

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Op. No. 2014-UP-430 (S.C. Ct. App. filed Nov. 26, 2014)
Appellate Case No. 2012-213579

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S.C. Supreme Court

Cashman Properties, LLC, Respondent,

v.

WNL Properties, LLC; E. Oswald Lightsey Trust f/b/o
Louise Lightsey Baughman; the Trust Under Will of
E. Oswald Lightsey dated August 8, 1958, and codicil dated
March 23, 1976, for the Benefit of Lillian Lightsey Drawdy;
and the Trust Under Will of E. Oswald Lightsey for the Benefit
of Claudia Lightsey Ware, Petitioners.

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

- I. Did the Master in Equity Correctly Grant Declaratory Relief to the Cashmans as a matter of law?

- II. Do Practical Reasons Exist for Granting this Petition?

COUNTER-STATEMENT OF THE CASE

This is a dispute over the ownership interests of a pier and two floating docks in Beaufort County, South Carolina. On May 21, 2009, the Cashmans¹ brought an action against the Defendants² seeking a declaratory judgment that the Cashmans were the owner of the walkway and pier head on “the Common Area into the May River” near Bluffton, South Carolina. (Supp. R. p. 11). The Cashmans also stated causes of action for: (1) prescriptive easement; (2) resulting trust; (3) injunctive relief related to the dock; and (4) adverse possession of the walkway, pier head and floating dock. The Cashmans also filed a lis pendens that same date.

Wachovia Bank, as trustee under the E.Oswald Lightsey Will, filed an answer on August 6, 2009, raising a number of defenses.

On September 3, 2009, the Cashmans filed an Amended Complaint which sought the same relief as the initial complaint. On October 15, 2009, all Defendants filed a joint answer to the Amended Complaint and on November 4, 2009, the Defendants filed an Amended Answer. On December 4, 2009, the court entered a consent order to correct misidentified parties in the caption.

¹ The plaintiffs were initially Eugene Keeny Cashman, Jr., as Trustee of the Eugene Keeny Cashman, Jr., Revocable Trust, and Kathleen Gilmore Cashman, as Trustee of the Kathleen Gilmore Cashman Revocable Trust. The court substituted Cashman Properties, LLC as the real party in interest at a later date. For simplicity, Respondents are simply referred to as “the Cashmans.”

² The initial defendants were E.O. Lightsey Trust and Wachovia Bank, N.A., as Personal Representative and/or Trustee of the Estate of the E.O. Lightsey Trust. The defendants were later changed to the parties who are Petitioners before the court. For ease they are referred to collectively as “Defendants” and separately identified where necessary.

The parties engaged in discovery and on May 18, 2010, Defendants moved for summary judgment. On July 29, 2010, the Cashmans filed a memorandum in opposition to Defendants' motion. The circuit court heard the motion on August 2, 2010, and on August 12, 2010, entered an order denying Defendants' motion.

On August 17, 2010, Defendants moved to file a Third Amended Answer so as to raise the Statute of Frauds as a defense.

On July 18, 2011, the court entered a consent order transferring the matter to the Master in Equity to hear the matter and enter a final judgment.

The case was tried on October 31 and November 1, 2011.³ On December 22, 2011, the master in equity entered an order finding:

1. The Cashmans and Defendants were co-owners as tenants in common of the entire pier and pierhead;
2. The ownership of "Dock 3" is appurtenant to the Defendants' property and the Cashman property;
3. The Cashmans were entitled to immediate access to the pier and pierhead and shall not be barred from such by Defendants or their agents;
4. Defendants had five (5) days to unlock the gate they had located on the pier or deliver a key to the Cashmans;
5. The Cashmans and the Defendants were to split equally the expenses directly related to the pier and pierhead that Defendants incurred from September 8, 2009

³ At a pretrial hearing the parties moved to substitute the named parties as they appear currently. (App. pp. 4-5).

- to the date of the order;
6. The Defendants had thirty (30) days to submit the amount of those expenses to the court;
 7. The court would determine the amount of those expenses to be paid by the Cashmans;
 8. All future costs for necessary maintenance and upkeep of the pier and pierhead would be divided equally between the parties or their successors in interest;
 9. The dock costs included, but were not limited to, insurance, taxes, maintenance, and upkeep for the pier and pierhead;
 10. The court would hold a supplemental hearing to determine how the parties would proceed in the future regarding payment of costs for maintenance and upkeep;
 11. That only the order for the supplemental hearing to determine costs should be considered the “final order” in the case for purposes of appeal.

(App. pp. 10-11). The order was filed on December 22, 2011.

The Defendants filed a motion for reconsideration on January 3, 2012. No specific grounds were stated therein. On July 10, 2012, the court entered its Order on Costs. On August 1, 2012, the Defendants filed a “Supplement” to the Motion to Reconsider or in the Alternative Alter Judgment on Behalf of Plaintiff. The supplement was directed at the July 10, 2012, order on costs, and did not state any specific grounds for relief.

On August 15, 2012, Defendants filed a Memorandum in Support of the Motion to Reconsider and the Motion to Amend. The Memorandum asserted numerous challenges to the court’s orders. The Cashmans filed a Memorandum of Law in

opposition to the Defendants' motions.

On November 5, 2012, the court entered an Amended Declaratory Judgment. On November 15, 2012, the court held a hearing and issued a supplemental order noting the court denied the Cashmans' claim for prescriptive easement.

On December 5, 2012, Defendants filed and served a notice of appeal from all orders entered in the case. On December 10, 2012, the Cashmans filed and served a notice of cross-appeal, but later withdrew the cross-appeal.

The Court of Appeals heard oral argument on October 8, 2014 and on November 26, 2014, filed its opinion affirming the Master in Equity's decision. Defendants timely sought rehearing and the Court denied that petition.

The Defendants' petition for a writ of certiorari followed.

FACTS

In their Petition, the Defendants do not challenge the factual findings by either the Master in Equity or the Court of Appeals. Thus, solely for purposes of the Return to the Petition, the Cashmans adopt the statement of facts as set forth by the Court of Appeals (App. pp. 817-820) and refer the Court to the summary of the testimony in their Final Brief of Respondent for background. (App. pp. 756-773).

For nearly eighty years, the Cashmans and the Defendants owned neighboring plots of land on Oyster Street in Beaufort County, South Carolina. The two properties do not abut the May River (the river); instead, they are located across Oyster Street from the river. In the early 1900s, with the Defendants' assistance, the Cashmans built a pier (Pier 1) on the commonly-owned neighborhood property (common property) across Oyster Street abutting the river. Pier 1 was affixed to the common property and extended out into the river.

In 1946, after a storm destroyed Pier 1, the Cashmans constructed a second pier (Pier 2) in the same vicinity, replacing Pier 1. The Defendants also assisted with constructing Pier 2 and both parties used the two piers. After a storm destroyed Pier 2, the Defendants constructed a new pier (Pier 3) in the same vicinity as Piers 1 and 2, replacing Pier 2. The parties agreed the Cashmans constructed, maintained, and regularly used a floating dock on the east side of Pier 3's pier head. In 2005, after a storm destroyed the floating dock, the Cashmans engaged a construction firm to replace it. However, the Defendants had placed a lock on Pier 3's entry gate and notified the Cashmans that they were no longer allowed to use Pier 3.

In 2009, the Cashmans brought a declaratory judgment action against the Defendants seeking a determination that the families were joint owners of Pier 3. The Cashmans also sought injunctive relief, alleging prescriptive easement, resulting trust, and adverse possession.

The Master in Equity issued a declaratory judgment, finding the parties were tenants in common with respect to Pier 3, ordering the Defendants to unlock the gate on Pier 3, and requiring the parties to equally split the expenses directly related to Pier 3 that the Defendants incurred since the date of filing and all costs for future maintenance and upkeep. The Master found laches barred the Defendants from recovering costs paid for constructing and maintaining Pier 3 prior to the date of filing. The Master stated the supplemental hearing order determining costs would be considered the final order for appeal purposes.

Prior to the final order, the Cashmans withdrew their adverse possession claim and the Master denied the Cashmans' claims for prescriptive easement and resulting trust. Following a costs hearing, the trial court ordered the Cashmans pay the Defendants \$214.18 for half of all maintenance expenses and \$247.83 for half of the property taxes the Defendants paid since the filing of the complaint. (App. pp. 666-667).

The Court of Appeals stated:

The Declaratory Judgment Act (the Act) provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status[,] and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §15-53-20 (2005). "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the [Act]." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423,

593 S.E.2d 462, 466 (2004). “To state a cause of action under the [Act], a party must demonstrate a justiciable controversy.” *Id.* “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” *Id.* (citations omitted). “The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights.” *Id.* “The [Act] should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995).

The [Defendants] argue the Cashmans are not entitled to a declaratory judgment because their claims for adverse possession, prescriptive easement, and resulting trust were withdrawn or dismissed. However, the Act provides trial courts are authorized to declare rights, status, and other legal relations whether any further relief is or could be claimed. § 15-53-20; *Sunset Cay*, 357 S.C. at 423, 593 S.E.2d at 466. We find the declaratory judgment issued here is in full conformity with the true intent and meaning of the Act. *Graham*, 319 S.C. at 71, 459 S.E.2d at 845.

(App. p. 819). The Court of Appeals found the presence of an actual controversy in this case was sufficiently demonstrated by the pleadings, stating:

In their amended complaint, the Cashmans sought a declaratory judgment declaring that the parties are “by virtue of the facts set forth in the preceding paragraphs, the joint owners, as tenants in common, of [Pier 3] located on and emanating from the [c]ommon [p]roperty.” Further, the amended complaint states, “**WHEREFORE**, the Plaintiffs pray that this Honorable Court issue an Order finding the Plaintiffs and Defendants are joint owners of the fixture affixed to the [c]ommon [property] as tenants in common and for such relief as this [c]ourt may find just and proper.” Therefore, from the pleadings and proceedings below, it is abundantly clear that the parties were in an “actual controversy” over their respective rights to Pier 3. *See Sunset Cay*, 357 S.C. at 423, 593 S.E.2d at 466 (“To state a cause of action under the [Act], a party must demonstrate a justiciable controversy.”).

During oral arguments before this court, the [Defendants] contended the pleadings did not put them on notice that the Cashmans

were claiming ownership of the pier as an appurtenant structure to commonly-owned property. We disagree. The complaint clearly asserts the pier is attached to a 1/10 acre strip of land, to which the [Defendants] concede in their answer is common property. Further, we are not persuaded by the [Defendants'] remaining arguments on this issue and find there is substantial evidence in the record to support the trial court's decision that the [Defendants] and the Cashmans are tenants in common with respect to Pier 3. Finally, we observe that the [Defendants] have not appealed the trial court's finding that there has been "no effective ouster" of the Cashmans as tenants in common. Accordingly, the trial court properly granted the declaratory judgment.

(App. pp. 819-820).

The Defendants sought rehearing and the Court of Appeals denied their petition.

ARGUMENTS

I. The Master in Equity Correctly Granted Declaratory Relief to the Cashmans

Defendants contend that because the Cashmans sought relief under the theories of adverse possession, resulting trust or prescriptive easement, and none of these underlying theories survived to the final order, then the Court of Appeals erred in holding the Master in Equity had authority to enter a declaratory judgment. (Petition, pp. 7-10). The Court should deny review of the unpublished opinion the Court of Appeals filed in this case.

Defendants argue that the Court of Appeals should not have affirmed the circuit court's grant of a declaratory judgment "in the absence of any substantive basis of ownership having been established." (Pet. pp. 7-9). The Court should not be persuaded by this argument.

The Declaratory Judgments Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (1976); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004). "Any person ... whose rights, status, or other legal relations are affected by a ... contract ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (1976); *Sunset Cay*. See also Rule 57, SCRPC ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."); S.C. Code Ann. § 15-53-40 (2005) ("A contract may be construed either before or after breach.").

In this case, the Cashmans brought an action for a declaration that the parties are “the joint owners, as tenants in common, of the fixture (i.e. the walkway and pier head) located on and emanating from the Common Property.” (App. p. 680, ¶ 31). The Cashmans requested the court “issue an Order finding the [parties] are joint owners of the fixture affixed to the Common Area as tenants in common and for such other relief as this Court may find just and proper.” (App. p. 680, prayer). The Cashmans also stated causes of action for prescriptive easement (App. p. 680, Second Cause of Action), Resulting Trust (App. p. 681, Third Cause of Action), Injunctive Relief (App. p. 682, Fourth Cause of Action), and Adverse Possession (App. p. 682, Fifth Cause of Action).

At trial, the Cashmans withdrew the claim for Adverse Possession, and the Master found the Cashmans failed to prove a prescriptive easement. (App. p. 21, ¶ 1). The Cashmans also prayed, however, that the Court “determine ownership rights of the land at issue in the Plaintiffs’ Fifth Cause of Action; determine that the Plaintiffs own an undivided interest in and to the walkway, pier head, and floating dock through adverse possession; and for such other relief as this Court may find just and proper.” (App. p. 683, prayer).

In the order, the Master held the case involved “ownership of a pier, pierhead and two floating docks....” (App. p. 5, ¶ 2). The Master also found the case presented “a justiciable controversy, and a Declaratory Judgment pursuant to the Declaratory Judgments Act, S.C. Code 15-53-10, *et. seq.* is necessary to determine the rights and relationship of the Parties to this action.” (App. p. 9, ¶ 1). The Master declared the parties are “co-owners as tenants in common of the entire pier and pierhead.” (App. p. 9, ¶ 5).

The Master also found “in the absence of an agreement or contract, a fixed and permanent structure constructed on common property and used by co-owners in a manner such as this becomes common property.” (App. p. 10, ¶ 7). The Court of Appeals properly affirmed these rulings.

This Court in *Sunset Cay* noted that despite the Declaratory Judgment Act’s broad language, it has its limits. The Court stated:

An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). A declaratory judgment should not address moot or abstract matters. *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951).

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Power v. McNair*, 255 S.C. at 154, 177 S.E.2d at 553. “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” *Power v. McNair*, 255 S.C. at 154, 177 S.E.2d at 553; *Graham v. State Farm Mutual Automobile Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (same); *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (same).

The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. *Waller*, 220 S.C. at 223, 66 S.E.2d at 882. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship. *Graham*, 319 S.C. at 71, 459 S.E.2d at 845; *Power*, 255 S.C. at 154, 177 S.E.2d at 553; *Waller*, 220 S.C. at 223, 66 S.E.2d at 882; *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888-89 (Ct. App. 2002).

Our courts have found the existence of a justiciable controversy, for example, in determining whether a vehicle insurance policy should be reformed to include underinsured motorist coverage, *Graham, supra*; in determining whether the consolidation of two municipalities resulted in the merger of municipally owned utility systems, *City of Columbia, supra*; in the determination of heirs' contingent or vested interest under a will, *Waller, supra*; in deciding whether the court should issue a writ of mandamus directing the sheriff to accept a non-cash bid at a judicial sale, *Holden, supra*; and in a dispute involving homeowners' challenge to amendments of their subdivision's restrictive covenants, *Pond Place Partners, supra*.

Sunset Cay, 357 S.C. at 423-424, 593 S.E.2d at 466-467 (underline added). Thus, courts entertain declaratory judgment actions in all kinds of cases to answer questions so as to resolve various kinds of disputes. *See also All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South*, 385 S.C. 428, 685 S.E.2d 163 (2009) (church congregation filed a declaratory judgment action against the national church and local Diocese seeking an order declaring that the congregation held title to its property or, in the alternative, held its property in trust for the benefit of the inhabitants of the Waccamaw Neck pursuant to a Trust Deed); *In re Estate of Rider*, 394 S.C. 84, 713 S.E.2d 643 (Ct. App. 2011) (personal representative of decedent's estate filed petition for declaratory judgment in probate court, naming Wife and ten others as respondents to the petition, and seeking a determination of whether decedent's execution of the letter completed the transfer of all the securities such that they are not part of decedent's estate); *Southeast Toyota Distributors, LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 693 S.E.2d 33 (Ct. App. 2010) (Southeast Toyota brought a declaratory judgment action against Jim Hudson to determine whether Hudson's relocation of his dealership was exempt from protection pursuant to S.C. Code Ann. § 56-15-46(C)); *Query v.*

Burgess, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2006) (Query brought a declaratory judgment against Burgess and the State of South Carolina seeking to establish ownership over certain marshlands abutting his Folly Beach property).

There is no question that there is a justiciable controversy in this case, namely, whether the Cashmans have an ownership interest in Dock 3. That is all that is required under the Act and under Rule 57.

Defendants point to *Harvey v. South Carolina Department of Corrections* for the rule that the Act “does not create substantive rights or duties.” 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000) (Pet. pp. 7-8). Defendants also point to the case upon which *Harvey* relied, *Felts v. Richland County*, 299 S.C. 214, 383 S.E.2d 261 (Ct. App. 1989), *aff’d* 303 S.C. 354, 400 S.E.2d 781 (1991). (Pet. p. 7). These cases, however, did not prevent the Master from entering the order he entered in this case.

The discussion the Defendants lifted from *Harvey* and from *Felts* involved the appellate courts’ discussion of their scope of appellate review. The courts were explaining that an action brought under the Act is “neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts*, 303 S.C. at 356, 400 S.E.2d at 782. That is, a declaratory judgment action is simply that, an action to declare rights, but whether the action is legal or equitable depends on the nature of the underlying issue and the main purpose of the complaint. *See Estate of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997) (“To make this determination the court looks to the main purpose of the action as determined by the complaint.”).

Here, the main purpose of the complaint was the determination of the ownership

of property affixed to a common area. This is akin to an action at law to determine title to real property. *Cf. Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001) (where main purpose of complaint concerns determination of title to real property, it is an action at law). That purpose did not change where the claims for adverse possession or prescriptive easement failed.

Defendants also point to cases from other jurisdictions in support of the argument that “success on a declaratory judgment action is necessarily dependent on success of an underlying claim.” (Petition, pp. 7-8). These cases, however, are meaningfully distinct from this case, and do not control the procedure in South Carolina. *See Becker v. Kroll*, 340 F. Supp.2d 1230 (D. Utah 2004), *aff’d in part and rev’d in part*, 494 F.3d 904 (10th Cir. 2007) (district court did not describe the nature of the declaratory relief, just that plaintiff brought a claim for “declaratory judgment” and stated, without citation to authority, the language Defendants quoted in their petition in this case; the Tenth Circuit Court of Appeals reversed without addressing this portion of the district court’s order); *Days Inn Worldwide, Inc. v. Sai Baba, Inc.*, 300 F. Supp.2d 583 (N.D. Ohio 2004) (noting defendants failed to link their counterclaim for declaratory judgment to an underlying substantive claim for relief, without citation to any authority for the specific rule; the Ohio court relied upon *Int’l Ass’n of Machinists and Aerospace Workers v. Tennessee Valley Authority*, 108 F.3d 658, 668 (6th Cir.1997) that held a declaratory judgment action is barred if the underlying claim is time-barred by the statute of limitations); *Economic Opportunity Com’n of Nassau County, Inc. v. County of Nassau*, 106 F. Supp.2d 433 (E.D. N.Y. 2000) (the federal Declaratory Judgment Act, 28 U.S.C. § 2201,

merely provides a remedy where none previously existed, and does not supply an independent cause of action; a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief; district court stated it was “at a loss to discern the underlying substantive claim alleged by the Plaintiffs in the particular causes of action”); *Matos v. First Nat. Bank*, 27 Mass. L. Rptr., 2010 WL 3327725, slip at 4 (Mass. Super. 2010) (in a memorandum opinion the superior court of Massachusetts stated, without citation to authority, that the “Plaintiff has requested that this court invalidate Defendant Mokkedem’s claim to legal title to the property. However, this claim is dependent on the success of the Plaintiff’s claims under Chapter 93A and Chapter 183C. Due to the failure of the Plaintiff’s previous claims, the claim must also fail”; the Chapter 93A claim failed due to the expiration of the applicable statute of limitations, and the Chapter 183C claim failed due to Plaintiff’s contrary admissions on a tax return, that is, under a rule akin to judicial estoppel); *Repwest Ins. Co. v. Praetorian Ins. Co.*, 890 F. Supp.2d 1168 (D. Ariz. 2012) (court noted plaintiff sought “a declaration that [defendant’s] conduct constituted a breach of contract that existed between [plaintiff and defendant]” under Arizona’s reinsurance statute governing brokers, and dismissed the claim for declaratory relief because the court had already dismissed plaintiff’s only cause of action against defendant for breach of contract).

As can be seen, *none* of these cases informed the Court of Appeals or this Court on how to apply the South Carolina Declaratory Judgment Act or Rule 57. Each case is limited to the distinct facts and none of them arise under a procedure akin to the Act or South Carolina’s Rule.

Defendants also point to the North Carolina case of *State ex rel. Edmisten v. Tucker*, 323 S.E.2d 294 (N.C. 1984) for the rule that “the Act creates a new remedy, not a new source of legal rights and obligations.” (Petition p. 1). This is a misstatement of the holding of that case.

In *Edmisten*, the North Carolina attorney general sought a declaratory judgment as to the constitutionality of the North Carolina Safe Roads Act of 1983. The attorney general sued “those judges who had declared portions of the Act unconstitutional or construed its provisions in a manner adverse to the State.” *Edmisten*, 323 S.E.2d at 299.

The North Carolina Supreme Court stated “while a determination of the constitutionality of a statute may be a proper subject for declaratory judgment, jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *Edmisten*, 323 S.E.2d at 303. The North Carolina Court concluded:

As we noted earlier, whether any provision of the Safe Roads Act is now or later determined to be constitutionally valid or infirm is of no concern to the personal rights, status and legal relations of the judicial defendants. *The jurisdictional prerequisite of an actual and existing case or controversy between antagonistic litigants stands to insure that when a dispute is brought before a judge for issuance of a declaratory judgment, all parties will be sufficiently and sincerely interested and motivated by their stake in the outcome of the litigation to present all facets of the issue under consideration.* Clearly it is the individual defendants who possess such direct interests in the outcome of the legal issues alleged in the Attorney General’s complaint, and not the district court judges who presided over their criminal trials.

In conclusion, although the Attorney General has a “compelling interest” in the enforcement of the criminal laws, such an interest does not entitle him to maintain a declaratory judgment proceeding against judges of the district court who rule adversely to the State in the discharge of their

constitutionally mandated duties to exercise the judicial power in deciding cases brought before them. The judicial rulings at issue simply may not be considered impediments to the discharge of the Attorney General's duties; they are necessary constituent parts in the process of criminal justice which both parties serve. Accordingly, *the trial court correctly concluded that the judicial defendants are not "antagonistic litigants" with, nor parties with adverse interests to, the Attorney General of the people of North Carolina, as concerns the Safe Roads Act, and properly dismissed the complaint as to the judges on this basis.*

Id. at 307-308 (emphasis added). The North Carolina Court concluded:

In conclusion, the trial court properly dismissed the complaint *for failure to disclose the existence of an actual or real existing controversy between the parties to the action necessary to invoke the court's jurisdiction under the Declaratory Judgment Act.* (citations omitted) As to the judicial defendants, *no adversity of interest exists* and they may not be considered as parties to the underlying controversies in the criminal prosecutions over which they presided in their official capacities. As to the individual defendants, although adversity of interest as to the validity and construction of the Safe Roads Act was properly alleged, *no actual or real existing controversy between these parties and the State may be premised upon pending cases or cases in which judgments have been entered by courts of competent jurisdiction.*

323 S.E.2d at 313-314 (emphasis added). Thus, it was the lack of "antagonistic litigants" or "an actual or real controversy" that drove the decision to dismiss the Attorney General's request for a declaratory judgment. It was not the lack of some other underlying substantive claim.

Edmisten has been cited in North Carolina for the proposition that there must be an actual or real existing controversy between parties having adverse interests in the matter in dispute. *See, e.g., Malloy v. Cooper*, 565 S.E.2d 76 (N.C. 2002) (citing *Edmisten* for that proposition); *Ludlum v. State*, 742 S.E.2d 580 (N.C. Ct. App. 2013) (same). Thus, Defendants' parenthetical cite to this case (without even identifying that it

is a *North Carolina* case and not a South Carolina case) (Petition, p. 1) is incomplete and misleading.

In this case there is in fact an existing controversy between parties having adverse interests in the matter in dispute. Even under the holding of *Edmisten*, then, the Master and the Court of Appeals both correctly found the Cashmans' action under the Declaratory Judgment Act was proper.

The Court should therefore reject Defendants' argument that the Master in Equity had no authority to enter a declaratory judgment and should deny review in this matter.

II. Practical Reasons Do Not Exist to Grant the Petition

Contrary to Defendants' assertion, the Court of Appeals' unpublished opinion disposing of this appeal does not create any confusion in the law, nor does it turn the Act "into a source of unstated and far reaching substantive rights." (Petition, pp. 10-11). The Court should not be persuaded by such unfounded hyperbolic argument.

First, as an unpublished opinion, the decision has no precedential value beyond the case involved in the decision. Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). *Cf. Ford v. Beaufort County Assessor*, 398 S.C. 508, 515 n. 3, 730 S.E.2d 335, 339 n. 3 (Ct. App. 2012) (noting an administrative law judge was not compelled to follow a previous unpublished Court of Appeals opinion in an unrelated case because the unpublished opinion was not "binding authority").

Second, Defendants contend “a defendant will not know what he must defend or what the plaintiff must prove in order to prevail” when “confronted with a complaint for a declaratory judgment...” (Petition, p. 10). The short answer is that the pleading itself told the Defendants in this case that the Cashmans were seeking a declaration that the parties are “the joint owners, as tenants in common, of the fixture (*i.e.* the walkway and pier head) located on and emanating from the Common Property.” (App. p. 680, ¶ 31). In the pleading the Cashmans requested the court “issue an Order finding the [parties] are joint owners of the fixture affixed to the Common Area as tenants in common and for such other relief as this Court may find just and proper.” (App. p. 680, prayer). Defendants’ contention that they had no way to know how to defend this case is just wrong.

Third, this precise argument was not made to the trial court, was not ruled upon by the trial court, was not raised in the Court of Appeals, and was not made in the Petition for Rehearing to the Court of Appeals (App. pp. 822-837). It is now being made way too late in the process. *See* Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”). *Cf. Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (a party may not raise an issue for the first time in a petition for rehearing); *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001) (refusing to reach argument raised for the first time in petition for rehearing).

As the Court of Appeals found, the Cashmans’ primary purpose in bringing this case was to require the Defendants to remove the lock from Pier 3 to enable the

Cashmans to continue to use the pier. That is, their primary purpose was to obtain injunctive relief. The Complaint plainly stated so, and set forth a justiciable controversy which is all this is required by the Act. They sought a declaration of rights, something the Act expressly provides. Section 15-53-20.

The Court of Appeals was not persuaded by the Defendants' contention at oral argument "that the pleadings did not put them on notice that the Cashmans were claiming ownership of the pier as an appurtenant structure to commonly-owned property." (App. p. 820). The Court noted the complaint "clearly asserts the pier is attached to a 1/10 acre strip of land, to which the [Defendants] concede in their answer is common property." (App. p. 820). The Court added that the trial court's decision was supported by substantial evidence in the record. (App. p. 820).

Even if this contention was properly before the Court, adopting the rule that the Defendants advocate would essentially gut the Act. It would require that before a party obtain a declaration of rights, the party must plead and prove some right under some other substantive law, rendering the declaratory judgment process to be a second (and seemingly unnecessary) vehicle for addressing that right. That has never been the law, and this case does not provide a compelling reason for this Court to ignore the plain language of the statute and adopt such a restrictive rule. *See* S.C. Code Ann § 15-53-20 (2005) ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed.*")(emphasis added); *Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008) (rejecting a similar argument made by the State that the Court of Common Pleas did not

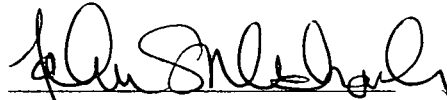
have jurisdiction to make a factual finding regarding respondent's kidnaping offense; Court held under § 15-53-20 the Court of Common Pleas had the power to make the factual finding); *South Carolina Tax Com'n v. United Oil Marketers, Inc.*, 306 S.C. 384, 412 S.E.2d 402 (1991) (noting the Tax Commission brought an action under § 15-53-20 solely to declare whether a provision of the Tax Code was constitutional; no other relief was sought or even permitted because of the manner in which the Tax Commission pled the case).

The master in equity made the correct decision in this case, declaring the parties' rights with respect to the justiciable controversy over ownership and use of Pier 3. The Court of Appeals appropriately rejected the Defendants' argument that the Declaratory Judgment Act is of such limited application so as to require as a prerequisite the ability to obtain "further relief" for some other existing claim for relief. This Court should deny review of the Court of Appeals' decision and permit the Court of Appeals to remit the matter to the trial court for further proceedings consistent with its decision.

CONCLUSION

For the reasons stated, this Court should deny the Defendants' request for a writ of certiorari to the Court of Appeals in this matter.

Respectfully Submitted,



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May 11, 2015

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Op. No. 2014-UP-430 (S.C. Ct. App. filed Nov. 26, 2014)
Appellate Case No. 2012-213579

RECEIVED

MAY 12 2015

S.C. Supreme Court

Cashman Properties, LLC, Respondent,

v.

WNL Properties, LLC; E. Oswald Lightsey Trust f/b/o
Louise Lightsey Baughman; the Trust Under Will of
E. Oswald Lightsey dated August 8, 1958, and codicil dated
March 23, 1976, for the Benefit of Lillian Lightsey Drawdy;
and the Trust Under Will of E. Oswald Lightsey for the Benefit
of Claudia Lightsey Ware, Petitioners.

PROOF OF SERVICE

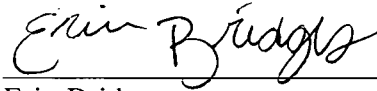
The undersigned hereby certifies that on the date indicated below she served
counsel for the Petitioners with a copy of the *Return to Petition for Writ of Certiorari* by
mailing copies of the same by United States Mail with first class postage prepaid to the
following addresses:

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Karl D. Twenge, Esquire
Twenge + Twombly Law Firm

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May 12, 2015

A handwritten signature in cursive script that reads "Erin Bridges". The signature is written in black ink and is positioned above a horizontal line.

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

May 12, 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAY 12 2015

S.C. Supreme Court

RE: Cashman Properties v. WNL Properties
Case Tracking No.: 2015-000736

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the *Return to Petition for Writ of Certiorari* in this case. I have also enclosed a proof of service of this document upon counsel for the Petitioners. Please return the additional filed copy to me via our courier.

Thank you for your assistance with this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb

Enclosures

cc: Mark S. Berglind, Esquire
Roberts Vaux, Esquire
James P. Scheider, Jr., Esquire

Robert E. Stepp, Esquire
Roland M. Franklin, Jr., Esquire
J. Ashley Twombly, Esquire
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