IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS

Honorable Doyet A. Early, III

Civil Action No. 10-CP-02-02981

I. Lehr Brisbin, ... Appellant

vs.

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

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

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FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Appellant 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 Appellant's property. On or about January 13, 2011, the Appellant 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, Defendants Aiken Electric Cooperative, Inc. and Gary Stooksbury ("Aiken Electric") filed their Answer. On or about January 27, 2011, the Appellant 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 Appellant 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

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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.

judgment in favor of Aiken Electric.

On or about December 20, 2011, the Appellant 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, this Notice of Appeal was filed.

I.

THE APPELLANT FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 56, SCRCP AND IS THEREFORE NOT ENTITLED TO RELIEF.

At the hearing on November 7, 2011, the only argument made by Appellant's counsel 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 thsi 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)

Rule 56(f), SCRCP makes it clear that a lawyer can simply not show up at a hearing and defeat a summary judgment motion by making a general, non-specific argument that discovery is needed. Rule 56(f) provides as follows:

> "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."

Here, neither the Appellant nor his counsel filed an affidavit that the Appellant could not for reasons stated therein present by affidavit facts essential to justify opposition to the motion. Rule 56(f) is clear and unambiguous. Rule 56(f) is binding on litigants and the court as well. All Judge Early did was apply the plain language of Rule 56(f), as he should have. Accordingly, his decision should be affirmed.

II.

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

The Appellant's counsel, at the hearing before Judge Early on November 7, 2011, only argued that "we don't have all discovery that is complete 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 Appellant 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 Appellant had no damages, he had no viable cause of action. Additional discovery, whatever it might be, would not cure this defect.

Since the Appellant failed to demonstrate a likelihood that further discovery would uncover additional relevant evidence creating a question of fact, he is not entitled to relief in this appeal.

III.

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

In his brief, the Appellant has made the following argument in his brief to this Court::

> "Counsel for AEC repeatedly requested that summary judgment should be granted because the Appellant could not demonstrate monetary damages. The trial court judge at the November 7, 2011 hearing questioned counsel for the Appellant 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 Appellant 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 Appellant's amended complaint. (R. P. 86-87)" Appellant's Brief, page 5.

However, this argument cannot avail the Appellant. The Appellant 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. Appellant'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. Appellant is not entitled to relief upon this ground.

IV.
APPELLANT'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 AND IS NOT PRESERVED FOR REVIEW.

The Appellant, on page 8 of his brief, has argued as follows:

"Counsel for the Appellant argued that if damages could not be quantified then a review of the record indicated that there was a genuine issue of material fact as to the issue of the injunction due to AEC exceeding the scope of AEC's power-line maintenance. (R. P. 89)" Appellant's Brief, page 8.

> It is the Appellant's opinion that a genuine issue of material fact existed as to the cause of action for the injunction against AEC. AEC's contention was that they were following their correct right-of-way procedures for maintaining their power lines on the Appellant's property. However, the Appellant's Response to Motion for Summary Judgment filed October 18, 2011 demonstrated that there was a genuine issue of material fact as to the issue of the injunction." Appellant's Brief, page 8.

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 is not preserved for review.

V.

EVEN IF THE APPELLANT'S ARGUMENT REGARDING INJUNCTIVE RELIEF WERE PRESERVED FOR REVIEW, THIS ARGUMENT, FOR THE REASONS STATED BY JUDGE EARLY, IS INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

The Appellant'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.

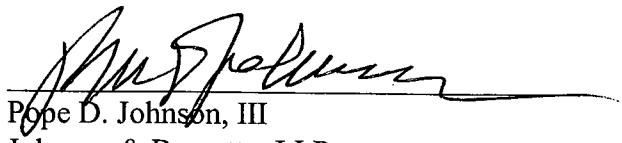
> "The plaintiff argued that summary judgment should not have been granted on the claim for injunctive relief since the plaintiff was seeking an injunction to prevent the use of herbicides on his property. However, I find that there is no genuine issue of fact relating to the claim for an injunction. 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."

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 Appellant's counsel argued that further discovery was needed, Appellant's counsel did not identify any pending or proposed discovery that would yield relevant evidence and create genuine issue of material fact. Counsel 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. This Court should now do likewise and affirm.

Respectfully submitted,



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PROOF OF SERVICE

I, Susan J. Mondello, of Johnson & Barnette, LLP, hereby certify that I have served the Initial Brief of Respondent by mailing a copy of same, postage prepaid and return address clearly indicated, to the attorney for the Appellant, Mark J. Devine, Law Offices of Mark J. Devine, P.O. Box 2008, Aiken, SC 29802 on the 13th day of June, 2012.

Susan J. Mondello

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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