

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

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**Nov 23 2022**

**APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas**

**S.C. SUPREME COURT**

Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No. 2022-001442

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

v.

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

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

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**REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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Warren C. Powell, Jr.  
Chelsea J. Clark  
P.O. Box 61110  
Columbia, S.C. 29260  
803-252-7693  
*Attorneys for Petitioners*

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## **INTRODUCTION**

This matter is before the Court upon the Petition for Writ of Certiorari of Roger Townsend & Thomas, P.C. and Lisa Hostetler (“Petitioners”). The Petition was filed October 13, 2022. The underlying plaintiffs, Ronald L. Jones and Gayle Langley Jones (“Plaintiffs”) and 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 (the “Trustees”) (collectively, “Respondents”) each filed responses to the Petition on November 14, 2022. This reply follows. Petitioners incorporate by reference their prior statement on the case and questions presented and commence their reply argument. Because the returns filed by Plaintiffs and the Trustees have identical headings and much the same content, there is no need to address them separately.

## **ARGUMENT**

Respondents suggest that the question before the Court is whether the Trustees were “properly dropped” from this action. Respectfully, Petitioners assert that it is not proper to “drop” parties from a case where complex and novel issues remain to be resolved. This case does not merely concern rearranging parties, correcting misnomers, or otherwise cleaning up a caption as Rule 21, SCRCP, would normally be employed to do. Case law shows that the joinder rules are not intended to allow for “dropping” when the more appropriate mechanism would be a properly adjudicated dismissal motion. Here, the Trustees were peremptorily removed from the case, despite the binding court order adding to them to this case, despite the valid claim against them for declaratory judgment, and despite the novel issue of whether the interests in an easement can be decided without the dominant estate holder. Respondents contend the issue is whether the dropping was done properly; Petitioners contend that dropping, proper or otherwise, should not be considered an option under the circumstances in this case.

**I. THE COURT OF APPEALS ERRED IN AFFIRMING THE “DROPPING” OF THE TRUSTEES.**

Respondents emphasize that Rule 21, SCRCF, states a party may be “dropped or added . . . on such terms as are just.” Rule 21, SCRCF. This language supposedly granted the lower court authority to drop the Trustees from this case. It is acknowledged in jurisprudence that Rule 21 grants broad discretion to a trial court judge to correct certain procedural issues with a case. However, Rule 21 is not and cannot be a blanket provision allowing dismissal of any party from a case. If it were, there would be no reason for Rule 12(b) or Rule 56. Indeed, a good portion of civil procedure jurisdiction could simply be erased if Rule 21 is all that is needed.

**a. The unique posture of this case demands more analysis than a cursory dismissal under Rule 21, SCRCF.**

Rule 21 in its federal form is most often used in district courts to correct jurisdictional defects. Unnecessary parties can be dismissed without prejudice to maintain diversity jurisdiction. See *John S. Clark Co. v. Travelers Indem. Co. of Illinois*, 359 F. Supp. 2d 429, 440 (M.D.N.C. 2004) (quoting *Newman–Green, Inc. v. Alfonso–Larrain*, 490 U.S. 826, 832, 109 S.Ct. 2218 (1989)). Those parties may still be involved in state litigation under those circumstances. See *Westside Assocs., LLC v. Certain Interested Underwriters at Lloyds, London*, No. CV 7:06-1991-HFF, 2009 WL 10713834, at \*2 (D.S.C. filed Apr. 7, 2009) (noting that Rule 21 dismissal of one non-diverse party could force a plaintiff to carry on two parallel lawsuits). Another possible use for Rule 21 is to correct misnomer situations. See, e.g., *Oswaldo Argueta v. Fred Smith Co.*, No. 5:19-CV-84-FL, 2019 WL 6337426, at \*5 (E.D.N.C. filed Nov. 26, 2019) (using Rule 21 to correct a corporate name issue). The function of Rule 21 is to give a trial judge the authority to correct procedural issues in a case that might otherwise be an irreparable defect. See *Halladay v. Verschoor*, 381 F.2d 100, 108 (8th Cir. 1967) (citation omitted) (“Rule 21 was adopted to obviate

the harsh common law adherence to technical rules of joinder.”). Rule 21 is not meant to be a substitute for substantive motions to dismiss.

The issues before Judge Jefferson were not mere matters of procedure. The lower court made a substantive and dispositive ruling on the basis of a miscaptioned motion, oral averments of counsel, and a single document. (*See* R. at p. 0061 (motion); p. 0003 (order stating, “Per Mr. Hulst . . .”); and p. 0065 (exhibit agreement).) The lower court’s order decided substantive issues about this case that are outside the ambit of Rule 21. *See* 7 Fed. Prac. & Proc. Civ. § 1682 *Application of Rule 21—In General* (3d ed.) (listing as uses for Rule 21 adding parties for a counterclaim, to correct misjoinder or nonjoinder, to preserve diversity jurisdiction, to correct venue issues, to add individual plaintiffs when a class is not certified, or to sever claims).

Indeed, the very sparsity of South Carolina state appellate precedent on Rule 21 makes this point in and of itself. If Rule 21 were an appropriate avenue for substantive and dispositive dismissals, then those orders would be immediately appealable and would create a line of South Carolina appellate court opinions construing the use of the rule. But Rule 21 is meant for issues that are inherently interlocutory and not immediately appealable. Because of this, there is very limited South Carolina state jurisprudence on the rule. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018) (few South Carolina decisions on Rule 21 and none relevant to case facts). But the order in this case was immediately appealable because it is dispositive as to the Trustees. *See Jones, et al. v. Rogers Townsend & Thomas, P.C., et al.*, Op. No. 2022-UP-314 at p. 4 (S.C. Ct. App. filed July 27, 2022) (hereinafter, “Opinion”) (citations omitted) (“This was a dispositive decision as to the Trustees—it dismissed them from the case—and the grant of a dispositive motion is immediately appealable.”).

Under those circumstances, the Court of Appeals should have followed its own published precedent in the only South Carolina state appellate case that critically assesses the function of

Rule 21. *See Farmer, supra*. Instead, the Court of Appeals issued a per curiam unpublished opinion that is not in line with precedent. The *Farmer* opinion concerned a case with a remarkably similar procedural posture. Declaratory judgment was sought, a novel issue was presented to the trial court, and the trial court granted dismissal under Rule 21 upon the basis that the party in question was dissolved and no longer concerned. The Court of Appeals, with Judge Hill writing for the court, ruled that dismissal under Rule 21 is not the appropriate mechanism to address a new and substantive issue. *Farmer*, at 589, 819 S.E.2d at 147 (“it was premature to toss out CompTrust on grounds of futility”). The lower court in this case also incorrectly dismissed parties on the basis that they are no longer concerned, despite a claim for declaratory judgment and a novel legal issue.

**b. This case does not concern misjoinder or nonjoinder.**

All parties appear to now agree that “non-joinder” was an error in the title of the Trustees’ motion. (See Trustees Return at p. 6.) That leaves misjoinder as the other issue addressed by Rule 21. According to the *Farmer* court, misjoinder “occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff’s claims against defendants do not stem from the same transaction.” *Farmer*, at 586, 819 S.E.2d at 146 (quoting *DirectTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006)). This is not the situation presented in this case. The Trustees were not accidentally named, they were brought into this case by a circuit court judge, who found them to be necessary parties. They were found to be necessary parties because of their position as dominant estate holders for the easement rights at issue in this case. Under such circumstances, it can hardly be argued that there is no common question of law or fact.

Petitioners cannot conceive of or find a case that concerns the validity of an easement where the parties to the easement are not parties to the case. Plaintiffs lament that this case has nothing in common with a normal case concerning the nature and existence of an easement. (*See*

Pl. Return at p. 9.) But that is precisely the point—the question of whether an easement can be litigated without the purported easement owner is unusual and novel and a matter of first impression, as far as Petitioners can tell. The fact that this case is not a humdrum fight over an easement, but rather a malpractice case where Plaintiffs want to leapfrog to damages without stopping to determine whether the easement actually existed in the first place is exactly why the dismissal of the Trustees should not have been decided under the auspices of Rule 21 with limited discovery or evidentiary development of the case.

**c. The Trustees are still required parties for a binding judgment in this case.**

The lower court and the Court of Appeals both erred in dropping the Trustees from this case using Rule 21 and ignoring precedent. The Trustees and Plaintiffs have taken the position that Petitioners are forcing the Trustees to participate in this case unnecessarily. Further, Plaintiffs argue that there is some hypocrisy in only seeking to join and keep the Trustees in this case because Petitioners have not sought to join the former dominant estate holders who have recorded relinquishment of their purported easements. (Pl. Return at p. 5.) There are a number of distinctions between those former easement holders and the Trustees that are key to this appeal.

Plaintiffs have not sued Petitioners for failing to disclose the purported easement rights of the other lot owners. Plaintiffs are not asserting that those lot owners had valid easements that have caused them damages. Plaintiffs are the ones who have put the Trustees' purported easement at issue in this suit and distinguished the Trustees from the other lot owners. Plaintiffs are the ones who have insisted that, despite there being a garage blocking the purported easement and it taking years for Plaintiffs to find out there was a purported easement, that they are greatly damaged by the Trustees' purported easement.<sup>1</sup>

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<sup>1</sup> (See R. at p. 0017, ¶ 15 (stating Plaintiff discovered the easement approximately five years after buying the property).)

Normally, a servient estate holder would seek release from an easement they considered problematic or damaging. Normally, if, as is the case here, an easement is subject to multiple arguments as to why it is not valid or binding, a servient estate holder would welcome and encourage any court review and determination of validity. But Plaintiffs have been vehemently seeking to avoid a court review of the easement they are asserting is burdening them. Not only do Plaintiffs not want to challenge the easement, they do not want Petitioners to challenge it either. Plaintiffs appear to finally have conceded in their return that Petitioners do have the right to challenge the easement's validity, but this is the first time they have done so. Prior to the return, Plaintiffs' counsel argued Petitioners lacked "standing" to challenge the easement before Judge Buckner, before Judge Jefferson, and before the Court of Appeals.<sup>2</sup> Plaintiffs assert that they have decided that the easement is valid and have jumped straight from breach to damages, without any regard for proximate cause.

This logical flaw matters a great deal for one primary reason. No one has conceded that the Trustees never had a valid easement at all.<sup>3</sup> Rather, Plaintiffs have contended that there is a valid easement, which has been modified by virtue of the "new" agreement they recorded.

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<sup>2</sup> Plaintiffs have also previously bemoaned that adding the Trustees as involuntary plaintiffs made them sue their neighbors—an assertion clearly not true. Petitioners have sought to counterclaim against the Trustees for declaratory judgment, which is the only claim in which the Trustees are defendants. On the subject of adding defendants to a declaratory judgment counterclaim, one federal district court stated, "The only reason suggested by Hyplains for not allowing joinder of its customers is Hyplains' desire to avoid disrupting its business relations with the customers. This desire, while understandable, provides no legal basis for declining jurisdiction of the court that has been properly invoked, for there is an unflagging obligation of the federal courts to exercise the jurisdiction given them." *See Hyplains Dressed Beef, Inc. v. EE Operating Corp.*, 142 F.R.D. 174, 176–77 (D. Kan. 1992) (citations and internal punctuation omitted). Clearly, the relationship between Plaintiffs and their neighbors has not been unduly strained, as they have shared much the same text in their returns in opposition to the petition for certiorari.

<sup>3</sup> Additionally, despite protestations to the contrary, no one has fully relinquished the purported easement either, as the "new" easement purports to extinguish a 2005 recording, while Plaintiffs have sued over a 2006 recording, for which there is no recorded relinquishment.

**d. The “new” agreement is not a substantial change.**

Plaintiffs argue in one section of their return that the purported new easement was “specifically plead” [sic] by them in their complaint. (Pl. Return at p. 5.) Meanwhile, they also argue that Judge Jefferson made her ruling based on “new evidence” that was “in no way ‘cumulative in nature.’” (*Id.* at pp. 15–15.) Both things cannot be true. The Court of Appeals based its ruling in part on a new evidence theory. (Opinion at p. 7.) But the new agreement was not new. It was in fact pleaded in the complaint as Plaintiffs state. Since the complaint commences the case, it cannot reasonably be argued that it was not before Judge Buckner or in the record at the time he added the Trustees to the case. Without a substantial change in the facts, Judge Jefferson had no authority to override Judge Buckner’s order. *See Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (citing *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (an unappealed ruling, right or wrong, is the law of the case); *Brandt v. Gooding*, 368 S.C. 618, 625–26, 630 S.E.2d 259, 262–63 (2006) (approving orders of second circuit judge upon the premise that orders followed the procedure outlined by the first circuit judge). The Trustees and Plaintiffs simply did what they had already said they would do. (R. at p. 0020 (the Trustees “have agreed to reduce the size and scope of the easement”).) The Court of Appeal’s reliance on the *Nelson*<sup>4</sup> case was misplaced. Rightly or wrongly, Judge Jefferson did not have the authority to reverse Judge Bucker’s decision to add the Trustees as necessary parties to this case.

**CONCLUSION**

In ignoring its prior precedent, the Court of Appeals has permitted the ambit of Rule 21 to greatly exceed its intended purpose. This case concerns a dismissal of parties ruled in by a sitting

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<sup>4</sup> *Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957).

circuit court judge, not added by mistake by a careless plaintiff. The underlying order constitutes a substantive and dispositive dismissal, not a procedural correction, and concerns a novel issue. Rule 21 was not intended for the use it was put to in this case. For these and the foregoing reasons, Petitioners request that the Court grant their petition for a writ of certiorari to the Court of Appeals to correct these errors.

Respectfully submitted,

**BRUNER, POWELL, WALL & MULLINS, LLC**

*s/ Chelsea J. Clark*

Warren C. Powell, Jr., Bar No. 4525

Chelsea J. Clark, Bar No. 102211

Post Office Box 61110 (29260)

1735 St. Julian Place, Suite 200 (29204)

Columbia, South Carolina

(803) 252-7693

[wpowell@brunerpowell.com](mailto:wpowell@brunerpowell.com)

[cclark@brunerpowell.com](mailto:cclark@brunerpowell.com)

*Attorneys for Petitioners*

November 23, 2022

Columbia, South Carolina