IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS

Honorable Doyet A. Early, III

Unpublished Opinion No. 2012-UP-207488
(S.C. Ct. App. Filed February 13, 2013)

I. Lehr Brisbin, ... Petitioner

vs.

Aiken Electric Cooperative, Inc., Gary W. Stooksbury and
Carolina Tree Care, Inc. of North America Defendants,

OF WHOM:
Aiken Electric Cooperative, Inc. and Gary W. Stooksbury are ..... Respondents

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RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner commenced this action on December 9, 2010 by the filing of a Summons and Complaint. The action arises out of the cutting and clearing of a right-of-way across the Petitioner's property. On or about January 13, 2011, the Petitioner filed an Amended Summons and Amended Complaint. In the Amended Complaint, he asserted the following causes of action:

1. Negligence
2. Trespass to Land
3. Interference with Prospective Economic Advantage
4. Breach of Contract
5. Equitable Rescission
6. Injunction

On or about January 24, 2011, Aiken Electric Cooperative, Inc. and Gary Stooksbury ("Aiken Electric") filed their Answer. On or about January 27, 2011, the Petitioner filed a Reply.[1]

On or about March 8, 2011, Aiken Electric filed a motion for summary judgment made upon grounds that the Complaint failed to state facts sufficient to constitute a cause of action and submitted the Affidavits of Dan Garman and Bryan Boatwright in support thereof. On or about October 18, 2011, the Petitioner filed and served his affidavit and the affidavit of his wife.

Aiken Electric's motion for summary judgment was heard by the Honorable Doyet A. Early, III on November 7, 2011. By an Order dated December 12, 2011, Judge Early granted summary judgment in favor of Aiken Electric.

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[1]No reference is made to Carolina Tree Company, Inc. of North Carolina which is not a party to this appeal.

On or about December 20, 2011, the Petitioner filed a motion to alter or amend judgment pursuant to Rule 59(e) as follows:

"1. That the Defendant herein was granted summary judgment; and
2. That under the evidence and testimony presented, the Defendant's motion for summary judgment should have been denied."

Judge Early held a hearing on the motion to reconsider on January 9, 2012. By an Order dated January 26, 2012, Judge Early denied the motion to reconsider.

On February 6, 2012, a Notice of Appeal was filed. Judge Early's decision was affirmed by a unanimous opinion of the Court of Appeals in an unpublished decision filed February 3, 2013.

The Petitioner moved to reconsider upon the following grounds:

"1. That a genuine issue of material fact existed as to the facts and circumstances surrounding the appellant's case.
2. That there is a genuine issue of material fact as to the issue of an injunction and the issue of damages."

The Petition for Rehearing was denied by an Order filed April 19, 2013 and the Petition for Writ of Certiorari was filed thereafter.

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE PETITION DOES NOT RAISE ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION.

A Writ of Certiorari is not a matter of right but of sound discretion and should be granted only where there are special and important reasons. Rule 242(b), SCACR. Rule 242(b) identifies the character of reasons which may be considered:

"1. Where there are novel questions of law.

2. Where there is a dissent in the decision of the Court of Appeals.

3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

4. Where substantial constitutional issues are directly involved.

5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." Rule 242(b), SCACR.

The Petition is not based on any of the five reasons. The Petition does not identify any other special or important reasons for granting a Writ of Certiorari. The Court of Appeals certainly found nothing special or important about the case. Its decision was unanimous, unpublished and of no precedential effect. Accordingly, the Petition for a Writ of Certiorari should be denied.

II.

THE PETITIONER, WHO ASSERTED DISCOVERY WAS NEEDED, FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 56, SCRCP, AND IS NOT ENTITLED TO ANY RELIEF.

At the hearing on November 7, 2011, the only argument made by Petitioner's counsel was a general argument that discovery was not complete and was needed. His entire argument was as follows:

> "Mr. Divine, you want to help me with this one?
> MR. DEVINE: Thank you, Your Honor. If it please the court. Your Honor, this land at issue is out in the New Ellenton area. Just so the court is aware of actually what Dr. Brisbin does research wise on this piece of property and his affidavit at paragraph three emphasizes that he researches the movement and behavior of resident box turtles and he also studies the ecology of nesting birds and he also is in the research and study of tracking and scent-discriminating law enforcement dogs.
> Dr. Brisbin and the Aiken Electric Co-Op have had, unfortunately, over the last 20-something years, rather an unfortunate history of where is the scope of this right-of-way, what is supposed to happen in the course of Aiken Co-Op's dealing. Back in the 80's this issue raised its ugly head when Mr. Harte was practicing law. He was able to come to some understanding and agreement with the Aiken Co-Op at that time.

> The problem we have at the moment, Judge, is – and why we feel that summary judgment should not be granted at this time, we don't have all discovery that is complete at the moment. We're still waiting for the discovery from Carolina Tree Company. We've got a scheduling order that's about to come into full force and effect. We haven't done any depositions yet, Judge, as it stands at the moment, and also I believe that Carolina Tree Company have said their discovery or the Aiken Co-Op have served their discovery on Carolina Tree Company – that hasn't been completed at this point, Judge.
>
> I believe if you reviewed the affidavits at your invitation, Judge, as to Dr. Brisbin and his wife Donna Brisbin you'll see that there are some issues here that we cannot resolve at this particular point. The discovery responses from Aiken Co-Op – the interrogatory responses – the majority of them say, no, at this point cannot answer those type of responses whereas Dr. Brisbin, he can answer those questions.
>
> THE COURT: Well, Mr. Devine, if I tried this case this morning non-jury right here and I asked you what are your damages, what would they be?
>
> MR. DEVINE: At this point, Judge, we don't have an answer to that.
>
> THE COURT: Very well. Anything else? Anything in response?
>
> MR. JOHNSON: No, Your Honor." (R. p. 85, line 10-R. p. 87, line 4)

If a lawyer cannot provide affidavits to resist a summary judgment motion because of the need for discovery, the lawyer cannot simply show up at the hearing and defeat a summary judgment motion by making a general, non-specific argument that discovery is needed. Rule 56(f) sets forth specifically what the lawyer must do.

> "When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Rule 56(f).

Here, neither the Petitioner nor his counsel filed an affidavit as required by Rule 56(f). Rule 56(f) is clear and unambiguous. Rule 56(f) is binding on litigants and the Court as well. Since no Rule 56(f) affidavit was filed, there was no error in failing to postpone the hearing to allow for discovery. The Petition for Writ of Certiorari should be denied.

III.

THE PETITIONER FAILED TO DEMONSTRATE BY AFFIDAVIT OR OTHERWISE THAT THE LIKELIHOOD OF FURTHER DISCOVERY WOULD UNCOVER ADDITIONAL RELEVANT EVIDENCE AND THE PETITIONER IS THEREFORE NOT ENTITLED TO RELIEF.

The Petitioner's counsel, at the hearing before Judge Early on November 7, 2011, only argued that "we don't have all discovery that is complete (sic) at this moment". He argued that a co-defendant's discovery had not yet been answered by Aiken Electric but identified no specific discovery that he had pending or needed to discovery that would create a question of fact and defeat Aiken Electric's motion for summary judgment.

It has long been the law in South Carolina that if the non-moving party seeks to avoid summary judgment on the basis that discovery is not complete, the non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a "fishing expedition". *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

In considering this issue, it should be noted that Judge Early found that the Petitioner had no damages as confirmed by his interrogatory answers. This was in part a basis for his decision to grant summary judgment. Judge Early found:

> "In addition thereto, the plaintiff's Answers to Interrogatories establish that the plaintiff has not suffered any monetary damages as a result of the matters alleged in the Amended Complaint. Aiken Electric served the standard state court interrogatory, asking the plaintiff to set forth an itemized statement of all damages claimed to have been sustained by the party. In response, the plaintiff answered that the damages "cannot be measured and directly quantifiable monetary terms". He further stated:
>
> > "A specific dollar value cannot be usefully associated with the damage/hindrance imposed upon either the bird nest-box or

> research or other studies of the movement and behavior of the eastern box turtles (Terrapene carolina carolina) on this property. Similarly, the dollar value of the impacts upon on-going studies of scent-following bloodhounds and other law enforcement canines which are based on the repetitive use of long established "scent corridors" which have now been mechanically destroyed and/or chemically contaminated/compromised through the use of the 'Garlon 4 Ultra' herbicide under the AEC power lines, as described above, cannot be quantified."

In Interrogatory 6, Aiken Electric asked the plaintiff to identify with specificity the destroyed trees, plants, scientific research projects, vegetation and property belonging to the plaintiff that is referred to in paragraph 21 of the complaint and set forth the value of each such item that was allegedly destroyed. The plaintiff submitted a lengthy, rambling response to this interrogatory, but he did not identify or set forth the value of any item that was allegedly destroyed." (R. p. 58).

Since the Petitioner had no damages, he had no viable cause of action. Additional discovery, whatever it might be, would not cure this defect.

Since the Petitioner failed to demonstrate a likelihood that further discovery would uncover additional relevant evidence creating a question of fact, Judge Early's decision to grant summary judgment was correctly affirmed and the Petitioner is not entitled to a Writ of Certiorari.

IV.

CONTRARY TO PETITIONER'S ARGUMENT, THE NOVEMBER 7, 2011 HEARING TRANSCRIPT ESTABLISHES THAT JUDGE EARLY DID NOT LIMIT PETITIONER'S COUNSEL FROM ARGUING ANY ISSUE AT THE HEARING AND PETITIONER IS NOT ENTITLED TO RELIEF UPON THIS GROUND.

In his brief, the Petitioner has made the following argument:

> "Counsel for AEC repeatedly requested that summary judgment should be granted because the Petitioner could not demonstrate monetary damages. The trial court judge at the November 7, 2011 hearing questioned counsel for the Petitioner as follows:

Q: If I tried this case this morning non-jury right here and I asked you what are your damages, what would they be?

A: At this point Judge, we don't have an answer to that.

The Court: All right, prepare me orders within 15 days. (R. P. 86-87)

The trial court judge would not let counsel for the Petitioner argue the issue as to the Plaintiff's request for an injunction against AEC and all of the causes of action set-forth in the Petitioner's amended complaint. (R. P. 86-87)" Petitioner's Brief, page 6.

However, this argument cannot avail the Petitioner. The Petitioner has mis-quoted the transcript and omitted the relevant portion. The transcript actually states the following:

"THE COURT: Well, Mr. Devine, if I tried this case this morning non-jury right here and I asked you what are your damages, what would they be?

MR. DEVINE: At this point, Judge, we don't' have an answer to that.

THE COURT: Very well. Anything else? Anything in response?

MR. JOHNSON: No, Your Honor." (R. p. 86, line 22-R. p. 87, line 6).

As the transcript establishes, Judge Early specifically asked whether there was anything else to be argued or anything to be argued in response. Petitioner's counsel made no further argument.

It is unfair to the Judge to argue that he cut off or shut down argument when he did not do so. It is misleading to mis-quote the record and make an argument based thereon. Petitioner is not entitled to a Writ of Certiorari.

V.

PETITIONER'S ARGUMENT THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO THE ISSUE OF INJUNCTION DUE AIKEN ELECTRIC EXCEEDING THE SCOPE OF AIKEN ELECTRIC'S POWER LINE MAINTENANCE AND THAT HE WAS ENTITLED TO INJUNCTIVE RELIEF WAS NOT MADE AT THE NOVEMBER 7, 2011 HEARING, WAS NOT PRESERVED FOR REVIEW AND PROVIDES NO BASIS FOR ISSUANCE OF A WRIT.

The Petitioner has argued as follows:

"The fact that damages could not be ascertained or quantified at the November 7,

2011 hearing should not be grounds for the granting of summary judgment."

However, this argument was not made at the hearing on November 7, 2011. It is settled law that an issue cannot be raised for the first time in a motion to reconsider. *Johnson v. Sonoco Products Company*, 381 S.C. 172, 672 S.E.2d 567 (2009) ("Sonoco further challenges the authority of the circuit court to award interest and assess the ten percent penalty under Section 42-9-90 of the South Carolina Code (1976). Sonoco contends such an award rests exclusively in the Workers' Compensation Commission. We find this issue is not preserved. The issue first appears in Sonoco's motion seeking reconsideration of the circuit court's December 20, 2006 order. An issue may not be raised for the first time in a motion to reconsider.") ("Further, because the transcript of the proceeding below is omitted from the record, it appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.")

Since this issue was not raised and argued at the November 7, 2011 hearing, it was not preserved for review and provides no basis for the issuance of a Writ of Certiorari.

VI.

EVEN IF THE PETITIONER'S ARGUMENT REGARDING INJUNCTIVE RELIEF WERE PRESERVED FOR REVIEW, THIS ARGUMENT, FOR THE REASONS STATED BY JUDGE EARLY, WAS INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT AND PROVIDES NO BASIS FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

The Petitioner's argument regarding injunctive relief was made for the first time at hearing on his motion to reconsider on January 9, 2012. (R. pp. 88-89).

Judge Early addressed and correctly decided this issue in his Order dated January 23, 2012.

"The plaintiff argued that summary judgment should not have been granted on the

> claim for injunctive relief since the plaintiff was seeking an injunction to prevent the use of herbicides on his property. However, I find that there is no genuine issue of fact relating to the claim for an injunction. To obtain an injunction, a party must demonstrate irreparable harm, the likelihood of success on the merits, and an inadequate remedy at law. *Roark v. Combined Util. Comm's.*, 290 S.C. 437, 351 S.E.2d 168 (Ct. App. 1986). Here, the plaintiff's property is burdened by the defendant's right-of-way. Defendant followed its standard clearing procedures on the plaintiff's property. Plaintiff offered no evidence to the contrary. The plaintiff has no quantifiable damages and cannot demonstrate irreparable harm. Since his property is burdened by the easement and right-of-way of the defendant, and there is nothing to show that the defendant cleared the right-of-way on his property differently from the clearing on other properties that were being cleared at the same time, no showing was made as to the likelihood of success on the merits." R. p.70-71.

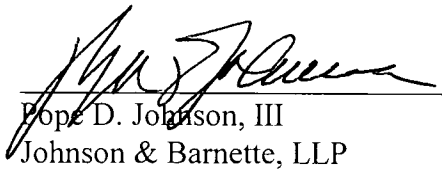
Judge Early correctly decided this issue and his decision was correctly affirmed. This issue provides no basis for the issuance of a Writ of Certiorari.

CONCLUSION

This action was commenced on December 9, 2010 and the motion for summary judgment was not heard until almost 11 months later. Aiken Electric's motion for summary judgment was pending from March 8, 2011 until it was heard on November 7, 2011, some 8 months. Obviously, there was plenty of time to take discovery and plenty of notice of the summary judgment motion and issues raised thereby. Although Petitioner's counsel argued that further discovery was needed, Petitioner's counsel did not identify any pending or proposed discovery that would yield relevant evidence and create genuine issue of material fact. Counsel only made a general, non-specific argument that additional discovery was needed. This does not cut it. The requirements and mandates set forth in Rule 56 are not mere empty noise. Holdings of the South Carolina Supreme Court which are set above are not mere empty noise. Judge Early did exactly what a judge should do. He followed and applied the law. The Court of Appeals was correct in unanimously affirming Judge Early's Order. Four experienced, seasoned judges have now held that summary judgment was

proper. There is no basis for the issuance of a Writ of Certiorari. The Petition should be denied.

Respectfully submitted,



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June 11, 2013

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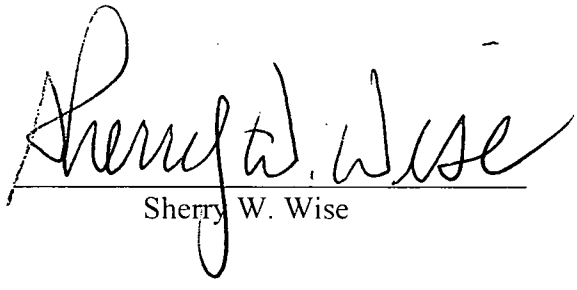
PROOF OF SERVICE

I, Sherry W. Wise, of Johnson & Barnette, LLP, hereby certify that I have served the Respondent's Brief by mailing a copy of same, postage prepaid and return address clearly indicated, to the attorney for the Petitioner, Mark J. Devine, Law Offices of Mark J. Devine, P.O. Box 2008, Aiken, SC 29802 on the 11th day of June, 2013.



Sherry W. Wise