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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2022-UP-314 (S.C. Ct. App. Filed July 27, 2022)
Appellate Case No. 2022-001442

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, Petitioners.

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that the circuit court properly dropped Trustees from the case because they were no longer necessary parties.

STATEMENT OF THE CASE

In May of 2018, Gayle and Ronald Jones ("Plaintiffs") filed a complaint in Berkeley County alleging that their closing attorney, Lisa Hostetler, and her law firm, Rogers Townsend & Thomas, P.C., (collectively, "Lawyers") failed to advise them of the existence of an easement encumbering the residential property they purchased in 2010 from E-Trade Bank. (Record on Appeal, hereinafter, "R.," p. 16, ¶ 9-p. 18, ¶18; p. 19, ¶¶ 24-27.) Plaintiffs also sued their surveyor, Alexander C. Peabody, and his company, Alexander Peabody & Associates, Inc., (collectively, "Surveyor") for failing to show the ingress-egress easement on the plat he prepared. (R. p. 18, ¶ 19; p. 19, ¶¶ 23-24, 28; 117.)

Plaintiffs' property—lot 6B—is bounded on the north and east by residential properties and on the south and west by Wando River marsh. (*See* plat, R. p. 117.) In their complaint, Plaintiffs allege that Lawyers breached the standard of care by failing to disclose the existence of a 25-foot wide ingress-egress easement that "will almost completely encircle lot 6B except for its northern boundary." (R. p. 17, ¶16 - p. 18, ¶ 17.) This easement grants the owners of lot 6A, located to the north, and to the owners of lots 5, 6, and 7 located to the east, access to the Wando River. (R., pp. 17-18, ¶17; *see also* pp. 96-98, 101; p. 563-566)

Respondents Thomas Huguenin Gaillard, Trustee of the Thomas Huguenin Gaillard Revocable Trust, and Thomas W. Cone, Jr., Trustee of the Thomas W. Cone, Jr., Revocable Trust (hereinafter, "Trustees") are the owners of lot 6A abutting the northern boundary of Plaintiffs' property. (*See* R. p. 117.) Trustees did not create the 25-foot wide easement circling Plaintiff's

property. They have never filed any action against Plaintiffs to enforce its terms. The Trustees do not assert any kind of claim against Lawyers. Trustees are not responsible for Lawyers' failure to disclose the easement at issue nor are they responsible for Plaintiffs' decision to sue Lawyers for malpractice. Trustees have been dragged into this action based on Lawyers' insistence that they must be parties to the case so that they will be "bound" by any adverse decision in this case regarding validity or enforceability the undisclosed easement.

In their amended answer, Lawyers admit the existence of a 25-foot Ingress/Egress easement on Plaintiff's property. (R. p. 3, ¶¶ 16-17; p. 228 ¶¶ 10-11.) They admit that the standard of care for lawyers requires, among other things, that they explain matters in the closing to the extent necessary to permit the client to make informed decisions regarding the transaction. (R. p. 20, ¶ 36; p. 229, ¶ 19.) They admit that they did not disclose the existence of the easement to Plaintiffs prior to the closing. (R. p. 19, ¶¶ 24, 27; p. 228, ¶ 13.) They admit that they had a duty to meet the standard of care in their handling of the closing and that it was foreseeable that Plaintiffs would suffer injury if they failed to perform their duties and meet the applicable standard of care. (R. p. 20, ¶¶ 34-35; p. 229, ¶¶ 18-19.) Lawyers deny, however, that Plaintiffs suffered any damages whatsoever as a result of their failure to disclose the easement and further allege that the "purported easement never existed," or that, if it did exist, it was no longer enforceable or had been waived. (R. p. 20, ¶ 34; p. 229, ¶ 18; p. 231, ¶ 46-p. 233, ¶ 75.)

Along with their answer, Lawyers also filed a motion to add Trustees as parties under Rule 19(a), SCRCP, asserting that if the undisclosed easement was found invalid or otherwise unenforceable, Trustees, as the dominant estate holders, would not be bound by the decision. R. (p. 59.) Lawyers argued that Trustees might "assert rights in the easement over the Jones' property" and that Plaintiffs might, in turn, bring an action against their title insurer or "enter into

suit against the dominant estate holder, which could lead to additional actions against Movant." (R. p. 59.) The Honorable Perry M. Buckner, III, heard the motion on August 6, 2018 and a week later issued a Form 4 order which simply stated:

> The Motion of Rogers, Townsend and Thomas P.C. to Add a Party is GRANTED. The Additional parties will be made a Plaintiff pursuant to Rule 19, SCRCP.

(R. p. 1.)

For the next several months the parties exchanged written discovery and documents. Lawyers also conducted an inspection of Plaintiffs' and Trustees' properties. On March 15, 2019, Plaintiffs and Trustees entered into an "Access, Maintenance and Joint Dock Use Agreement" (hereinafter, "the Agreement"). (R. pp. 66-78.) Pursuant to the terms of that instrument, Trustees agreed to "remise, quitclaim, terminate, cancel, and release" to Plaintiffs "all of their right title and interest in and to" the 25-foot wide ingress/egress easement encircling most of lot 6B. (R. p. 70, ¶ 6.) A copy of the recorded Agreement was emailed to all parties with a request that they stipulate to the dismissal of Trustees based on their termination of any right, title, or interest in the easement at issue in the action. (R. pp. 437-450.) Surveyor promptly agreed to the proposed stipulation. Lawyers' counsel, however, declined to respond to the Trustees' request until after the parties had been deposed. (R. p. 81.) When pressed to explain his position, this was his reply:

> The issues in a case are framed by the pleadings. The subject post pleading document signed by the plaintiffs at most relate to but do not discard matters in the pleadings. If your clients would be willing to admit by affidavit and a request to admit that upon reflections since the suit was filed they now realize that prior to the document executed this month they had no easement across the Ms. Jones' (sic) property then we may have something to talk about. This would indeed shorten the duration of their depositions and greatly improve their exit from the case. I'm certain that a fine lawyer such as yourself is aware of all the various arguments in the case so you need no sermon for (sic) me on the matter. Let me know. Best, Warren

(R. p. 80, emphasis added.)

Stunned by Lawyers' unreasonable demand, the next day Trustees filed a motion asking the Court to drop them as parties to the case because they had resolved their interest in the undisclosed easement and because they neither asserted any claims nor had any claims been asserted against them in the case.[1] (R. pp. 61-81.) Lawyers responded with a motion seeking leave to amend their answer to add a claim for declaratory relief requesting "that the Court determine the rights of the owners of lot 6A and lot 6B under the 'Purported Easement.'" (R. pp. p. 93, ¶ 89.) Both motions were heard by the Honorable Deadra L Jefferson on May 7, 2019. On May 9, 2019, Judge Jefferson first issued an order granting Trustees' motion to be dropped from the case. (R. pp. 3-5.) Shortly thereafter, Judge Jefferson issued an order granting Lawyers' motion to amend their answer. (R. p. 6.) Judge Jefferson denied Lawyers' subsequent motion seeking reconsideration of her order dropping Trustees. (R. pp. 10-11.)

On July 12, 2018, Lawyers filed notice of this appeal. Trustees moved to dismiss, arguing that the order dropping Trustees from the case under Rule 21 was not immediately appealable pursuant to S.C. Code of Laws Ann. § 14-3-330(1)-(4). (*See* Memo. of Pts. & Auth. in Support. of Respondents' Mot. to Dismiss Appeal, August 21, 2019.) In their response to that motion, Lawyers asserted—for the first time in the case—that there are "two purported easements in the Lot 6B chain of title." (*See* Appellants' Return to Respondents' Motion to Dismiss Appeal, October 9, 2019, p. 7.) Based on this, Lawyers argued:

> Accordingly, [Trustees'] contentions that they no longer have any interest in the purported easements over Lot 6B is patently incorrect because Trustees disclaimed only the easement alleged to have been created in the 2005 deed and not the easement alleged to have been created in the 2006 deed, the one addressed in the Plaintiffs' Complaint.

[1] The caption of Trustees' motion mistakenly references the term "non-joinder. That term is not employed anywhere in the body of the motion. (R. 61-64.)

(Appellants' Return., p. 7.) The 2005 and 2006 deeds referenced by Lawyers represent earlier conveyances in Plaintiffs' chain of title describing the same property—lot 6B—and the same 25-foot ingress/egress easement around that lot for the benefit of lots 6A, and lots 5, 6 and 7. (*See* 2005 deed at R. p. 563-565 and 2006 deed at R. p. 96-98—referencing the 2005 deed in the derivation section of the property description.) Further, Trustees stipulated in writing to the termination of the supposed interest they might have in the easement described in the 2006 deed:

> However, to make it crystal clear for Appellants, Respondents hereby remise, quitclaim, terminate, cancel and forever release unto Plaintiffs, her heirs and assigns, all of Respondent's right, title, and interest, if any, in the 25-foot wide ingress/egress easement described in the 2006 deed from Monaghan to Daniels, attached as Exhibit B to Appellants' Return.

(Reply in Support of Motion to Dismiss Appeal, p. 4, fn. 2.)

The Court of Appeals denied Trustees' motion to dismiss by order dated December 13, 2019, but allowed the parties to argue the issue of appealability in their briefs. After briefing and oral argument, the Court of Appeals ruled in a *per curium* decision that Trustees were no longer necessary parties and that the circuit court did not err in dropping them from the case. *See Jones v. Rogers, Townsend, & Thomas, P.C. et al.*, Op. No. 2022-UP-314 (S.C. Ct. App. filed July 27, 2022), pp. 3-5, hereinafter, "Opinion." The Court of Appeals further ruled that the circuit court's decision to drop the Trustees from the case was a "dispositive decision as to the Trustees" and was therefore immediately appealable. (Opinion, p. 3.) Lawyers' Petition for Rehearing was denied by the Court of Appeals on September 13, 2022.

I. THE COURT OF APPEALS DID NOT ERR IN RULING THAT THE CIRCUIT COURT PROPERLY DROPPED TRUSTEES FROM THE CASE BECAUSE THEY WERE NO LONGER NECESSARY PARTIES.

As set forth below, Lawyers misstate the facts, misconstrue the cases, rules, and statutes, and misapprehend basic property law. The circuit court properly dropped the Trustees from the

case. The Court of Appeals properly affirmed the circuit court's decision. Accordingly, Trustees respectfully request that Lawyers' petition for a writ of certiorari be denied.

A. THE COURT OF APPEALS APPLIED THE CORRECT RULE.

In Section I of their Petition, Lawyers start with the declaration that "this case presents a somewhat unusual procedural scenario." Petition, p. 7. This is a routine transactional malpractice case involving a closing attorney's failure to disclose an easement in Plaintiffs' chain of title. What makes the procedural scenario "somewhat unusual" is Lawyers' unreasonable insistence that somehow, someway, Trustees are still the dominant estate holders and must be parties despite the fact that they terminated their interest in that easement.

Lawyers grouse that the "Trustees filed a motion for non-joinder," as if mis-captioning the motion played some role in the circuit court's decision to drop Trustees from the case. (Petition, p. 7.) Trustees' motion clearly seeks relief for misjoinder under Rule 21, SCRCP, which states:

> … 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….

Rule 21, SCRCP. As observed by the Court of Appeals, "misjoinder (rather than nonjoinder) is the vehicle for dropping parties who have been previously added." (Opinion, p. 3.) "[T]he court may only dismiss a party or drop a claim against a *dispensable* party." *See* 4 James Wm. Moore et al., *Moore's Federal Practice* § 21.05 (3d ed.) (emphasis in original). A party is necessary if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(Opinion, pp. 3-4, citing Rule 19(a), SCRCP.) Based on the terms of Rule 19(a), the Court

concluded that "Trustees do not meet Rule 19's criteria. Their rights against the Joneses are settled by the new easement, not the old one." (Opinion, p. 4.)

The Court of Appeals found the situation "not meaningfully different" from that in *Hardwick v. Liberty Mutual Insurance Company*, 243 S.C. 162, 133 S.E.2d 71 (1963). (Opinion, p. 4.) *Hardwick* involved a dispute between the driver of a rental car involved in an accident and the rental car's insurer. *Id.*, 165-166, 131 S.E.2d, 72. In *Hardwick*, this Court held that the driver's personal automobile insurer was not a necessary party because there was no need for the trial court to ascertain the personal auto insurer's rights under its policy before it could determine the rights between the driver and the rental insurer.

> [I]t is well established 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., 169, 131 S.E.2d, 74-75, quoting *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949). Based on this, the Court of Appeals concluded:

> We have not been able to identify any interest the Trustees could have in this suit. The Trustees have no claim against the law firm for legal malpractice. The Trustees also have no interest in the original easement. We do not see any practical problems created by dropping the Trustees, nor do we see a risk of inconsistent judgments. The Joneses may win or lose their malpractice case, and we see no way either outcome affects the new easement between the Joneses and the Trustees. Therefore, the Trustees are not necessary parties.

(Opinion, p. 4.) The Court continued:

> The plain language of Rule 21 gives the circuit court broad authority to drop a party "at any stage of the action and on such terms as are just." Rule 21, SCRCP. We do not see anything unjust about the circuit court's decision to drop the Trustees. When the Trustees were joined to the case, their rights as to the Joneses were settled by the same easement at the center of the Joneses' malpractice claim. That easement no longer exists. The Trustees do not want to be in the case, they have no claim against the other parties, and as far as we can see, dropping the Trustees does not prevent or impair the law firm from asserting any of its claims about the original easement's validity. We

> see no error on the circuit court's part. *See* 4 James Wm. Moore et al., *Moore's Federal Practice* § 21.03 (3d ed.) (noting dismissal of a party must be on terms that are just and would be error if it prejudiced a party's substantial rights).

(Opinion, p. 5.)

The Court of Appeals then considered whether Trustees were proper parties under Rule 20(a), SCRCP. A finding of misjoinder is proper when the party "fail[s] to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018) (quoting 7 Wright & Miller, *Federal Practice and Procedure* § 1683 (3d ed.)). A party may join or be joined under Rule 20(a), "if he asserts or there is asserted against him 'any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.'" (Opinion, p. 5, quoting Rule 20(a), SCRCP.) The Court reached the same conclusion as it had under Rule 19:

> Even if we go beyond [Rule 21's] plain language and consider whether the Trustees satisfy the preconditions of permissive joinder, we reach the same conclusion. The Trustees do not assert any right to relief against the law firm, and the law firm does not have any conceivable claim against the Trustees. As we read the filings, the law firm seeks a declaratory judgment on the validity of the original easement, but the Trustees no longer claim any interest in that easement. Accordingly, we agree with the circuit court that dismissal for misjoinder was proper.

(Opinion, p. 5.)

In response to this, Lawyers argue that "Rule 21 is quite short and does not shed much light on the situation presented in this case." (Petition, p. 8.) The Court of Appeals, however, found Rule 21, SCRCP, sufficiently illuminating—it relied on the rule's "plain language" in reaching its decision. (*See* Opinion, p. 5.) Lawyers further assert that "the most common usage of Rule 21 is

to realign parties, particularly in the federal system where realignment can cure jurisdictional defects" and neatly conclude that "the instant case does not concern realignment." (Petition, p. 8.) This case does not involve a federal jurisdictional defect, but it certainly involves "the changing or restoring to a different or former position or state." *Realignment*, OXFORD ENGLISH DICTIONARY (Online ed. 2022, oed.com, accessed 11-11-2022). The circuit court realigned the parties by dropping the Trustees from the case based on the new easement.

Lawyers grumble that the Court of Appeals "did not address much of the analysis" from *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018). The Court did not address much of the analysis from *Farmer* because most of the analysis in that case is inapplicable. In *Farmer*, CompTrust, a dissolved unincorporated business trust, moved for dismissal under Rule 12(b) and Rule 21, SCRCP. *Id.*, at 584, 819 S.E.2d at 144. The circuit court dismissed CompTrust despite finding that the motions raised novel issues, including whether an unincorporated trust can be sued after it has voluntarily dissolved. *Id.* The Court of Appeals reversed the dismissal of CompTrust under both Rule 12(b) and Rule 21, SCRCP. *Id.,* at 589, 819 S.E.2d at 147. Regarding its dismissal under Rule 21, the Court observed:

> It appears that the circuit court was persuaded CompTrust was misjoined not because CompTrust had no connection to the factual or legal issues in the action, but because it had been dissolved. As the circuit court pointed out, whether an unincorporated business trust can be sued after it has voluntarily dissolved is a novel question in South Carolina. We do not believe it was within the court's discretion to answer this question of first impression with no factual record while ruling upon a Rule 21 motion. Motions to dismiss are no place for novelty.

Id., 586, 819 S.E.2d 146.

Based *Farmer,* Lawyers assert:

> There is a novel issue in this case that the undersigned have not been able to find any authority to resolve. The issue is the 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.

(Petition, p. 9.) In a footnote, Lawyers string-cite eight cases involving easements in South Carolina. These cases involve lawsuits *between* dominant and servient estate holders over the existence and nature of easements—so it is no surprise that both estate holders were parties in those cases. This case is a legal malpractice action based on the closing attorney's failure to identify and advise his client about an easement in Plaintiffs' chain of title. There is not now, nor has there ever been, a lawsuit between Plaintiffs and Trustees over the existence or nature of the 25 foot ingress/egress easement encircling lot 6B that is at issue in this case. The Trustees have, as a matter of record, disclaimed any right, title, or interest in that easement. The circuit court did not find, much less decide, that there was any kind of novel issue involved in its decision to drop Trustees from the case. *See Farmer,* at 584, 819 S.E.2d at 144.

Nevertheless, Lawyers conclude:

> 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 dominant estate.

(Petition, p. 9.) There is no such implication in the Court of Appeals' decision. The Court merely agreed with the circuit court that Trustees had terminated their interest in and were no longer the dominant estate holder in the 25-foot ingress egress easement encircling Plaintiffs' property. Opinion p. 4-6; R. pp. 67-81. The Court makes it absolutely clear, as did the circuit court below, that Lawyers would still be able to have their day in court regarding the easement:

> We are convinced the circuit court does not need to ascertain the Trustees' rights before it can determine the dispute about the old easement between the Joneses and the law firm. *See Altom Transport, Inc. v. Westchester Fire Ins. Co.*, 823 F.3d 416, 420-21 (7th Cir. 2016) (dismissing an entity that had no legal interest in the suit and no claims against any party).
>
> …

> We have not been able to identify any interest the Trustees could have in this suit. The Trustees have no claim against the law firm for legal malpractice. The Trustees also have no interest in the original easement. We do not see any practical problems created by dropping the Trustees, nor do we see a risk of inconsistent judgments. The Joneses may win or lose their malpractice case, and we see no way either outcome affects the new easement between the Joneses and the Trustees. Therefore, the Trustees are not necessary parties.
>
> …
>
> The Trustees do not want to be in the case, they have no claim against the other parties, and as far as we can see, dropping the Trustees does not prevent or impair the law firm from asserting any of its claims about the original easement's validity.
>
> …

(Opinion, pp. 4-5; *see also* R pp. 3-4, 10-11.) The ruling by the Court of Appeals does not "go against the *Farmer* opinion," nor was it a "finding an entire category of party is not necessary." (Petition, p. 9.) Because Trustees disclaimed their interests in the easement at issue in the case, they no longer belong in the "dominant estate holder" category for that easement. Judge Buckner's order adding Trustees—issued prior to execution of the Agreement between Plaintiffs and Trustees terminating the subject easement—was based on a substantially different set of facts than Judge Jefferson's order dropping Trustees from the case. (*See motions and orders,* R. pp. 56-60, 1-2; pp. 61-81, 3-5.)

Lawyers attempt to distinguish *Hardwick,* arguing that the case involved a ruling on a demurrer and also that "the issue of whether there was a defect in named parties was already ruled upon by Judge Buckner well before the order appealed in this case." Petition, p. 10. These are distinctions without a difference. The demurrer challenged the complaint on the grounds that it failed to include a necessary party—the plaintiff driver's auto insurer. *Id*.. 165-166, 133, S.E.2d 72. As observed by the Court of Appeals,

> It is well-established that parties are not necessary to a complete determination of a controversy unless they have rights which must be

> ascertained and settled before the rights of the parties to the suit can be determined.

(Opinion, p. 4.) The Court continued:

> So too here—the Trustees' rights against the Joneses are settled by the new easement, not the old one. We are convinced the circuit court does not need to ascertain the Trustees' rights before it can determine the dispute about the old easement between the Joneses and the law firm. *See Altom Transport, Inc. v. Westchester Fire Ins. Co.*, 823 F.3d 416, 420-21 (7th Cir. 2016) (dismissing an entity that had no legal interest in the suit and no claims against any party).

(Opinion, p. 4.)

Lawyers wrap up their arguments in this section with the remarkable claim that *Hardwick* "actually illustrates [their] contention that without an underlying judgment determining the rights of the parties to the easement, the dominant estate holders must be parties to the case." (Petition, p. 10.) Lawyers fail to point to any language in *Hardwick* supporting this argument. Plaintiff driver (Hardwick) was involved in an accident while driving a rental car and was subsequently sued by her passenger in a separate action. *Hardwick*, 165-166, 133, S.E.2d 72. When the insurer for the rental car denied Hardwick's tender of her defense/indemnification, her own auto insurer defended that claim under a reservation of rights. *Id.* Nothing in *Hardwick* establishes that there was a *judgment* in that underlying action. It is equally likely that the accident case was still ongoing or, like most lawsuits, had been settled.

B. TRUSTEES TERMINATED THEIR INTERESTS IN THE EASEMENT AT ISSUE IN THIS CASE AND ARE NO LONGER THE DOMINANT ESTATE HOLDERS.

In Section II of their Petition, Lawyers complain that "Plaintiffs have argued numerous times that [Lawyers] do not have the right to argue that the easement they are alleged to have missed was invalid and therefore of no consequence." (Petition, p. 10.) Trustees have never advanced this argument, and both the circuit court and the Court of Appeals have made it clear

that Lawyers can challenge the validity of the undisclosed easement at trial. (*See* Opinion, pp. 4-6; *see also* R. pp. 3-4, 10-1.)

Lawyers helpfully point out that "[i]n many legal malpractice claims there has been an underlying suit that forms the basis for the claim." (Petition, pp. 10-11.) There is no dispute that many legal malpractice claims arise out of mistakes made by lawyers during trial and "where a plaintiff alleging legal malpractice fails to show that the underlying claim would have been successful, defendant is entitled to judgment as a matter of law." *See, e.g., Brown v. Theos*, 345 S.C. 626, 629, 550 S.E.2d 304, 306 (2001). In such cases, the attorney's mistake and its impact on the outcome of the underlying litigation is tried in a subsequent legal malpractice action—i.e., a "trial within a trial." *See id.*

This case does not involve a mistake made by Lawyers in some prior lawsuit. This is a transactional malpractice action based on the Lawyers' admitted failure to advise Plaintiffs that a 25-foot ingress/egress easement encircled most of the property they were purchasing. (R. p. 19, ¶ 27; p. 47, ¶ 13.) Plaintiffs must establish the elements of Lawyer's negligence—duty breach, proximate cause, and damages, but they will not have to show that they would have been successful in the prior action had the attorney not committed the alleged malpractice. *Brown v. Theos*, *supra,* 345 S.C. at 629, 550 S.E.2d at 306. There was no prior action.

Lawyers assert that "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 lawyers fault in that ruling." True—a legal malpractice action over an easement *might* arise in that fashion, but is not what occurred in this case. Lawyers cite *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002), as an example of a case that, like *Hardwick v. Liberty Mutual Ins. Co, supra,* "also came after an underlying ruling." (Petition, p. 11.) *Binkley*

involved multiple parties and claims over a flood easement. The Binkleys sued their closing attorney for failing to disclose the existence of an easement or its impact. *Binkley,* 291. There were several rulings and related appeals in the consolidated action prior to closing attorney's motion for summary judgment that the Binkley's claim was barred by the statute of limitations. *Id.*, at 291-293. In affirming the circuit court's grant of summary judgment, the Court ruled that closing attorney's statute of limitation claim was distinct from and did not depend on any prior rulings in the case regarding the extent and enforceability of the easement. *Id.*, 293-296.

The decisions in *Hardwick* and *Binkley* do not rely on rulings made in underlying cases. As previously discussed, nothing in *Hardwick* establishes that there were ever any factual findings or a final ruling in the underlying accident case. (*See* Section A, *supra,* pp. 11-12.) There was no prior "underlying action" in *Binkley* nor a "trial within a trial" as discussed in *Brown v. Theos, supra*, 345 S.C. at 629, 550 S.E.2d at 306. To the extent there were any rulings in *Binkley* regarding the extent and enforceability of the easement, those determinations were irrelevant to the circuit court's grant of summary judgment for the closing attorney based on the statute of limitations. *Binkley,* at 293-296.

Lawyers concede that "coverage actions do have some parallels with legal malpractice actions" but claim that "before coverage is invoked, the underlying liability must already be decided." (Petition, p. 12.) In South Carolina, an insured's duty to defend and indemnify a claim is determined by the allegations of the complaint—not whether underlying liability has been decided. *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 577, 666 S.E.2d 897, 899 (2008). It is true that, in federal declaratory relief actions, district courts typically agree to hear cases involving an insurer's duty to *indemnify*—as opposed to its duty to *defend*—only after liability has been established. *See Trustgard Ins. Co. v. Collins,* 942 F.3d 195, at 200 (4th

Cir. 2019). *Hardwick*, however, clearly involves a claim for both defense and indemnification. *Hardwick, supra,* at 165, 133 S.E.2d at 72.

Lawyers continue to insist that "in this case, there is no underlying litigation"—as if that amounts to some fatal defect. (Petition, p. 13.) There is no "underlying litigation" here because this case involves a claim of transactional legal malpractice, not legal malpractice during litigation. Nevertheless, Lawyers conclude: "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 any damage." Petition, p. 13. The validity of the easement and whether it caused any damage are issues that will be determined whenever this case is tried.[2] That determination will simply be part of the trial. Lawyers dramatic insistence on a having trial within a trial is absurd.

Lawyers further argue that "a ruling on this issue without the dominant estate holders cannot provide complete relief because the people whose rights are affected are not parties." Lawyers' premise is false: As determined by the circuit court and the Court of Appeal, Trustees terminated their interest in the easement at issue in the case, so their rights will not be affected by any ruling regarding the validity of that easement. (*See* Opinion, p. 4 "The Trustees also have no interest in the original easement.")

Lawyers again rehash comments made by Plaintiffs' counsel over 4 years ago in the hearing before Judge Buckner:

> 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.[fn]

[2] As emphasized by the Court of Appeals, "dropping Trustees does not prevent or impair the law firm from asserting any of its claims about the original easement's validity." Opinion, p. 5.

(Petition, p. 13; *see also* fn. 8.) Lawyers will have full opportunity to challenge Plaintiffs' arguments regarding the easement and their alleged damages. (Opinion, p. 6. "The law firm clearly has standing to make all arguments necessary to its defense.") The circuit court's decision to drop Trustees as parties in no way relieves Plaintiffs of their burden to prove all the elements of Lawyers' negligence.

Finally, Lawyers conclude:

> 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.

(Petition, p. 13.) Not so. If the easement issue in this case is determined to be invalid, then "it may show [Plaintiffs'] decision to participate in the new easement was unwise or imprudent." (Opinion, p. 6.) For Trustees, it does not matter whether the easement at issue is determined to be valid or invalid because they no longer have any interest in that easement. (*See* R. pp. 3-4, 104-117; Opinion, pp. 3-6.) The Court of Appeals did not "essentially overturn" Judge Buckner's initial order adding Trustees. (Petition, p. 14.) The circuit court dropped Trustees as parties to the case based on new and substantially different facts evidenced by the Agreement between Trustees and Plaintiffs. (R. pp. 3-4, 104-117.)

C. THE COURT OF APPEALS DID NOT MISAPPREHEND THE DECLARATORY JUDGMENT STATUTE.

In Section III of their Petition, Lawyers now admit that they moved to add a claim for declaratory relief in an attempt to keep Trustees in the case. "Such a claim," according to Lawyers, "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." (Petition, p. 14.) As discussed above, both the circuit court and the Court of Appeals determined that Trustees had terminated their interests in the easement at issue. Any future ruling regarding the validity of that easement would have no

effect on Trustees. (*See* sections A and B, *supra.*) Lawyers further assert that "Judge Jefferson granted the motion to amend at the same time she granted the Trustee's motion for 'non-joinder.'" This is another mischaracterization—Judge Jefferson first issued her order dropping Trustees and *then* issued the order granting Lawyers' motion to amend. (R. pp. 5, 8.) As observed by the Court of Appeals, "the record makes it clear that the circuit court dismissed the Trustees from the case before granting the law firm's motion to amend." (Opinion, p. 6.)

Lawyers next argue that "a claim for declaratory judgment requires that all parties with an interest be a party to the suit." (Petition, p. 14.) Lawyers misquote South Carolina's Uniform Declaratory Judgement Act. Section 15-53-80 actually provides:

> 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 (emphasis added). Thus, a claim for declaratory relief does not merely require that any person with an interest be made parties—a person's interest must be affected by the declaration sought. *See id.*

Lawyers then contend that there are two identical 25-foot ingress/egress covering Plaintiffs' property and that Trustees disclaimed only the 2005 easement in the Agreement.[3]

> But the fact remains, there is a 2006 easement alleged in the Complaint of this case. No recorded document has disclaimed the easement. The Trustees, therefore, have a property interest as a dominant estate holder, whether they like it or not.

(Petition, p. 14.) As set forth in Trustees' Statement of the Case, (*supra*, at pp. 4-5) the 2005 and

[3] This issue has not been preserved. Lawyers first raised their "two easements" argument while the case was on appeal. (*See* Appellants' Return to Respondents' Motion to Dismiss Appeal, October 9, 2019, p. 7.) An issue must have been raised to and ruled on by the trial court in order to be preserved for review. *BMW of N. America, LLC v. Complete Auto Recon. Services. Inc.,* 399 S.C. 444, 454-55, 731 S.E.2d 902, 908 (Ct. App. 2012).

2006 deeds in Plaintiffs' chain of title describe the same property—lot 6B—and the same 25-foot ingress/egress easement around that lot for the benefit of the same neighboring properties—6A, and lots 5, 6, and 7.[4] (R. 96-98; 563-565.) Furthermore, Trustees stipulated to the termination of their interests in the easement described in the 2006 deed. (*See* Reply in Support of Motion to Dismiss Appeal, p. 4, fn. 2.) Lawyers' odd excuse for disregarding that stipulation—because it was made in a pleading—is literally incredible.

The Agreement is recorded. (R. pp. 66-78.) The stipulation, and anything that has been filed in this case, is a matter of public record. All of this information is available to any competent title abstractor. Any competent closing attorney will have notice of and should be able to determine that the easement at issue in this case—described in the 2005 deed and the 2006 deed in Plaintiffs' chain to title—has been terminated. Lawyers' contrived claim that there are two identical 25-foot ingress/egress easements covering Plaintiffs' property is absolute nonsense.

Lawyers argue that Trustees must be parties to the declaratory relief action because "they "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." Petition, p. 15. Lawyers misconstrue the substance of Plaintiffs' allegations. (*See* R. p. 20, ¶¶ 31-32.) Further, to the extent Plaintiffs attempt to assert such a claims, they will have the burden of proof and Lawyers are free to challenge any attempt to assert that the new easement is the proximate cause of Plaintiffs' alleged damages. Trustees, however, have no "interest that would be affected" by a declaration on that issue. *See* S.C. Code Ann., § 15-53 80. As the Court of Appeals observed:

> As we read the filings, the law firm seeks a declaratory judgment on the validity of the original easement, but the Trustees no longer claim any

[4] Lawyers conveniently ignore the other parties to the easement at issue in this case—the owners of lots 5,6, and 7. (R. 96-98; 563-565.) Like Trustees, those owners terminated their rights in the easement by reference to the 2005 deed.

> interest in that easement.
>
> …
>
> We do not see how the law firm could have standing to challenge the new easement, which (by all accounts) was a voluntary agreement between the Trustees and the Joneses. We do not see how the new easement affects the law firm or its defense that the original easement was not valid. *See Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (explaining standing requires a personal stake in the controversy).
>
> If the original easement turns out to be invalid or waived, that may show the Joneses' decision to participate in the new easement was unwise or imprudent. Either way, it seems apparent that the Trustees will not be affected by a declaratory judgment on the original easement's validity.

(Opinion, p. 5-6.)

D. THE COURT OF APPEALS PROPERLY AFFIRMED THE CIRCUIT COURT'S DECISION TO DROP TRUSTEES BASED ON THEIR AGREEMENT TO TERMINATE THE EASEMENT AT ISSUE IN THE CASE.

In Section IV of their Petition, Lawyers argue that the Court of Appeals erred in "holding that Judge Jefferson had authority to undo what Judge Buckner had done." (Petition, p. 17.) As explained by the Court of Appeal, "[t]he plain language of Rule 21 gives the circuit court broad authority to drop a party at any stage of the action and on such terms as are just.'" (Opinion, p. 5.) Lawyers further argue that "an unappealed order like that issued by Judge Buckner is the law of the case" and that Judge Jefferson had no authority to reverse his decision to add the Trustees.[5] (Petition, pp.15-16.) The Court of Appeals disagreed:

> The new easement agreement between the Trustees and the Joneses did not exist at the time Judge Buckner joined the Trustees. *See Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957) (explaining the law of the case doctrine is inapplicable when the evidence has materially changed).

[5] This issue was never raised to the circuit court and is not preserved for appeal. (*See* R. pp. 118-126, 260-268.) *BMW of N. America, LLC v. Complete Auto Recon. Services. Inc.,* 399 S.C. 444, 454-55, 731 S.E.2d 902, 908 (Ct. App. 2012).

(Opinion, p. 6.)

Lawyers contend, again, that the Agreement "does not address the easement in Plaintiffs' complaint at all." (Petition, p. 16.) As previously discussed, that claim is both inaccurate and unpreserved for review. (*See* Section C, *supra*, pp. 18-19.) Lawyers continue: "But even setting that aside, the key problem is that recorded dock agreement is merely cumulative evidence" because Plaintiffs pleaded "that the Trustees were going to sign such a new agreement." (Petition, p. 16.) Plaintiffs alleged no such thing. Rather, Plaintiffs pled:

> 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.

20, ¶¶ 31-32. Contrary to the above allegations, Trustees *did* in fact terminate their rights in the existing easement and then joined with Plaintiffs in creating a new easement/joint dock use agreement. (R. pp. 66-78.)

Lawyers further argue, without citing anything in the record, that "the allegation was before Judge Bucker…." (Petition, p. 16.) Lawyers submitted no affidavits or exhibits in support of their abbreviated motion to add Trustees under Rule 19. (R. pp. 50-56.) There was no mention whatsoever of the above allegations during the oral argument of Lawyers' motion. (R. pp. 495-507.) Judge Buckner's ruling was based on the simple fact that Trustees were the dominant estate holder for the easement at issue in the case. (R. pp. 499-504.) Judge Jefferson's ruling was based on the fact that Trustees had terminated their interest in the easement at issue in the case—as evidenced by the Agreement. (R. pp. 3-5; 61-78.)

Lawyers conclude that "there cannot be a substantial change in circumstances under *Nelson* if the Trustees simply did precisely what Plaintiffs had already said they were doing." (Petition,

p. 17.) Plaintiffs' allegations are not evidence of anything. Moreover, as set forth above, Trustees did *not* do precisely what Plaintiffs alleged in their complaint. The factual basis for Judge Buckner's ruling—that Trustees were the dominant estate holder—no longer existed. Judge Jefferson made her ruling on substantially different facts established by new evidence—the Agreement. That evidence is in no way "cumulative in nature." *See Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957).

Lawyers argue that this position was made "abundantly clear by Plaintiffs' counsel's arguments before the Court of Appeals."[6] Petition, p. 17. Plaintiffs' counsel indicates quite clearly that there was no written agreement with Trustees terminating the easement at issue when he filed his complaint. (Petition, p. 17.) Indeed, had such an agreement been in place at that time, there would have been no factual basis for Judge Buckner's order.

E. THE CIRCUIT COURT'S ORDER DOES NOT "RELY ON FACTS AND AVERMENTS NOT IN THE RECORD."

In Section V of their Petition, Lawyers contend that the circuit court "accepted arguments of counsel as fact and made an inaccurate assumption about the nature of the easement."[7] Petition, p. 17. Lawyers first argue:

> Judge Jefferson's order dismissing the Trustees under Rule 21, SCRCP, 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.

[6] Lawyers evidently miss the irony of this contention, given that they later assert that the arguments of counsel are not evidence. (Petition, p. 17.)

[7] Lawyers failed to raise either of these issues in its Petition for Rehearing. (*See* Appellants' Petition for Rehearing, pp. 1-17.) The issues therefore have not been preserved for review on certiorari. Rule 242(d)(2), SCACR; *Mazloom v. Mazloom*, 392 S.C. 403, 709 S.E.2d 661 (2011).

(Petition, p. 18.) The Court of Appeals disagreed:

> We disagree. The circuit court had a copy of the new easement between the Trustees and the Joneses. Indeed, the law firm attached a copy of the new easement agreement to its motion to amend its answer.

Opinion, p. 7. The circuit court dismissed Trustees based on terms of the recorded Agreement terminating their interests in the easement at issue, not just because Trustees' attorney said it was so. (R. pp. 62-78; pp. 526:16-528:24; 541:12-542:25; 546:25-547:4.)

Lawyers argue, yet again, that "new easement…does not disclaim the easement pleaded in Plaintiffs' complaint." (Petition, p. 18.) As previously discussed, Lawyers did not raise that frivolous claim until the case was on appeal and it has not been preserved. (*See* Section C, *supra*, pp. 18-19.)

Lawyers next contend that Judge Jefferson misapprehended the nature of the 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.

Again, the Court of Appeals disagreed.

> Last, the law firm argues the circuit court said during one of the hearings that the Trustees had "to come over the property somehow[, s]o they needed to resolve it." The law firm asserts this essentially amounted to a ruling there was an easement by necessity. Again, we disagree. While we do not know what to make of this particular comment, there is no language in any of the circuit court's orders suggesting the circuit court decided anything more than the discrete issues the then-pending motions presented.

(Opinion, p. 7.) Lawyers persist, contending that "[t]here could be no reasonable argument that the easement is one of necessity. (Petition, p. 18.) No such an argument has ever been made in this case. The circuit court's order dropping Trustees from the case was not based on an easement by necessity. (*See* Opinion, p. 7.)

F. THE CIRCUIT COURT'S ORDER GRANTING LAWYERS' MOTION TO AMEND DOES NOT "CONTROL" HER ORDER DROPPING TRUSTEES FROM THE CASE.

In Section VI of their Petition, Lawyers argue:

> 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.

(Petition, p. 19.) Lawyers misapprehend the ruling by the Court of Appeals on this issue. After noting that "it seems apparent that the Trustees will not be affected by a declaratory judgment on the original easement's validity," the Court concluded:

> [T]the record makes clear that the circuit court dismissed the Trustees from the case before granting the law firm's motion to amend. We cannot sensibly construe the circuit court's twin rulings as releasing the Trustees only to add them right back.

(Opinion, p.6.) The Court did not view Judge Jefferson's order dropping the Trustees and her order granting Lawyers leave to amend as irreconcilable, much less conflicting. Trustees are no longer parties to the case, and Lawyers have been granted leave to amend their complaint to add a claim for declaratory relief against the Plaintiffs. The Court clearly determined that to construe the rulings otherwise would be unreasonable. (*See* Opinion, p. 6.)

Lawyers cite *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) for the proposition that "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." That is not a holding in *ML-Lee* nor even a reasonable extension of the decision. The Supreme Court simply ruled that it was error for the Court of Appeal to reconsider and reverse the Master's unappealed ruling on an issue below as part of its holding on an appealed issue. *Id.,* 327 S.C. 241, 489 S.E.2d 472. Further, even if Lawyers' contrived proposition were somehow true, the Court

of Appeals did not express any doubts to be resolved in favor of the order granting leave to amend. Judge Jefferson did not, as Lawyers claim, rule that "Petitioners could pursue a declaratory judgment claim that would include the Trustees" (Petition, p. 19) because she had already issued an order dropping Trustees from the case. (R. pp. 3-5.)

II. CONCLUSION

The Court of Appeals did not err in ruling that the circuit court properly dropped the Trustees from the case under Rule 21, SCRCP, because they were no longer necessary parties. Based on the foregoing, Trustees respectfully request that the Court deny Lawyers' petition for writ of certiorari.

WILLIAMS & HULST, LLC

November 14, 2022

/s/ J. Jay Hulst

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