THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2010-CP-12-0168

Mell Woods . . . . Appellant,

v.

Robert H. Breakfield, Esquire, as Personal Representative
of the Estate of Reba Hinson . . . . Respondent.

RESPONDENT'S AMENDED INITIAL BRIEF

B. Michael Brackett, S.C. Bar # 838
Moses & Brackett, PC
P.O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. The Circuit Court properly granted summary judgment on Appellant's nuisance claim because Appellant failed to offer sufficient evidence establishing causation for his nuisance claim so as to meet his burden on summary judgment.

2. The Circuit Court properly granted summary judgment on Appellant's nuisance claim because t he mere existence of, and citation to, the case of Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984) did not itself preclude the granting of Respondent's motion for summary judgment because the Plaintiff's case in Lever did not suffer from causation issues.

3. The Appellant's Issue on Appeal no. 3, regarding the trial court's denial of Appellant's motion to amend his claim to add attorney Ned Gregory, II as a party, has not been preserved for appellate review.

4. Alternatively, the trial court acted well within its discretion in denying Appellant's motion to add attorney Ned Gregory, II as a party to the case.

STATEMENT OF THE CASE

Respondent objects to Appellant's Statement of the Case because it violates Rule 208(b)(1)(C), SCACR, by including contested matters and argument.

Appellant filed a claim against the Estate of Reba Hinson on or about November 9, 2009. (Appellant's Statement of Creditor's Claim dated November 9, 2009). The claim identified nuisance as one of the bases of the claim although the narrative allegations in the claim said nothing about nuisance damages.

The Personal Representative disallowed the claim by notice dated and served November 10, 2009. (Notice of Disallowance of Claim).

On December 9, 2009 Appellant filed and served a Petition for Allowance of Claim, a Demand for Jury Trial and a Motion to Remove his action for allowance of claim to Circuit Court. (Appellant's Petition for Allowance of Claim, Demand and Motion, all dated December 9, 2009).

On January 4, 2010, the Respondent Personal Representative filed and served his Return to Appellant's motion to remove, and filed and served a motion to dismiss portions of Appellant's Petition. (Respondent's Return and Motion filed January 4, 2010). The motion to dismiss was grounded in part on the fact that the Petition for Allowance of Claim was silent with respect to nuisance allegations.

On February 3, 2010, immediately prior the probate court hearing, Appellant filed an "Amendment of Claim" that rendered portions of the Personal Representative's Return moot. (Appellant's Amended Claim dated February 1, 2010). The Amendment of Claim was the first time that Appellant actually made allegations regarding the facts of his nuisance claim. (Appellant's Amended Claim dated February 1, 2010, ¶ 1.)

The Probate Court motion hearing on February 3, 2010 resulted in an Order removing this claim proceeding to Circuit Court. (Probate Court Order dated February 10, 2010). The Order

expressly provided that "This decision is without prejudice to the Personal Representative's pending motions." (Probate Court Order dated February 10, 2010). The matter was removed to Circuit Court and was assigned the above-captioned case number.

The Respondent-Personal Representative's motion to dismiss the 2d and 3rd claims/causes of action (Respondent's Return and Motion filed January 4, 2010) was heard in the Circuit Court, Judge Newman presiding, on September 8, 2010. The Appellant confirmed on the record that he was proceeding only on the claims as set out in his "Amendment of Claim." (September 30, 2010 Order, p. 2, l. 7-12). The amended claim contains three separate claims, or causes of action: (1) nuisance proximately caused by the alleged absence of a septic tank resulting in alleged illegal discharge of sewage into the lake from property owned by the decedent Reba Hinson, (2) conversion resulting from the Personal Representative's probating of the "wrong will," and (3) unspecified damages suffered by Appellant because of actions of attorney Ned Gregory and the Personal Representative. (Appellant's Amended Claim dated February 1, 2010). The nuisance claim was not a subject of the Respondent Personal Representative's motion to dismiss.

The Circuit Court (Judge Newman) decided the motion to dismiss by Order Partially Dismissing Claims, dated September 30, 2010, in and by which Appellant's second and third causes of action were dismissed, leaving only the nuisance cause of action. (Judge Newman Order dated September 30, 2010.)

On or about November 9, 2010 Appellant filed two motions in a single filing with the trial court. The motions were identified as "Motion to Amend Complaint, Add Parties" and "Motion to Reconsider, and to Alter or Amend Judgment." (Appellant's Motions dated November 9, 2010). The hearing judge, Judge Newman, retained jurisdiction only as to the motion for reconsideration. The motion to reconsider was eventually denied by Order dated May 3, 2011. (Judge Newman

Order dated May 3, 2011.) Neither the May 3, 2011 Order nor the underlying September 30, 2010 Order Partially Dismissing Claims , the 2d and 3d claims/causes of action, was appealed.

Appellant's motion to amend to add attorney Ned Gregory, II as a party and Respondent's motion for summary judgment with respect to the nuisance claim were heard by the Circuit Court on February 2, 2011. By Order dated February 4, 2011, the Appellant's motion to amend his claim to add attorney Ned Gregory as a party was denied. (Judge Goldsmith Order dated February 4, 2011.) By Order dated February 9, 2011, Respondent's motion for summary judgment on the nuisance claim was granted. (Judge Goldsmith Order dated February 9, 2011.)

Appellant filed a motion for reconsideration with respect to the Order granting summary judgment. (Appellant's Motion for Reconsideration dated March 11, 2011). The motion for reconsideration did not address the Order denying Appellant's motion to amend/add a new party. By Order dated March 23, 2011, the motion for reconsideration was denied. (Judge Goldsmith Order dated March 23, 2011).

On May 5, 2011, Appellant served a Notice of Appeal whereby he appealed "the order of the Honorable Brooks P. Goldsmith dated March 23, 2011." On May 20, 2011 Respondent filed and served a motion to dismiss appeal because the Appellant had appealed only the Order denying motion for reconsideration and not the Order that granted summary judgment. By Order dated August 12, 2011, this Court granted the motion to dismiss appeal. Appellant's Petition for Rehearing was denied by Order dated October 13, 2011. Appellant petitioned the Supreme Court for a writ of certiorari, and by Memorandum Opinion No. 2011-MO-039, filed December 19, 2011, the dismissal order was reversed and the matter was remanded to the Court of Appeals. (The records identified in this paragraph are on record in this Court's file).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Bass v. Gopal, Inc., 395 S. C. 129, 716 S.E.2d 910 (2011). Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Bass v. Gopal, Inc., supra. Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a scintilla of evidence to withstand a motion for summary judgment. Id.

A trial court has discretion to allow or not an amendment of the complaint, and such decision will not be overturned without a showing of abuse of discretion or unless manifest injustice has occurred. Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App. 1997), rehearing denied and certiorari denied. The party opposing a motion to amend a pleading has the burden of establishing prejudice. Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002).

STATEMENT OF THE FACTS

The Appellant has commenced four actions in either the Chester County Probate Court or Circuit Court, all having to do with the Estate of Reba Hinson and Appellant's claim that he is entitled to exercise an alleged purchase option for a lot of land he leased from the decedent Reba Hinson.

Case 1. Appellant sought to inject himself into estate administration. Those proceedings are already before this court in 2010-CP-12-0201 (tracking no. 2011201066). Appellant did not prevail in the Probate Court, or in his appeal to Circuit Court. Initial Briefs have been filed.

Case 2. The above-captioned nuisance claim and appeal.

Case 3. 2010-CP-12-0595 (tracking no. 2012206469); a tort case brought by Appellant against members of the Hinson family. The Circuit Court entered summary judgment in favor of the Hinson family. Appellant's motion for reconsideration was recently denied, and Appellant has commenced an appeal to this court.

Case 4. 2011-CP-12-0323 is a quiet title or trespass to try title action [Respondent describes it as a will construction case] in which Appellant seeks a construction of Reba Hinson's spouses's last will in an effort to show that Reba Hinson owned fee title to the lot in dispute rather than having owned a life estate. The Circuit Court entered summary judgment in favor of the Hinson family. (Judge Goldsmith Order dated December 29, 2011 in case no. 2011-CP-12-0323.) Appellant's motion for reconsideration was recently denied, and Appellant has filed an appeal in this court.

The disputed lot occupied by Appellant is located in a neighborhood on Fishing Creek Lake in Chester County. (Appellant's deposition, p. 7, l. 18 to p. 8, l. 24.) The land on which the neighborhood is located, Chester county tax map # 158-0-0-3) was owned by Levie Hoyt Hinson, Reba Hinson's spouse. (Appellant's depo., p. 32, l. 12-23.) Initially, lots were rented for temporary use such as cabins, mobile homes or campers, mostly for weekend fishermen, over time some lots were used for more permanent, year-round residences. When Levie Hinson died on August 1, 1986,

he left a Last Will that devised his real property to his wife, Reba. (Levie Hinson Last Will dated April 21, 1977 - Exhibit 5 to Appellant's depo.) It is disputed whether the will devised the fee or a life estate to Reba. That is the subject of case no. 4 above.

Reba Hinson was managing the rental properties in this neighborhood when, in 2002, she leased the lot known as 1537 Hinton Road to the Appellant. (Exhibit 10 to Appellant's depo.) Subsequent issues regarding title to the lot are not relevant to this appeal. In his nuisance claim, Appellant alleges that a lot in proximity to Appellant's dock, leased by Reba Hinson (and now her estate) to Larry Baskins, is discharging untreated sewage into Fishing Creek Lake. (Appellant's Amended Claim, ¶ 1 and Appellant's depo., p. 48, l. 2-8).

ARGUMENT

1. The Circuit Court Properly Granted Summary Judgment on Appellant's Nuisance Claim Because Appellant Failed to Offer Sufficient Evidence Establishing Causation for His Nuisance Claim so as to Meet His Burden on Summary Judgment.

In South Carolina "anything" working inconvenience or damage or interfering with the enjoyment of life or property is a nuisance. More particularly as relates to this case, it is a nuisance to use property in such a way that annoying or injurious odors are emitted. Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 454, 322 S.E.2d 692, 693-694 (Ct. App. 1984). To prevail in a private nuisance cause of action, the plaintiff must demonstrate (1) an unreasonable interference; (2) with use and enjoyment of land; and (3) proximate causation of the interference by the defendant. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil §4-32 (2009); see generally Bradford W. Wyche, A Guide to the Common Law of Nuisance in South Carolina, 45 S.C. L. Rev. 337, 361 (1994).

Although a fair amount of South Carolina nuisance case law has developed in the areas of damages, determining the reasonableness of the defendant's interference and whether the defendant acted intentionally in causing the interference, little case law has developed that squarely addresses the issue of causation in nuisance cases. Though not binding on this Court, the approach other jurisdictions have taken in this area is instructive. As detailed below, just as with any tort claim, courts have refused to allow a plaintiff to proceed past summary judgment where evidence establishing causation has not been produced.

A. Appellant failed to establish causation because he did not provide specific facts in opposition to Respondent's showing that the Baskins residence had a septic system and was not the causal source of any illegal sewage discharge.

In order to establish a nuisance, a causal connection must exist between the defendant and the nuisance complained of. 58 Am. Jur. 2d Nuisances § 81 (2011). Proximate cause is a requisite element to any nuisance claim. Home Sales, Inc. v. City of North Myrtle Beach, 299 S.C. 70, 382 S.E.2d 463 (Ct. App. 1989) (In order to constitute an actionable nuisance, a wrongful act of the defendant must be shown and the maintenance of the nuisance must be the natural and proximate cause of the injury suffered by the plaintiff.) Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries. McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 386, 684 S.E.2d 566 (Ct. App. 2009.) Ordinarily, proximate cause is a question for the jury. Id. However, when the evidence is susceptible to only one inference, proximate cause is a matter of law for the court. Id. An inferential leap does not create a genuine issue of material fact. Id. The party opposing summary judgment may not rely on speculation to defeat a motion for summary judgment. Id.

Where nuisance is concerned, courts have held that even where evidence exists that the plaintiff experiences a nuisance that interferes with his use and enjoyment of property, the plaintiff must direct the court to admissible evidence establishing causation. Dickens v. Oxy Vinyls, LP, 631 F. Supp. 2d 859, 866 (W.D. Ky. 2009) (summary judgment granted for defendant manufacturing facility where plaintiffs did not offer credible evidence of causation linking the odor they experienced to the defendant); Bell v. DuPont Dow Elastomers, LLC, 640 F. Supp. 2d 890, 896 (W.D. Ky. 2009) (summary judgment granted where the record contained no evidence of a connection between the known emissions from defendant manufacturing plant and the odors and nuisances alleged in plaintiffs complaint); Radcliff v. Tate & Lyle Sucralose, Inc., No. 06-0345, 2008 U.S. Dist. LEXIS 98710,13-14 (S.D. Ala. Dec. 4, 2008) (summary judgment granted after defendant chemical plant provided contrary expert opinion evidence as to the cause of alleged odors that plaintiff failed to rebut); Satterfield v. J.M. Huber Corp., 888 F. Supp. 1567, 1572-1573 (N.D. Ga. 1995) (defendant industrial plant's motion for summary judgment granted where plaintiff's own lay testimony sighting smoke on their property was not sufficient evidence supporting causation).

Here, the trial court appropriately determined that Appellant failed to establish the causation element of his nuisance claim and, therefore, could not overcome a summary judgment ruling. The specific conduct of the decedent, and now her estate, complained of by the Appellant as causing the alleged nuisance is that "the estate operates, and Mrs. Hinson, while in life, **allowed a certain residence to exist on the property which has no septic tank, or any approved method of disposal** . . . the plumbing for this particular residence is arranged so when a commode is flushed, everything is flushed straight into the rubble pile. . . raw sewage then leaches into the lake . . ." (emphasis added.) (Appellant's amended claim, ¶ 1.) The "certain residence" referred to by

Appellant is the Baskins residence. (Appellant's depo., p. 48, l. 2-8.) The Appellant quite clearly contends that the proximate cause of the alleged nuisance is the absence of a septic tank or any approved method of disposal for the Baskins residence.

The Respondent supported his motion for summary judgment with two affidavits. The particulars of those affidavits are fully addressed in the Order Granting Summary Judgment. (February 9, 2011 Order). Those affidavits show that the residence in question actually has a septic tank (Howard Steen affidavit), and that the Chester County Health Department knows of Appellant's complaint, has investigated the Baskins residence and its septic/disposal system, found no evidence of illegal sewage discharge and has no objection regarding (implicitly approved) the system. (Mike Johnson affidavit.)

In opposition to the motion for summary judgment, Appellant offered his own sworn "Response to Defendant's Summary Judgment Motion." The affidavit-proper reads in its entirety:

> Mell Woods, being first duly sworn, hereby deposes and states the following facts upon his own personal knowledge:
>
> Larry Baskins, and the Hinson Estate dump illegal, untreated sewage into the Catawba River on a daily basis; affiant has to smell and endure these Health violations on a daily basis; this is the same fact situation which existed in Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452 and is the same as when this lawsuit was filed, has not changed any, and constitutes a continuing nuisance; affiant has reviewed the within and foregoing pleading, and states on his oath that each allegation in the pleading is the truth.

(Appellant's Response to Defendant's Summary Judgment Motion dated January 29, 2011).

Appellant's Response/Affidavit does not meet the evidentiary requirements to establish causation in order to rebut Respondent's showing that there is a complete absence of credible and admissible evidence supporting Appellant's claim. Appellant offered nothing in his submission to the Court to prove that, as he alleges in his amended claim, the Baskins property has no septic tank

or that governmental authorities disapprove of the septic system that is in place on the Baskins lot. **Plaintiff's affidavit is conclusory in nature, relies on inadmissible evidence, and makes absolutely no statement of fact based on personal knowledge that the Baskins property does not have a septic tank and/or that the septic system on the property is not known to or approved by the government's regulators.** The fact that Plaintiff claims to detect odors does not mean that the Baskins property has no septic tank or other approved method of disposal. See argument in section B following.

Appellant contends that the cause of the nuisance is the lack of a septic system at the Baskins residence, and Respondent has shown by proper evidence that there is in fact an operating septic system at the Baskins residence. (Steen affidavit). And, Respondent has shown by proper evidence that Chester County has determined by testing that the Baskins residence is not the source of the alleged raw sewage leaching into the Catawba River. (Johnson affidavit). Appellant did not produce any admissible evidence in opposition to Respondent's affidavits. Instead, just as with the plaintiffs in the Satterfield case cited above, Appellant relies solely on his own lay testimony in order to prove causation. However, as the above-cited cases indicate, a plaintiff's mere allegation of experiencing a nuisance that denies him the use and enjoyment of his property is insufficient. The plaintiff must show at the summary judgment stage that the alleged nuisance is or could be proximately caused by the defendant. The Circuit Court understood this and, therefore, appropriately granted summary judgement.

B. The Circuit Court applied the correct summary judgment standard, and the motion was appropriately granted because Appellant failed to produce even a scintilla of proper evidence in opposition to Respondent's showing that the Baskins residence had a septic system and was not the causal source of any illegal sewage discharge.

In cases where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Under Rule 56(c), the party seeking summary judgment has the initial responsibility to demonstrate the absence of a genuine issue of material fact. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). The grant of summary judgment is appropriate only if it is clear that no genuine issue of material facts exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law. Id.

Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986). Further, Rule 56(e), SCRCP requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); see also Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001) (explaining that "a party opposing summary judgment [must] come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial"). An entry of summary judgment is appropriate against a party who has had adequate time for

discovery and has failed to make a showing sufficient to establish an element essential to the party's case, and on which that party will bear the burden of proof at trial; bald allegations are insufficient to create a genuine issue of fact. See Baughman, 306 S.C. at 116-117, 410 S.E.2d at 545-546 (explaining that summary judgment was appropriate in light of a total absence of any competent evidence showing damage was proximately caused by the acts of the plaintiff).

Within his argument on Issue One, Appellant contends in paragraphs 1, 2, and 3 that the trial court applied the federal summary judgment standard and not the state court standard. However, the trial court's February 9, 2011 Order cites Rule 56, SCRCP; the Order does not cite or purport to apply anything other than South Carolina law. The trial court did not employ the heightened federal court summary judgment standard. Appellant simply failed to meet the lesser 'scintilla' state court burden as he provided nothing more than an affidavit containing his own conclusions and opinions regarding the alleged nuisance. Despite having ample time and opportunity to conduct discovery, Appellant has conducted no investigation to support the allegations in his complaint other than the affidavit. Appellant has not produced any admissible evidence in opposition to Respondent's showing that the alleged leaching sewage is in no way linked to the respondent.

For example, the Appellant's Response states the following:

He challenges the bias and competence of the affiants Steen and Johnson (Response, Reasons #1, 2, 3[1]); this goes to the weight of evidence and not to the existence of evidence in opposition;

He quotes DHEC regulations (Response, Reasons #4 and 5) without expert opinion as to the application, if any, of said regulations to the situation presented;

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[1] Misnumbered as #4.

He says that Baskins and the Hinson estate dump illegal untreated sewage into the Catawba River (a conclusion or "bald allegation");

He says that what Baskins and the Hinson estate are doing constitutes a nuisance (a conclusion).

Appellant offered no "specific facts" such as admissible evidence showing exactly where the alleged illegal discharge is placed in the water and linking that spot to the Baskins residence, or admissible evidence that Baskins does not have a septic tank on his property, or that Chester County has not knowingly allowed the Baskins septic system to operate. What Appellant is arguing is *res ipsa loquitur*, that the mere existence of an unpleasant odor in the proximity of the Baskins residence itself proves causation. South Carolina does not recognize the rule of *res ipsa loquitur*. Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010).

The granting of summary judgment must be affirmed as the Circuit Court correctly analyzed and applied the appropriate summary judgment standard leading it to the conclusion that Appellant had not provided the 'scintilla' of evidence required to overcome respondent's motion for summary judgment.

2. The Mere Existence of, and Citation to, the Case of Lever v. Wilder Mobile Homes, Inc. Did Not Preclude the Granting of Respondent's Motion for Summary Judgment Because the Plaintiff's Case in Lever Did Not Suffer From Causation Issues.

In Lever, the plaintiffs brought an action alleging trespass and nuisance based upon the defendant's improper maintenance of a sewage treatment lagoon. Lever, 283 S.C. at 453, 322 S.E.2d at 693. The plaintiff complained that the lagoon emitted offensive odors and leaked sewage that ran six hundred feet downhill into his fish pond, polluting the pond and killing the fish. Id. The central holding in Lever is that it was appropriate to allow a jury to determine whether or not the plaintiffs

had actually suffered inconvenience and damage or interference with the use and enjoyment of their property. Lever, 283 S.C. at 454, 322 S.E.2d at 693. The defendant's in Lever appealed a denial of a motion for directed verdict, and the Court of Appeals affirmed because the jury had heard testimony regarding how the defendant's actions had inconvenienced the plaintiff. Id.

Appellant misconstrues Lever, stating in his Second Amended Initial Brief, "The South Carolina Court of Appeals has ruled in a case very similar to the present one, that matters of nuisance, sewage, and odors are jury questions." Appellant seems to contend via the preceding statement that the South Carolina Court of Appeals has ruled that all nuisance matters involving sewage and odors are questions for the jury. This is not the holding of the case as set forth above. Further, Appellant's contention that Lever is factually "very similar" to the present matter is a misstatement. The only factual similarity is that both plaintiffs smell sewage. In Lever, it was clear where the sewage was coming from-a giant lagoon 600 feet from the plaintiff's property. In the present matter, the Respondent has provided evidence that the sewage Appellant is experiencing is not coming from, nor is it caused by, the lack of a septic system at the Baskins residence. Appellant seems to believe that allegations of smelling sewage and claiming inconvenience thereby are sufficient to allow him to drag any neighbor he deems responsible into court, regardless of what the evidence actually proves. The lower court's granting of summary judgment must be affirmed as it appropriately ignored Appellant's misguided representation of the facts and law in Lever.

3. The Appellant's Issue on Appeal No. 3, Regarding the Trial Court's Denial of Appellant's Motion to Amend His Claim to Add Attorney Ned Gregory, II as a Party, Has Not Been Preserved For Appellate Review.

Appellant's Motion to Amend his claim to add Gregory as a party was dated November 9, 2010 and was filed and served with Appellant's Motion for Reconsideration related to the September

30, 2010 Order Partially Dismissing Claims. The Motion to Amend was denied by Order dated February 4, 2011. No Motion for Reconsideration with respect to the February 4, 2011 Order was filed or served. Appellant has not filed or served a Notice of Appeal identifying the February 4, 2011 Order Denying Plaintiff's Motion to Amend Complaint as a subject of an appeal. Consequently, the subject of the proposed amendment of claim to add Ned Gregory as a party is not preserved for review by this Court.

4. Alternatively, the trial court acted well within its discretion in denying Appellant's motion to add attorney Ned Gregory, II as a party to the case.

The only proposed amendment identified in Appellant's motion is to add attorney Ned Gregory, II as a party-defendant for the purpose of trying to prove that he committed extrinsic fraud on the probate court related to the issue of the particular last will of decedent Reba Hinson that the probate court entered for probate.[2] (Appellant's Motion to Amend dated November 9, 2010). In paragraph 4 of his Motion to Amend and to Add parties, Appellant says that he **"proposes to add Ned Gregory, II, known to the South Carolina Court System as a document forger, . . . Gregory participated in the forging of documents in the present probate case, Gregory drew a document used to suborn perjury, with the end result being the wrong will probated . . ."** (emphasis added). This same issue was the subject of another proceeding involving Appellant, 2010-CP-12-0201 (the estate administration case in which an appeal is not pending in this court), described as follows.

[2] Paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the Motion to Amend all relate to the Ned Gregory issue.

Following a hearing on April 12, 2010, the Chester County Probate Court, Judge Gettys presiding as Special Probate Judge for Chester County, issued an Order dated April 19, 2010 by and in which the Probate Court decided three matters raised by Mr. Woods in his filings with the probate court regarding administration of the Reba Hinson estate[3]: (1) his Petition/Motion to Remove the Personal Representative; (2) his Rule 60 Motion to Vacate an earlier Order of the Probate Court; and (3) his Motion to have the aforesaid Rule 60 Motion to Vacate removed to circuit court for hearing and decision. (April 19, 2010 Order in case no. 2010-CP-12-0201.) In its April 19, 2010 Order the Probate Court denied Mr. Woods' motions in toto, in great part on the finding and conclusion that Mr. Woods is a stranger to the Reba Hinson estate and has no standing to involve himself in estate administration matters. The Probate Court held that Mr. Woods lacked standing to complain about who could serve as personal representative and which proposed last will would be entered for probate. (April 19, 2010 Order in case no. 2010-CP-12-0201.) The Circuit court affirmed the Probate Court's April 19, 2010 Order. By his motion to amend his Complaint in the above-captioned action to add attorney Ned Gregory as a defendant because of alleged fraud in the preparation and presentation of a last will signed by Reba Hinson, Appellant was attempting to do an end run around the Probate Court Order holding that the subject matter of Ned Gregory's involvement, if any, with the last will of Reba Hinson is not Appellant's concern.

A trial court has discretion to allow or not an amendment of the complaint, and such decision will not be overturned without a showing of abuse of discretion or unless manifest injustice has occurred. Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App. 1997), rehearing denied and

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[3] The April 12, 2010 hearing in the Probate Court that resulted in the April 19, 2010 Order was related to estate administration matters and not to the claim/amended claims filed against the estate by Mr. Woods.

certiorari denied. The party opposing a motion to amend a pleading has the burden of establishing prejudice. Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002).

The trial court denied the Motion to Amend on the ground that Appellant is a stranger to the Reba Hinson estate and has no standing to bring an action concerning the probating of Reba Hinson's last will, including to complain about Ned Gregory's role, if any, in the preparation of the last will or in the opening of the estate. (Judge Goldsmith Order dated February 4, 2011.)

To have standing, one must generally have a personal stake in the subject of the lawsuit, i.e., one must be a real party in interest. Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000). A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). Being only someone who has filed a claim against the estate, Plaintiff has no standing to be involved in estate administration matters. A creditor of the decedent cannot contest her will. 3 Bowe-Parker: Page on Wills §26.60. "Interested persons" may apply to the probate court for determination of issues arising under Title 62, Article 3. S. C. Code Ann. §62-3-105. A formal testacy proceeding (litigation to determine whether a decedent left a valid last will), S. C. Code Ann. §62-1-201(43) and §62-3-401, may be commenced by an interested person. Id.

Two last wills have been filed with the probate court: June 23, 1998 Last Will and Testament of Reba Pettit Hinson (last will) , and a document headed "Private Last Will" bearing the typed date April 5, 2003 but purportedly signed on April 24, 2003. There are signed and unsigned copies of the April 2003 Last Will. (signed and unsigned versions). The court's February 18, 2009 order admitted the June 23, 1998 Last Will to probate by agreement of the heirs and devisees. Appellant

is not a devisee under either Last Will. His name does not appear in either Last Will. He is a stranger to each of the Last Wills.

Mr. Woods has filed a claim against the estate. After filing his claim in November 2009, Mr. Woods was a claimant and was not, and still is not, a creditor whose claim has been allowed by either the personal representative or the court. It is in the capacity of a mere unproven or unallowed claimant that Mr. Woods now seeks to sue Ned Gregory on estate related allegations, by law a decision left solely to the personal representative.

Under these facts, Mr. Woods has no property interest that can be affected by the resolution of which last will to probate. Assuming, without admitting, that Mr. Woods can eventually prove a claim against the estate, the issue of which Last Will governs the estate does not affect Mr. Woods' property interests. The two wills name the same four devisees, the decedent's children, and the difference between the two wills is how the estate assets are divided among the four children. The size of the estate is not affected by which Last Will is probated, and the sequence of or relative priority for payments from the estate (the payment of allowed claims prior to distributions to devisees) remains the same. Mr. Woods' claim, if allowed, would be entitled to payment before distributions to the devisees could be made. S. C. Code Ann. §62-3-805 and §62-3-902. Whatever property interest Mr. Woods might have, if any, is unaffected by which Last Will is probated. Other authorities supporting this principle of law in analogous situations include: 3 Bowe-Parker: Page on Wills §26.52 (one who would not take more if the will in question were held to be invalid than he would take if it were held to be valid cannot, by the weight of authority, contest the will in question); Baker v. Henderson, 69 S.E.2d 278 (Ga. 1952) (if petitioners will not be injured or benefitted by the establishment and probate of the alleged copy will, they are strangers to it and are not proper parties

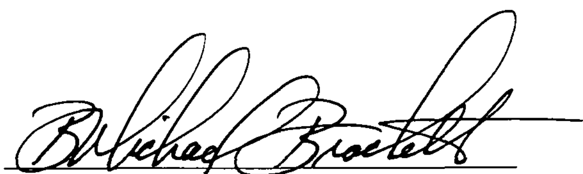
to the litigation); Estate of Keener, 521 N.E.2d 232 (Ill. App. 1988) (even if the latest will was invalid, earlier wills failed to name the contestant, so he was not entitled to contest); Matter of Wharton, 453 N.Y.S.2d 308 (1982) (generally a person who is not a distributee of the decedent and who will receive no part of a decedent's estate if a will is denied probate, will not be permitted to file objections to probate. The exception is when a person is named in a prior will and his interest under the prior will is greater than under the propounded will).

Other grounds to affirm the Order denying leave to amend are:

Plaintiff has already amended his Complaint/Petition for allowance of Claim once, and the amendment involved deleting the Ned Gregory allegations. The original claim contained a cause of action with respect to Ned Gregory's alleged role in the preparation and presentation of the Reba Hinson last will to the probate court. When Plaintiff filed his Amendment of Claim and elected to pursue only the matters alleged in the amended claim, Plaintiff elected to voluntarily dismiss the Ned Gregory allegations. Thereafter discovery was undertaken which did not include the subject of the Ned Gregory allegations, and pretrial motions have been made, argued and decided. The ping-pong, Gregory is in, Gregory is out, Gregory may be back in, causes the case to be impermissibly extended, and requires that Defendant pursue another round of expensive discovery. One bite at the Gregory apple should be enough, and amendments at this stage of the proceedings were rightfully denied. (after two of the Appellant's claims had already been dismissed in the September 30, 2010 Order and Gregory had nothing to do with the nuisance claim that would be later argued).

CONCLUSION

The trial court's Order Granting Respondent's Summary Judgment Motion on Appellant's nuisance claim should be affirmed. The trial court's Order Denying Appellant's Motion to Amend his claim to add Ned Gregory as a party should be affirmed because that Order was not properly appealed ant the issue was not preserved for appellate review. Alternatively, the Order Denying Appellant's Motion to Amend his claim to add Ned Gregory as a party should be affirmed because the trial court acted within its allowable discretion.



B. Michael Brackett, S.C. Bar # 838
Moses & Brackett, PC
P.O. Box 100261
Columbia, SC 29202
803.461.2312
Attorney for Respondent

July 12, 2012

STATE OF SOUTH CAROLINA

COUNTY OF CHESTER

IN THE COURT OF APPEALS

2010-CP-12-0168

IN THE MATTER OF: THE ESTATE OF REBA P. HINSON, PETITION FOR ALLOWANCE OF CLAIM

Mell Woods,

Plaintiff-Claimant,

v.

Robert H. Breakfield, as Personal Representative of the Estate of Reba P. Hinson,

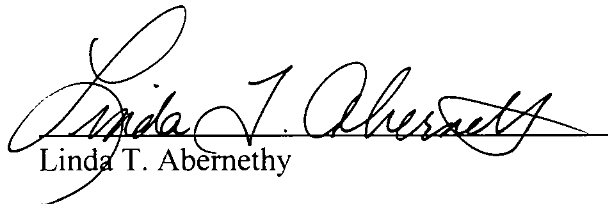
Defendant

CERTIFICATE OF SERVICE

RECEIVED
JUL 13 2012
SC Court of Appeals

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Defendant in the above-captioned matter, do hereby certify that I have served the Plaintiff, Mell Woods, with a copy of Respondent's Amended Initial Brief, postage prepaid and return address clearly indicated on said envelope, on this 12th day of July, 2012 at the following address:

Mell Woods
P. O. Box 2603
Lancaster, SC 29721
Plaintiff, pro se



Linda T. Abernethy

MOSES & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 650 (29201)
Post Office Box 100261
Columbia, South Carolina 29202-3261

Telephone (803) 461-2300
Facsimile (803) 461-2309

B. Michael Brackett
Direct Dial: (803) 461-2312
Email: mbrackett@mkb-law.com

July 12, 2012

The Honorable Tanya A. Gee
Clerk of Court
S.C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RECEIVED
JUL 13 2012
SC Court of Appeals

Re: Woods v. Hinson, et.al.
2010-CP-12-0595

Woods v. Breakfield, Personal Representative
2010-CP-12-168
2011191876

Dear Ms. Gee:

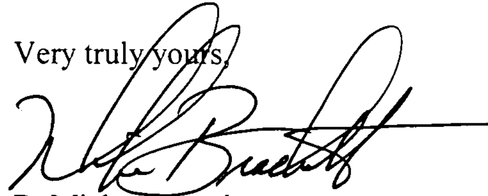
In Respondent's Initial Brief in case no. 2010-CP-12-168, the litigation history between the parties included the statement that the Appellant had apparently abandoned his appeal in case no. 2010-CP-12-0595. In his Initial Reply Brief, Appellant denied that he had abandoned his appeal in 0595.

A review of the Court's file will show that Appellant first served a Notice of Appeal in 0595 on or about January 7, 2012. By letter to the court dated January 25, 2012, Appellant asked that his appeal be dismissed without prejudice to allow his Rule 59(e) in Circuit Court to be heard and decided.

By Order dated February 29, 2012 the appeal was dismissed without prejudice. I was expecting the Appellant to file a Motion for Leave to Reinstate the Appeal, which was never done. However, I have discovered that the February 29, 2010 dismissal Order permitted a refiling of the appeal without a formal motion for reinstatement. I regret the oversight.

Accordingly, I am enclosing the original and six copies of Respondent's Amended Initial Brief that corrects the inaccurate statement on page 6, lines 8-9. If the Court requires a formal motion for this amended initial brief, please so advise. By copy of this letter a copy of the enclosed Respondent's Amended Initial Brief is being served on the Appellant.

Very truly yours,



B. Michael Brackett

BMB/bmb

Enclosures

cc. Robert H. Breakfield, Esquire
Mell Woods