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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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Robert W. Maring
S.C. Bar No. 8810
Maring & Moyer, LLC
PO Box 478
Georgetown, SC 29442
843-545-9544 Phone
robert@maringmoyer.com

Attorney for Respondents Ronald L. Jones and Gayle Langley Jones

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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

This is a transactional legal negligence case. The Respondents, Gaye and Ronald Jones (collectively, "Respondents") allege that their closing attorney, Lisa Hostetler, and her law firm, Rogers Townsend & Thomas, P.C., (collectively, "Petitioners") negligently failed to advise them of the existence of an easement encumbering the residential property they purchased in 2010 from E-Trade Bank. Complaint, ¶¶ 9-18; 24-27. Respondents 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. Complaint, ¶¶ 19-23, 24, 28.

Respondents' U-shaped property—Lot 6B—is bounded on the north and east by residential properties and on the south and west by Wando River marsh. *See* Motion to Amend, Exhibits 2, 4. In their complaint, Respondents allege that Petitioners 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." Complaint, ¶¶ 16-17. The undisclosed 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, the most direct access to the Wando River. Complaint, ¶ 17; *See* Motion to Amend, Exhibit 2.

The Respondents' home is located on lot 6B, which abuts the southern boundary of Thomas Huguenin Gaillard, as Trustee of the Thomas Huguenin Gaillard Revocable Trust, and Thomas W. Cone, Jr., as Trustee of the Thomas W. Cone, Jr. Revocable Trust (collectively, "Trustees").' property. *See* Motion to Amend, Exhibits 2, 4.

The Respondents allege:

16. Upon information and belief a 25 foot Ingress/Egress easement was created by way of deed from James J. Monaghan to Benjamin J. Daniel, Sr. dated April 4, 2006 and recorded in the Office of the Register of Deeds for Berkeley County in Deed Book 5506 at page 12.

> Defendants admit the allegations of Paragraph 16 of the Complaint. Answer, ¶ 10.

17. The easement granted to the owners of Lot 6A (TMS # 263-00-03-068) Lot 5 (No. 108 Cainhoy Landing Road, TMS # 263-00-05-005) TMS Lot 6 (No. 110 Cainhoy Landing Road, TMS # 263-00-05-006) as shown on the above-referenced plat, and Lot 7, (112 Cainhoy Landing Road, TMS # 263-00-05-007) a 25' Ingress/Egress along the Northern boundary of the Lot 6B at the point labeled D and extending one-half the way to the point labeled A as shown on the Plat entitled "PLAT SHOWING A SUBDIVISION OF LOT 6, "RIVERVIEW VILLAGE", CREATING LOT 6A AND 6B, SITUATED AS SHOWN N ROAD S-8-33, IN WANDO, BERKELEY COUNTY, SOUTH CAROLINA. PRESENTLY OWNED BY DAVID E. HATCHELL AND JOESEPH BARTONE" and shall run down the sides of the Lot shown on said plat as going S 9° 22/10" W for 154.18', and then continuing on Lines L1, L2, L3,L4, L5, L6, L7,L8, L9, L10, and L1. Therefore, the Easement will almost completely encircle the Lot 6B except for most of the Northern boundary of the Lot. This easement is given in perpetuity and is to run with the land.

> Defendants admit the allegations of Paragraph 17 of the Complaint, except that the words "Ingress/Egress along the Northern Boundary" should read "Ingress/Egress beginning on the Northern Boundary" and the words "L10 and L1" should read "L10 and L11." Answer, ¶ 11.

18. The easement described in paragraph 17 herein was created by deed in the direct chain of title for the subject premises.

> Defendants admit the allegations of Paragraphs 18 through 23 of the Complaint. Answer, ¶ 12.

…

24. Upon information and belief, the existence of this easement was not disclosed to the Plaintiffs prior to the closing on May 7, 2010 or any time after the closing by any of the defendants.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

…

26 The existence of the easement is and was a material fact that should have been disclosed to the Plaintiffs prior to closing on the property hereinabove referenced by the Defendants Rodgers, Townsend & Thomas, P.C. and Lisa Hostetler.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

27. The Plaintiffs are informed and believe that the Defendants Rodgers, Townsend & Thomas, P.C. and Lisa Hostetler did not disclose the encumbrance/easement on the property, nor, did the Defendants properly communicate and explain the existence of the easement.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

…

30. That subsequent to discovery of the easement, the Plaintiffs have terminated three (3) of the (4) properties that held and easement through agreements between the Plaintiffs and those lot owners. Complaint

Defendants denied the allegations of Paragraph 30 of the Complaint. Answer, ¶ 14.

31. That the owners of Lot 6A will not terminate their rights to the easement, but in the alternative, have agreed to reduce the size and scope of the easement.

Defendants denied the allegations of Paragraph 31 of the Complaint. Answer, ¶ 15.

34. Plaintiffs were foreseeable parties to suffer injury if the Defendants Rogers, Townsend, & Thomas, P.C. and Lisa Hostetler failed to perform their duties and meet the standard of care in their representations in the aforementioned property transaction.

Defendants admit the allegations of Paragraphs 34 of the Complaint, but deny any damage to Plaintiffs. Answer, ¶ 18.

35. Defendants Rogers, Townsend & Thomas, P.C. and Lisa Hostetler owed a duty to meet the standard of care in their handling of the closing and transaction and to prevent foreseeable injuries to Plaintiffs.

Defendants admit the allegations of Paragraphs 35 and 36 of the Complaint. Answer, ¶ 19.

36. The standard of care for Petitioners representing a client in transactions in South Carolina requires a Petitioners, among other things, to inform, consult, and communicate with the client as to a transaction about the means by which a client's objectives are to be accomplished, to keep the client reasonably informed about the status of the matter, and to explain to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Defendants admit the allegations of Paragraphs 35 and 36 of the Complaint. Answer, ¶ 19.

…

Petitioners further deny that Respondents suffered any damages whatsoever as a result of their admitted failure to exercise due care. Answer, ¶¶ 18 and 20. As affirmative defenses, Petitioners allege that the easement "never existed," or that, if it did exist, it was no longer enforceable or had been waived. Answer, ¶¶ 46-75.

Based on the pleading, Petitioners do not dispute that the standard of care requires they explain matters to the extent reasonably necessary to permit the client to make reasonably informed decisions and that it was foreseeable that Respondents would suffer injuries if Petitioners failed to perform their duty and meet that standard of care. The terms of the undisclosed easement and that it was created by deed in the direct chain of title is not disputed. It is also undisputed that Petitioners did not disclose the easement prior to closing or any time after closing, that Petitioners did not properly communicate and explain the existence of the easement, and that the easement was a material fact that should have been disclosed prior to closing. *See* Complaint, ¶¶ 16-18, 24-27,

34-36; Answer, ¶¶ 10-13; 18-19. The issue in this case is whether, and to what extent, Plaintiffs suffered any damages caused by Petitioners' admitted failure to disclose the easement.

Petitioners filed a motion to add the Trustees as parties pursuant to Rule 19(a), SCRCP, arguing that if the undisclosed easement was somehow determined to be invalid or otherwise unenforceable, Trustees, as the dominant estate holders, would not be bound by the decision. Petitioners did not move to add the owners of Lots 5 (No. 108 Cainhoy Landing Road, TMS # 263-00-05-005) TMS Lot 6 (No. 110 Cainhoy Landing Road, TMS # 263-00-05-006) as shown on the above-referenced plat, and Lot 7, (112 Cainhoy Landing Road, TMS # 263-00-05-007) even though they were also granted an easement by the 2006 deed.

The motion was heard by the Honorable Perry M. Buckner on August 6, 2018 who granted the Appellant's motion by Form 4 order filed on August 13, 2018.

On March 15, 2019, the Respondents and Trustees entered into an "Access, Maintenance and Joint Dock Use Agreement" (hereinafter, "the Agreement"). Motion for Non-Joinder, Exhibit A. The Agreement terminated the undisclosed 25 foot wide ingress-egress easement encircling lot 6B—identified as the "Old Purported Easement." Motion for Nonjoinder, Exhibit A, p. 2; ¶ 6. Specifically, Trustees agreed to

> …remise, quitclaim, terminate, cancel, and forever release unto Plaintiffs, her heirs and assigns, all of [their] right, title and interest, if any, in and to the Old Purported Easement….

Motion for Nonjoinder, Exhibit A, ¶6. The existence of this agreement was specifically plead by the Respondents.

On March 29, 2019, Trustees filed a "Motion for Non-Joinder Pursuant to Rule 21, SCRCP," seeking to be dropped from the case.

In response, Petitioners moved to amend their answer to add a claim for declaratory relief against Respondents and Trustees. Motion to Amend Answer, p. 1. Petitioners new cause of action

requests "that the Court determine the rights of the owners of Lot 6A and Lot 6B under the "Purported Easement." Amended Answer, ¶ 89.

The Honorable Deadra L. Jefferson heard Trustees' Motion for Nonjoinder and Petitioners' Motion to Amend their answer on May 7, 2019. On May 9, 2019, Judge Jefferson issued a Form 4 Order dismissing Trustees from the action. On May 20, 2019, Petitioners moved for reconsideration of Judge Jefferson's order dismissing Trustees from the action.

On July 12, 2019, Petitioners filed notice of this appeal.

The Trustees' Motion to Dismiss the appeal was denied by this Court's order dated December 13, 2019. 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.) Petitioners' 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, Petitioners' arguments are disingenuous and are not supported by the statutes and case law of South Carolina. The circuit court properly dismissed the Trustees from the case. The Court of Appeals properly affirmed the circuit court's decision. Accordingly, The Jones' respectfully request that Petitioners' petition for a writ of certiorari be denied.

A. THE COURT OF APPEALS APPLIED THE CORRECT RULE.

The South Carolina Court of Appeals stated that "misjoinder" (rather than nonjoinder) is the vehicle for dropping parties who have been previously added." (Opinion p.3) The Petitioners made the argument that the "Trustees filed a motion for non-joinder" because the caption indicated that it was motion for non-joinder. However, the contents of the motion and argument clearly indicate that the Trustees were seeking misjoinder under Rule 21, SCRCP in requesting that they "…may be dropped or added by order of the Court on motion of any party…" Rule 21 SCRCP. "[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 believes that the Trustees are not necessary parties to this action. The Court of Appeals further stated "We have not been able to identify any interest the Trustees could have in this suit." (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:

> 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.)

The Petitioners 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, relied on the rule's "plain language" in reaching its decision. (*See* Opinion, p. 5.)

Petitioners cite eight cases involving easements in South Carolina which involve lawsuits *between* dominant and servient estate holders over the existence and nature of easements, and these cases have no commonality with this action. Given the nature of these cases, both estate holders were made parties in these cases. The case that is pending before the Court 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. No lawsuit has been filed or will be filed over the existence or nature of the easement that was not disclosed to the Respondent Joneses. The Trustees have disclaimed any right, title, or interest in that easement. 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.)

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

Both the circuit court and the Court of Appeals have made it clear that Peititioners can challenge the validity of the undisclosed easement at trial. (*See* Opinion, pp. 4- 6; *see also* R. pp. 3-4, 10-1.) Petitioners correctly state that "[i]n many legal malpractice claims there has been an underlying suit that forms the basis for the claim." (Petition, pp. 10-11.) However, this is a transactional malpractice action based on the Petitioners' 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 Petitioner'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. In this matter, there was no prior action. Petitioners 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 Petitioners fault in that ruling." A legal malpractice action over an easement *might* arise in that fashion, but is not what occurred in this case. Petitioners cite *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002), as a case that "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 decision in *Binkley* does not rely on rulings made in underlying cases. 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.

Petitioners 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." As determined by the circuit court and the Court of Appeals, 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.") Petitioners 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 Petitioners' negligence. 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, Petitioners 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 Petitioners, "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.*) Petitioners further assert that "Judge Jefferson granted the motion to amend at the same time she granted the Trustee's motion for 'non-joinder.'" However, Judge Jefferson first issued her order dropping Trustees and *then* issued the order granting Petitioners' 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.)

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

The Petitioners fail to recognize that the new easement Agreement is recorded with the Register of Deeds Office in Berkeley County. (R. pp. 66-78.) The Agreement and Easement, and anything that has been filed in this case, is a matter of public record readily accessible to any title abstractor or attorney. The easement at issue in this case which is described in the 2005 deed and 2006 deed in Plaintiffs' chain of title, has been terminated. Petitioners' claim that there are two identical 25-foot ingress/egress easements covering Plaintiffs' property is incorrect.

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, Petitioners 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 Appeals, "[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.) Petitioners 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. (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).

Petitioners 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. Petitioners 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 terminated their rights in the existing easement and then joined with Plaintiffs in creating a new easement/joint dock use agreement. (R. pp. 66-78.)

Petitioners further argue, without citing anything in the record, that "the allegation was before Judge Buckner…." (Petition, p. 16.) Petitioners 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 Petitioners' 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 which is evidenced by the Agreement. (R. pp. 3-5; 61-78.)

Petitioners 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 upon the execution of the new Agreement and Easement. Judge Jefferson made her ruling on

different facts than those that were heard by Judge Buckner. She made her ruling based on new evidence, the existence of a new 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).

Petitioners argue that this position was made "abundantly clear by Plaintiffs' counsel's arguments before the Court of Appeals." 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, Petitioners contend that the circuit court "accepted arguments of counsel as fact and made an inaccurate assumption about the nature of the easement." Petition,p. 17. Petitioners 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.

(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.)

Petitioners argue, yet again, that "new easement…does not disclaim the easement pleaded in Plaintiffs' complaint." (Petition, p. 18.) As previously discussed, Petitioners 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.)

Petitioners 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.) Petitioners 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 PETITIONERS' MOTION TO AMEND DOES NOT "CONTROL" HER ORDER DROPPING TRUSTEES FROM THE CASE.

In Section VI of their Petition, Petitioners 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.) Petitioners misinterpret 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 Petitioners leave to amend as irreconcilable, much less conflicting. Trustees are no longer parties to the case, and Petitioners 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.)

Petitioners 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 Petitioners' 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 Petitioners 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, Respondents Ronald L. Jones and Gaye Langley Jones respectfully request that the Court deny Petitioners' petition for writ of certiorari.

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/s/ Robert W. Maring
Robert W. Maring
S.C. Bar No. 8810
Maring & Moyer, LLC
PO Box 478
Georgetown, SC 29442
843-545-9544 Phone
robert@maringmoyer.com

Attorney for Respondents Ronald L. Jones and Gayle Langley Jones