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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2019-001140
Civil Action No. 2018-CP-08-00817

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 . . . . . Appellants.

APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

This matter is before the Court upon Appellants' Petition for Rehearing. This case began in 2018 when the Jones ("Plaintiffs") sued the alleged closing attorneys, Rogers Townsend & Thomas, P.C. and Lisa Hostetler ("Appellants"), for the house they purchased in Berkeley County. Plaintiffs alleged that the defendants missed and failed to disclose an easement around Plaintiffs' property for the benefit of the neighboring lot. That lot is owned by 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 ("Trustees").

Because Appellants dispute the validity of the alleged easement, they moved to join the Trustees as parties to the case on June 8, 2018. (R. at 0056–57.) The Honorable Perry M. Buckner then properly joined the Trustees as necessary and involuntary Plaintiffs on August 6, 2018. (R. at 0001.) The Trustees disputed the ruling requiring them to participate in the case as the dominant estate holders for the alleged missed easement. The Trustees also refused to participate in discovery, such as the depositions of the Trustees. (R. at 0491 (threatening to move for protective order to avoid depositions).) To circumvent the order of Judge Buckner, Plaintiffs and the Trustees entered into a modified easement and dock agreement, whereby the original alleged easement was *purportedly* replaced by a new easement and a construction and maintenance agreement for a dock built on Plaintiffs' property. (*See* R. at 0067–72.) However, at no point did the document recorded with the registrar of deeds address the 2006 easement alleged in the Complaint filed by Plaintiffs. (*Compare* R. at 0068 (addressing easement recorded August 3, 2005) *with* R. at 0017, ¶ 16 (addressing easement dated April 4, 2006).)

Plaintiffs and the Trustees then argued that the Trustees were no longer necessary to adjudication of the case. The Trustees filed a motion "for Nonjoinder," which was heard before The Honorable Deadra L. Jefferson. At the same time, the trial court heard Appellants' motion to amend their answer to include a counterclaim for declaratory judgment on the validity of the easement. Declaratory judgments require the naming of all interested parties, even if their participation is purportedly nominal. Judge Jefferson granted the Trustees' motion and also granted Appellants' motion. (*See* R. at 0003–0008.) Appellants filed a motion for reconsideration, which was denied, and then filed the instant appeal to seek review of the order granting the Trustees' motion. (R. at 0009–0012; 0554–0558.) Neither the Trustees, nor Plaintiffs, appealed the order allowing amendment for a declaratory judgment cause of action. After briefing and oral arguments, this Court affirmed the disjoinder Form 4 order of Judge Jefferson but rejected arguments of the Respondents that Appellants lack standing to challenge the easement(s) or that this appeal was interlocutory and should be dismissed. (*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").

In this appeal, there are essentially three easements at issue—the original one, recorded in 2005, the one alleged in the Complaint, recorded in 2006, and the modified one, recorded post-suit in 2019 while discovery was pending. In each case, the easement alleged is one by express grant, rather than via prescription or necessity. Further, in each case, the easement creates a walking promenade, but does not provide any access necessary for the use and enjoyment of the Trustees' own property. In each case, the Trustees are the claimed dominant estate holder. Moreover, Plaintiffs are claiming damages due to the Trustees insistence on enforcing the easement. (*See* R. at 0135, ¶ 31–32.) Indeed, Plaintiffs have not changed their allegations in this case since Judge Buckner's order. There has been no amended complaint changing the allegations of Plaintiffs.

ARGUMENT

This case may well be the first time in South Carolina court history that a dominant estate holder will not be a party to the case wherein the validity of their easement is determined. For the reasons listed below, Appellants maintain that the Court overlooked or misapprehended certain points of fact or law in reaching this result. *See* Rule 221(a), SCACR.

I. THE ALLEGATIONS OF THE PLAINTIFFS DID NOT CHANGE BETWEEN THE FILING OF JUDGE BUCKER'S ORDER AND JUDGE JEFFERSON'S ORDERS.

This Court held there was new evidence, in the form of the alleged new easement, that allowed Judge Jefferson to override the order of Judge Buckner. (Op. at 7.) However, the filing of the easement did not change the allegations of Plaintiffs. The existence of the alleged new easement was alleged in the Complaint. (R. at 0020, ¶ 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.")[1] The Trustees did exactly as Plaintiffs have alleged they would and have fulfilled exactly the damages Plaintiffs said they would—the Trustees allegedly agreed to reduce the size and scope of the easement. The fulfillment of these allegations cannot reasonably be considered new evidence allowing one circuit court judge to override the ruling of another. The allegations, damages, and relief requested all remained exactly the same. Plaintiffs did not amend their complaint between the time of the two orders. This renders the case cited by the Court inapposite. *See Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 357, 98

[1] Indeed, this allegation, which stands as pleaded, directly contradicts the Court's statement that the new easement was "(by all accounts) a voluntary agreement." (Opinion at 6.) Plaintiffs have made it abundantly clear that they plan to argue that they were forced to enter into the new agreement in order to extinguish the old, alleged easement. That is, the new agreement is what Plaintiffs will assert as damages in this case. Thus, the Court's statement is quite wrong. Plaintiffs have and will argue that the new easement is not voluntary continues to harm them. (*See* R. at 0135, ¶¶ 31–32.)

S.E.2d 798, 800 (1957) (stating that "substantially different" evidence may override the law of the case doctrine, but evidence cumulative in nature will not). The Trustees never challenged Judge Buckner's order. No motion for reconsideration was filed following the order. Thus, the order was the unappealed law of the case and evidence simply showing that the then-existing allegations were fulfilled is not a substantial change in the evidence before the Court.

II. JUDGE JEFFERSON'S TWO ORDERS CREATE AN IRRECONCILABLE CONFLICT.

Judge Jefferson entered two orders at nearly the same time. The Court determines without citing any authority in its order that the first order should control and prevent the second order from being construed as adding the Trustees as third-party defendants (or any other party status) to Appellant's declaratory judgment cause of action. This is concluded even though the Trustees are the dominant estate holders of the alleged easement.

Appellants are not presently aware of any law finding that a first-in-time order of the circuit court controls to prevent the later one from being enforced, nor does the Court refer to any. If this issue is compared to a situation where two laws irreconcilably conflict, case law provides that the later in time statute controls over the first statute. *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)).

Notably, the Trustees did not appeal the second, more recent order. If either of the two orders must yield, it should be the one that was appealed—namely the one dismissing the Trustees. The unappealed order granting the motion to amend stands as the law of the case and the ability to alter its meaning is not a power of the Court at this juncture. "[A]n unappealed ruling, right or wrong, is the law of the case." *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)). Of course, Appellants contend that the Trustees are quite rightly parties to a declaratory judgment action and to this case in general as the purported dominant estate holders of all easements at issue.

III. THE RECORD SHOWS A CONTINUED INTEREST OF THE OWNERS OF THE TRUSTEES' LOT.

The Trustees and Plaintiff contend that the "new easement" resolves all interests that the Trustees could potentially have. Respectfully, this is incorrect. The new easement, assuming it is valid, disclaims a 2005 easement. (*See* R. at 0317 (defining "Old Purported Easement") and 0319, ¶ 6 (terminating Old Purported Easement).) However, Plaintiffs sued over a 2006 easement. (*See* R. at 0399, ¶ 16.) That allegation has not changed. No document has been recorded with the Berkeley County Register of Deeds that extinguishes that easement and no court ruling has been entered finding that the easement is not enforceable.

The Trustees may argue that they have stipulated in the filings in appeal that they will not pursue rights under this easement, but the simple fact stands. There is nothing recorded that extinguishes the easement and, therefore, nothing giving notice to future property owners that the easement is terminated. Unless and until that happens, the Trustees do have a legal interest, whether they wish to have it or not, and those are the facts before the Court. Because they have a legal interest, they are properly parties to this case, either as involuntarily plaintiffs, as Judge Buckner made them, or as third-party defendants, as any reasonable interpretation of the order allowing Appellants to amend their answer to include a declaratory judgment claim would make them.

IV. THE COURT MISAPPREHENDS THE APPLICATION OF THE DECLARATORY JUDGMENT "PARTIES" STATUTE.

"When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. § 15-53-80. The Trustees have a property interest in any easement, actual or alleged, for which they are the dominant estate holder. The Trustees may not want the interest, but they have one. This is the position of many litigants, but in such situations, the proper position is to remain either a nominal party or to stipulate on the record agreement to the ruling of the court on all issues within the declaratory judgment. None of those things have been done here.

"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 is still most certainly insecurity as to the legal relationships of the parties in this case and there are three potential easements affecting this case, recorded in 2005, 2006, and 2019, all of which affect the outcome of this case. The Trustees are the dominant estate holders for all three. In any normal circumstance the dominant estate holders would be made a party for the purpose of determining the rights of the parties. Indeed, there is no hardship upon the Trustees, as their participation in this case would be primarily limited to discovery. That discovery will be conducted one way or the other, whether by subpoena or by party discovery, as their actions relate directly to certain defenses of Appellants.[2]

[2] The Trustees previously refused to come to their mutually scheduled and noticed depositions, instead trying demand dismissal in exchange for their testimony. (*See* R. at 0368.) The Trustees have yet to explain why they needed to have their motion heard before having their depositions taken.

The Court misapprehended Appellants' arguments on declaratory judgment by suggesting that only the new easement is at issue. (Opinion at 7.). While the new easement will certainly be at issue as part of Plaintiffs' alleged damages, the other easements remain in contest. Most particularly, the 2006 easement alleged in the Complaint has not been terminated by any recorded document and therefore is still certainly subject to a declaratory judgment action. The Court may assume that some action will be taken to extinguish that easement, or it may be adjudicated invalid, but none of those things have happened and the Court cannot rely on assumptions. This case is still in early discovery stages and Plaintiffs' complaint is still the controlling document as to the claims in this case. Nothing has changed Plaintiffs' allegations, regardless of what counsel for the Trustees may argue. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (arguments of counsel are not evidence); *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (facts stated only by counsel are not to be considered); *see also Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 728 (4th Cir. 2021) (the civil plaintiff is the master of their complaint and determines the claims to bring).

However, counsel for Plaintiffs stated during oral arguments 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.) Based on this statement, the complaint's allegations stand.

V. THE TRUSTEES WERE IMPROPERLY DISMISSED.

The Court relied in part upon a 1963 South Carolina Supreme Court case in its opinion. *See Hardwick v. Liberty Mut. Ins. Co.*, 243 S.C. 162, 133 S.E.2d 71 (1963). It should first be noted that the *Hardwick* court expressly declined to rule on the issue of the declaratory judgment act's

effect on whether parties should be dismissed. The "Parties" statute at the time was labeled Section 10-2008. *See id.* 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"). In this case, the effect of the "Parties" statute is at issue as authority supporting Appellants position. This is the first reason the case is distinguishable.

In addition, the *Hardwick* case was in a different procedural posture. Although the Rules of Civil Procedure were not yet adopted in 1963, the *Hardwick* opinion arose from a procedural position akin to a motion to dismiss. That is, the defendants demurred to the complaint and, *inter alia*, alleged a defect in the parties. *Id.* at 166–67, 133 S.E.2d at 72. An argument for the defect of the parties in this case was made by the defendants in this case, ruled upon by Judge Buckner who did find a defect, and is *not* before this Court. That unappealed order—making the Trustees parties to this action as the alleged dominant estate holders—is the law of this case.

More specifically, the *Hardwick* court was ruling upon whether the complaint must be dismissed due to the lack of certain named parties. That is not the question presented by this appeal. The question is whether having been found to be necessary parties by a law-of-the-case order of Judge Buckner, there is a substantial enough change from the facts that existed before Judge Buckner to override his existing order and dismiss the Trustees from this suit. Because Plaintiffs alleged the exact scenario presented by the new easement—a continuing, reduced-in-scope easement—the answer must be no. However, even assuming that the assessment begins from the beginning, with no deference to the law of the case, the Trustees should still not be dismissed from this suit on the basis of a *Hardwick* analysis.

The *Hardwick* case is a coverage case. It is a declaratory judgment case for coverage that followed another case wherein the actual car accident at issue was presumably actually litigated. *See id.* 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 court first considers whether the specific terms of the insurance policy need 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 argues 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)). The court holds that the record shows no need for additional parties but does not provide any further factual analysis on the allegedly missing parties. One key distinction that seems apparent however, is that the car accident in question was already litigated. The same is not true here.

Coverage actions following motor vehicle accidents are extremely common in federal court, due to the existence of diversity of the parties. One consideration of the district court must always be 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.[3] In order for the Court of Common Pleas to determine if Appellants 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. The Trustees are the dominant estate holders. It is quite remarkable to hold that the rights of parties to an easement can be properly determined absent the dominant estate holder. Determining rights to an easement without the alleged dominant estate holder is adjudicating the issue without a necessary party. Indeed, to bind all necessary parties, the Trustees must be parties so that any successors in interest to their rights are bound by the ultimate ruling on the validity of the easement. This is particularly true where the Trustees have not recorded any documents foreswearing their rights in the 2006 easement alleged in the Complaint. If the dominant estate holders are not parties, there is a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [their] claimed interest." *See* Rule 19(a), SCRCP. Judge Buckner was correct to add the Trustees as necessary parties, even under the *Hardwick* precedent, because there has been no underlying litigation to determine the rights of the parties, like there was in *Hardwick*.

[3] 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.

However, *Hardwick* was a case arguably applying the analogues of Rules 12 and 19, SCRCP. The recent precedent on Rule 21, SCRCP, is more apposite. The Court failed to apply that precedent in its opinion. (*See* Opinion at 5–6 (citing only once *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018)).) In the *Farmer* case, as in this case, the party seeking dismissal failed to appeal and interlocutory order and then sought to avoid discovery and to be dismissed. *See Farmer*, at 584, 819 S.E.2d at 145. In explaining the history of Rule 21, the Court essentially explains that it was intended to avoid a situation not dissimilar to that present but avoided in the *Hardwick* case—that is, to prevent dismissal of the complaint on the basis of incorrectly named parties. *Farmer,* at 585–86, 819 S.E.2d at 145.

The Court in *Farmer* made it clear that Rule 21 is not a catchall that allows the trial court to dismiss parties for novel reasons or even because they are dissolved. Indeed, the Court held that even if no relief is sought from a party *except a declaration of rights of a dissolved corporation*, that claim is sufficient to meet the test under Rule 20 for permissive joinder. *Id.* at 587, 819 S.E.2d at 146. In *Farmer*, the Court of Appeals held that using Rule 21, SCRCP, to prematurely dismiss a company where novel questions remained and a claim for declaratory judgment existed, even when the company was insolvent and dissolved, was improper. *Farmer,* at 588–89, 819 S.E.2d at 147.

In this case, there is a novel question—whether the property rights of parties to an easement can be determined without the dominant estate holder. There is no case law that Appellants have located suggesting that question to have been addressed in South Carolina, must less decided in favor of the answer being in the affirmative. Moreover, the dismissal of the Trustees was premature. The proper avenue by which they could argue for their potential dismissal would be through a Rule 12(b)(6), SCRCP, challenge to the declaratory judgment claim, like any other party. Instead, the Trustees sought dismissal pursuant to a rule with limited purview and the lower court

applied it in much the same way the trial court in *Farmer* did before reversal. Here, the result should be the same. The Trustees should remain parties and this time should cooperate with discovery.

CONCLUSION

For the foregoing reasons, Appellants request that the Court reconsider its opinion in this matter and reverse the order of the lower court that is before the Court at this time.

Respectfully submitted,

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

PROOF OF SERVICE

I, Chelsea J. Clark, an attorney with the law firm Bruner, Powell, Wall & Mullins, LLC, do hereby certify, pursuant to Rule 262(c)(3) and Order of the Supreme Court dated May 6, 2022, that on the 26th day of August, 2022, I electronically served **Appellant's Petition for Rehearing** upon counsel for Respondents by email from my primary account to their currently listed AIS email address as follows.

Robert W. Maring (8810)	robert@maringmoyer.com
J. Jay Hulst (71667)	jjh@williamsandhulst.com

August 26, 2022
Columbia, South Carolina

s/ Chelsea J. Clark
Chelsea J. Clark (Bar No. 102211)

Chelsea Clark

From: Chelsea Clark
Sent: Friday, August 26, 2022 3:43 PM
To: robert@maringmoyer.com; jjh@williamsandhulst.com
Cc: Warren Powell
Subject: Service of Documents in Rogers Townsend v. Jones appeal (2019-001140)
Attachments: Pet for Rehearing.pdf; 2022.08.26 Ltr to Clerk at Ct App (Filing Fee).pdf

Good afternoon,

Please find attached our Petition for Rehearing in the Rogers Townsend v. Jones appeal as well as a copy of the filing fee cover letter going in by US Mail today.

Thank you,

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