are alleged to have missed was invalid and therefore of no consequence to Plaintiffs. (*See, e.g.*, R. at 0591, ll. 8–12 (“First of all, the law firm has no standing to request whether or not there’s an easement or not. That’s between the dominant and servient estate. They have no standing to say there is no easement. We believe there is an easement.”).) It is axiomatic that the validity of the easement goes to the causation and damages elements of a professional negligence claim.⁶ The validity of the easement in question has never been adjudicated by a court of competent jurisdiction. In many legal malpractice claims there has been

⁵ For instance, Petitioners have raised the issue of the Declaratory Judgment Act's requirement for parties with an interest to be named. The *Hardwick* court expressly declined to rule on that statute, which as the time was labeled Section 10-2008. *See Hardwick* at 170, 133 S.E.2d at 74 (“We do not here or now decide whether Surety Indemnity Company and/or various claimants should have been or should be joined as parties pursuant to the provisions of Section 10-2008, as that issue is not before us.”); *see also* S.C. Code Ann. § 15-53-80 (under History, “1962 Code § 10-2008”).

⁶ Like Judge Buckner, the Court of Appeals gave Plaintiffs' contention short shrift stating that “of course” the old easement remained a ripe dispute. (*See* R. at 0591, ll. 17–19; Opinion, p. 3.)

an underlying suit that forms the basis for the claim. For example, a plaintiff represented by a lawyer lost their personal injury claim due to failure of their lawyer to obtain an expert witness or properly object at trial. In such a situation, a malpractice case often becomes a “trial within a trial.” See *Eadie v. Krause*, 381 S.C. 55, 63, 671 S.E.2d 389, 393 (Ct. App. 2008) (citing *Shearon v. Seaman*, 198 S.W.3d 209, 210 (Tenn.Ct.App.2005)). A legal malpractice plaintiff must show that the alleged error made a difference, that it caused the plaintiff’s damages just as any negligence claimant must show. Here, Plaintiffs argue that there’s a facially valid easement. Petitioners contend that the easement, if properly examined, would be found invalid.

In a legal malpractice claim over an easement, the issue of validity could already have been examined by a court, leading to either acceptance of that ruling or a dispute as to the lawyer’s fault in that ruling. For instance, in a 2002 case, the Court of Appeals considered a claim against Haynsworth, Marion, McKay & Guerard, LLP for malpractice related to an easement. But prior to consideration of that claim, then-Judge Kittredge had already ruled on the easement with the dominant and servient estate holders as parties. See *Binkley v. Burry*, 352 S.C. 286, 291–92, 573 S.E.2d 838, 841 (Ct. App. 2002). Like the *Binkley* case, the *Hardwick* case relied upon by the Court of Appeals also came after an underlying ruling. Here, there has been no such underlying ruling and one must hereafter be made.

The *Hardwick* case is not a Rule 21 case, but rather it sought declaratory judgment on a coverage issue after the facts of the actual precipitating car accident were presumably already actually litigated. See *Hardwick* at 166, 133 S.E.2d at 72 (describing accident suit wherein a carrier defended under a reservation of rights, followed by the suit at bar for a coverage declaration). The *Hardwick* court first considered whether the specific terms of the insurance policy needed to be pleaded in order to state a claim for declaratory judgment and determine that, since that knowledge is particularly within the knowledge of the defendant carrier, the answer is no. *Id.* at 167–68, 133

S.E.2d at 73. The carrier next argued that there is a defect of parties because the Surety Indemnity Company, which defended under a reservation of rights in the underlying car accident case, was not named. *Id.* at 168, 133 S.E.2d at 73. The carrier relies in part upon the Declaratory Judgments Act, but the court pivots to the concept of necessary and proper parties and expressly declines to rule on the Declaratory Judgments Act issue under the “Parties” statute. *Id.* 168–70, 133 S.E.2d at 73–74.

In ruling on the necessary party issue, the court quotes the principle that ““that parties are not necessary to a complete determination of a controversy unless they have rights which must be ascertained and settled before rights of parties to the suit can be determined.”” *Id.* at 169, 133 S.E.2ed at 74 (quoting *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949)). Although the court does not further outline its reasoning, one obvious distinction from this case is that the car accident in question was already litigated. In this regard coverage actions do have some parallels with legal malpractice actions—before coverage is invoked the underlying liability must already be decided. Due to frequent diversity of the parties in coverage actions, they are frequently heard by the federal courts.

When rulings on coverage issues, a district court must always consider the ripeness of the determination, which is to say—is the declaratory judgment action still purely hypothetical or is there an adjudication of fault and damages which the court may rely on in construing coverage. This issue, which amounts to whether there is Article III standing, was described and addressed by the Fourth Circuit in 2019. *See Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199–200 (4th Cir. 2019). In that case, the Fourth Circuit questions whether Judge Childs had the authority to rule on coverage where the underlying accident was still being litigated. *Id.* There is no hint in the facts of the *Hardwick* case that the fault and damages pertaining to the car accident had not already been litigated as would be required to avoid a situation where rights must be ascertained and settled.

In this case, there is no underlying litigation. There is no court order declaring the rights of the parties to the easements in question.⁷ In order for the Court of Common Pleas to determine if Petitioners were the actual or legal cause of any damages to Plaintiffs, there must be a determination of the rights of the parties to the alleged easements. Thus, it becomes absolutely mandatory to have a trial within a trial on the validity of the easement and whether it has in fact caused Plaintiffs any damage. But a ruling on this issue without the dominant estate holders cannot provide complete relief because the people whose rights are affected are not parties. Because the theory of this easement has never been tested in court, there could be many possible defects in the alleged easement. Indeed, under most normal circumstances, Plaintiffs would be seeking to clear their title of any encumbrances, but in this instance they are insisting that their agreement with the Trustees that the easement is valid is enough to force Petitioners to pay damages—this argument skips right over causation and goes straight to damages.⁸ If Plaintiffs are wrong and the easement is not valid, the only way to enforce that ruling against the dominant estate holders is to make them a party to the ruling. This is precisely the reason Judge Buckner joined the Trustees in the first instance. (*See* R. at 0504, ll. 16–19 (“This is exactly why we have Rule 19. And because I believe that, in their absence, complete relief cannot be granted in this action, because I want the parties

⁷ By comparison, there was an order declaring rights of the parties in relation to the lot next door to the ones at issue in this case issued by Judge McDonald in 2013. *See HSCB Bank USA, et al. v. Benjamin L. Daniel, Sr., et al.*, Case No. 2012-CP-08-01148 (order filed Feb. 5, 2013 S.C. Ct. of Common Pleas). There is no such reformation of rights order in relation to the easements in this case.

⁸ Plaintiffs impliedly argued before Judge Buckner that regardless of parties, not even a court of competent jurisdiction could make a ruling on the validity of an easement because “the only two people who can make a determination as to whether or not an easement exists is the dominant estate holder and the servient estate holder.” (R. at p. 0503, ll. 18–23.) Petitioners’ arguments assume that the Court of Common Pleas has subject-matter jurisdiction to rule on the validity of an easement when the matter is before it.

all bound by it, you will prepare the order, Mr. Powell.”).) For reasons stated below, the Court of Appeals erred in essentially overturning Judge Buckner’s unappealed order.

III. THE COURT OF APPEALS MISAPPREHENDED THE APPLICATION OF THE DECLARATORY JUDGMENT “PARTIES” STATUTE.

Once aware that the Trustees were seeking to be disjoined from this case as involuntary plaintiffs, Petitioners moved to amend their answer to include a claim for declaratory judgment as to the validity of the easement. Such a claim would accomplish the same goal of keeping the dominant estate holders bound to the result of the court’s ultimate ruling on the easement at issue. Judge Jefferson granted the motion to amend at the same time she granted the Trustees’ motion for “non-joinder.” (R. at 0003–08 (orders entered approximately one minute apart).) A claim for declaratory judgment requires that all parties with an interest be a party to the suit. Specifically, the Declaratory Judgment Act states, “When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration” S.C. Code Ann. § 15-53-80. The Court of Appeals decided that the dominant estate holders have no interest in the purported easement because of the new dock agreement. (*See* Opinion, pp. 7–8.) But the fact remains, there is a 2006 easement alleged in the Complaint of this case. No recorded document has disclaimed that easement. The Trustees, therefore, have a property interest as dominant estate holders, whether they like it or not.

Under the Declaratory Judgment Act, the Trustees must be party to the declaratory judgment claim that is in Petitioners’ amended answer, regardless of whether they are involuntary plaintiffs against whom there is a counterclaim or if they are third-party defendants. The public policy surrounding declaratory judgments supports this contention. “Declaratory judgment actions must be liberally construed to settle legal rights and remove insecurity from legal relationships without awaiting a violation of the relationships.” 23 S.C. Jur. *Declaratory Judgments* § 5. There

are—without doubt—insecurities as to the legal rights of the parties relative to the various different instruments recorded in relation to Plaintiffs’ property. The Trustees were welcome to disclaim all rights and acknowledge that they never had an interest in Plaintiffs’ property as a dominant estate holder of an easement by grant. There never would have been a need for this suit by Plaintiffs and no damage at all to Plaintiffs. In such a circumstance, there would be no need for the Trustees to be in this case. But the Trustees have maintained a property interest and Plaintiffs have pleaded that their retained interest has caused them damage and forced them to enter into an agreement for a joint dock. Under such circumstances, the “parties” statute requires that they be joined to the cause of action in Petitioners’ amended answer. The order allowing that amendment is final and unappealed. Therefore, the Court of Appeals was incorrect to “construe” that the lower court did not mean to include the Trustees. (Opinion, p. 8.)

IV. THE COURT OF APPEALS ERRED IN DETERMINING THAT ONE CIRCUIT COURT JUDGE COULD REVERSE THE DECISION OF ANOTHER BECAUSE THERE WAS A CHANGE IN CIRCUMSTANCE.

One of the unique characteristics of this appeal is that Judge Jefferson’s order undid what Judge Buckner had done. Judge Buckner joined the Trustees under Rule 19 and Judge Jefferson disjoined them under Rule 21. Generally, one circuit court judge cannot override the order of another one. *See Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (citations omitted) (“One Circuit Court Judge does not have the authority to set aside the order of another.”). Further, an unappealed order like that issued by Judge Buckner is the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970)) (right or wrong, an un-appealed ruling is the law of the case). Where one circuit court judge rules, it “is manifest that [another judge] ha[s] no authority, in effect, to reverse the previous

order of [the first judge] on the same facts and allegations.” *Murphy v. Murphy*, 269 S.C. 101, 105, 236 S.E.2d 417, 418 (1977).

Addressing the order that Judge Buckner was “convinced” to issue,⁹ which held that the Trustees are necessary parties, the Court of Appeals held that there were distinguishing circumstances arising between the rulings. This holding is remarkable because it was directly rebutted by Plaintiffs’ counsel during oral argument. The Court of Appeals relied upon *Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957), which provided that “substantially different” evidence may override the law of the case doctrine, but evidence cumulative in nature will not.

In the first instance, the “new” easement that supposedly provided the sea change in circumstances does not address the easement in Plaintiffs’ complaint at all. (*Compare* R. at p. 175 (defining Old Purported Easement as 2005 language) and p. 177, ¶ 6 (terminating Old Purported Easement) *with* R. at pp. 0017–18, ¶ 16–17 (pleading 2006 easement).) There is no document in the recorded that has been recorded with the Berkeley County Register of Deeds that disclaims the 2006 easement pleaded in the complaint. But even setting that aside, the key problem is that the recorded dock agreement is merely cumulative evidence even if it does address the correct easement. Specifically, Plaintiffs pleaded in their original and still-in-force complaint that the Trustees were going to sign such a new agreement. That allegation was before Judge Buckner and it has not been altered by any new filing.

31. That the owners of lot 6-A (TMS#263-00-03-068) will not terminate their rights to the easement, but in the alternative, have agreed to reduce the size and scope of the easement.

32. That as a result, the owners of Lot 6-A will continue to have an easement on the Plaintiffs property, depriving them of exclusive ownership of their property.

⁹ “The law firm convinced the circuit court to add the Trustees to the suit as necessary parties, but the circuit court later dismissed them.” (Opinion, p. 3.)

(R. at 0135, ¶¶ 31-32.) There cannot be a material or substantial change in circumstances under *Nelson* if the Trustees simply did precisely what Plaintiffs had already said they were doing.

This point was made abundantly clear by Plaintiffs' counsel's arguments before the Court of Appeals. He argued that ". . . this was all put in the complaint. This was nothing new. In the complaint, it was alleged that the other three owners were able—we were able to get them out and that an agreement with the Trustees was forthcoming and had not been—it had not been formalized to a written easement yet because we had a statute of limitations [that] was the reason for the filing of the suit prior suit prior to that. Simply because we had to." (Audio at 29:16–29:43.) It is undisputed that the "new" easement had already been agreed to but simply not formally recorded at the time the suit was filed. That information was in the Complaint and that information was in the record at the time Judge Buckner ruled. Given this indisputable fact, the Court of Appeals erred when holding that Judge Jefferson had authority to undo what Judge Buckner had done.

V. JUDGE JEFFERSON'S ORDER RELIED ON FACTS AND AVERMENTS NOT IN THE RECORD.

The record before the lower court was not sufficient to support the order finding no interest of the Trustees and the Court of Appeals erred in affirming it. Additionally, the lower court accepted arguments of counsel as fact and made an inaccurate assumption about the nature of the easement. The law is clear, "[a]rguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (footnote omitted). This has been the law for decades, if not a century. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). The Court of Appeals ignored this precedent in its opinion.

Judge Jefferson’s order dismissing the Trustees under Rule 21, SCRCF, reads, “Per Mr. Hulst, the Trustees assert that their rights are not affected and that they have resolved the underlying easement issue by entering into a new easement with Plaintiff Jones thereby resolving and determining their interests in this matter.” (R. at 0003–04.) This is clearly a finding of fact accepting arguments of counsel as true. The Trustees do not get to make their own determination about whether they have a property interest. The record is clear—as the current owners of Lot 6A, the Trustees have a property interest that remains to be adjudicated. While the Court of Appeals held that the lower court must have relied on a copy of the “new easement,” that document does not disclaim the easement pleaded in Plaintiffs’ complaint. (*Compare* R. at p. 175 (defining Old Purported Easement as 2005 language) and p. 177, ¶ 6 (terminating Old Purported Easement) *with* R. at pp. 0017–18, ¶ 16–17 (pleading 2006 easement).)

Furthermore, it appears from the transcript that the lower court misapprehended the nature of the easement at issue. When discussing the purported new agreement between the Trustees and Plaintiffs, the court stated, “They got to come over the property somehow.” (R. at 0529, ll. 8–9.) This indicates that the court thought the easement at issue was one of necessity. There could be no reasonable argument that the easement at issue is one of necessity. Plaintiffs’ lot is closer to the water and further from the highway. Assuming validity, the easement was designed to allow the owners of Lot 6A to perambulate around the edges of Lot 6B—presumably to look out at the marsh. This is certainly not necessary to reach Lot 6A and, after all, Lot 6A has its own marsh frontage. (R. at 0101.) Plaintiffs, who live at the end of the road from the highway, might arguably have a claim for an easement of necessity from Lot 6A if access was cut off, but there simply is no construction of the purported easement which could make it one of necessity. This issue, which requires more than arguments of counsel and the limited information which may be ascertained in a short motions hearing to understand, should not have been decided on a Rule 21 motion, but

rather should have been the subject of a thorough motion to dismiss or motion for summary judgment.

VI. JUDGE JEFFERSON'S UNAPPEALED ORDER SHOULD CONTROL OVER THE ORDER APPEALED.

Petitioners have asserted and continue to assert that the lower court's two orders have irreconcilably conflicting results. Rather than squarely address this issue, the Court of Appeals construed the order that is unappealed and was not before the court to conform to the order that was appealed and was before the court. (*See* Opinion, p. 8.) This holding cited to no authority, nor could it, given that any existing case law would indicate the opposite result. Petitioners thus assert that the Court of Appeal's ruling is an error of law. When there are two orders and one is before the court and the other is not, any doubt should be resolved in favor of the unappealed order, which is the law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling was law of the case and "should not have been reconsidered by the Court of Appeals").¹⁰

In this case, Judge Buckner already ruled that the Trustees were necessary parties. That is law of the case and there is no substantial change in the facts that could merit ignoring that order. Moreover, Judge Jefferson ruled that Petitioners could pursue a declaratory judgment claim that would include the Trustees. That order too, is law of the case. The last order at issue ignores those other rulings and lets the Trustees out of the case under the auspices of Rule 21, SCRCF, which was never intended to resolve novel issues of law, like whether an easement's validity can be adjudicated without the dominant estate holder as a party. The Court of Appeals erred in ignoring

¹⁰ Indeed, even construction rules to interpret conflicting statutes would dictate that the unappealed order would control, as it was the later in time of the two orders. *See, e.g., Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988) (citing *Powell v. Red Carpet Lounge*, 280 S.C. 142, 311 S.E.2d 719 (1984); *Stone & Clamp, General Contractors v. Holmes*, 217 S.C. 203, 60 S.E.2d 231 (1950)).

the allegations in the complaint, the order of Judge Buckner, and recent case law, like the *Farmer* opinion.

CONCLUSION

For these and the foregoing reasons, Petitioners request that the Court grant their petition for a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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