

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
JUN 20 2013

APPEAL FROM CHESTER COUNTY  
Court of Common Pleas

SC Court of Appeals

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2010-CP-12-0595

Mell Woods ..... Appellant,

v.

John D. Hinson, Christine E. Jones, John C. Hinson, Kathy Huffstickle,  
Robert H. Hinson, Darrell W. Hinson, Charles J. Hinson, William L. Hinson,  
Elaine H. Hensley, William C. Hinson, Jr., John Does, (1-5), Jane Does, (1-2) . . . . Respondents.

RESPONDENTS' BRIEF

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In filing and serving this Initial Brief and the accompanying Designation of Matter to be Included in the Record on Appeal, Respondents reserve all rights and arguments in their Motion to Dismiss Appellant's Issue on Appeal No. 2.

### STATEMENT OF ISSUES ON APPEAL

1. The trial court did not rely solely on arguments of the Respondents' trial attorney and properly considered the state of the trial court record when it granted summary judgment in favor of the Respondents. (Appellant's Issue on Appeal No. 1).
2. Appellants' Issue on appeal No. 2 is not preserved for appellate review because Appellant's argument is so deficient as to constitute an abandonment of the issue.

### STATEMENT OF THE CASE

Respondents object to Appellant's Statement of the Case because it violates Rule 208(b)(1)(C), SCACR, by including argument and contested matters from other cases.

Appellant filed this action against the members of the Hinson family on December 9, 2010. (R. p. 611-619). Appellant alleges that the Hinson family, as descendants of Levie and Reba Hinson and as owners of a neighborhood on Fishing Creek Lake are responsible for the conduct of one Richard Van Griffin, alleged to have then been occupying a residence in the neighborhood. Respondents generally denied Appellant's allegations and alleged counterclaims that are not relevant to these appeal proceedings. (R. p. 648-652 and 653-657). The timing of the Answers was the product of the dates of service of process on the Respondents.

Following pretrial discovery, the Respondents moved for summary judgment. (R.p. 627-628.) Respondents' Motion for Summary Judgment was heard on November 9, 2011 by the Honorable Brooks P. Goldsmith. By Order dated November 14, 2011, the Motion for Summary Judgment was granted. (R.p. 619-626.)

Appellant served his Rule 59(e) Motion to Alter or Amend Summary Judgment on December 19, 2011. (R.p. 588-595.)

On December 30, 2011, before his Rule 59(e) motion was decided, Appellant served his Notice of Appeal. (R.p. 578-579.)

On or about January 7, 2012, without leave of court, Appellant filed and served a “First Amended Notice of Appeal.” (R.p. 580-581.)

By letter to the Court of Appeals dated January 25, 2012, Appellant asked that his appeal be dismissed without prejudice to allow his Rule 59(e) motion to be heard in the Circuit Court. (R.p. 584-585.)

By Order filed February 29, 2012, this Court granted Appellant’s motion for dismissal of appeal without prejudice. (R.p. 586.)

On March 13, 2012 Respondents served their Return to Appellant’s Rule 59(e) motion. (R.p. 596-600.)

By Remittitur filed March 22, 2012, the case was remitted to the Circuit Court. (R.p. 587.)

By Order filed April 25, 2012, the Circuit Court denied Appellant’s Rule 59(e) motion. (R.p. 629.)

On May 29, 2012 Appellant filed and served a Second Amended Notice of Appeal.

#### 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), SCRC, 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.

### 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. All four cases have thus far resulted in Orders favorable to the above-captioned Respondents and their agent, and to the Personal Representative of the Reba Hinson Estate.

Case 1. 2010-CP-12-0168 (tracking no. 2011-191876). Reba Hinson died in January 2007. Plaintiff filed three claims against the Estate of Reba Hinson. Those claims were dismissed in case no. 2010-CP-12-0168. The claim for nuisance damages was dismissed by summary judgment, and Appellant's appeal of the summary judgment order to the Court of Appeals is pending under the above tracking number. Initial briefs have been filed.

Case 2. 2010-CP-12-0201 (tracking no. 2011-201066). Appellant tried to insert himself into the administration of the Reba Hinson estate by seeking to have the personal representative removed and advocating that the probate court was probating the wrong last will of Reba Hinson. The probate court denied Appellant's petitions and

motions<sup>1</sup>, and the circuit court, sitting as an appellate court, affirmed the probate court's Order. Appellant has appealed the case to this court, and final briefs have been filed.

Case 3. 2010-CP-12-0595 (tracking no. 2012-206469); the above-captioned tort case.

Case 4. 2011-CP-12-0323 (tracking no. 2012-212330) 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.) Appellant's motion for reconsideration was denied in April, 2012, and Appellant has filed an appeal in this court.

#### SUMMARY JUDGMENT LAW

Summary Judgment. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCPP; Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); South Carolina Elec. & Gas v. Town of Awendaw, 351 S.C. 491, 570 S.E.2d 542 (Ct. App. 2002) In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Osborne v. Adams, supra.; Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

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<sup>1</sup> One of the grounds for the probate court's ruling was that the Plaintiff was not a devisee in any version of Reba Hinson's last will and therefore is a stranger to the Reba Hinson estate and has no standing to insert himself into matters of estate administration.

A fact is material if it is “outcome determinative” under the applicable law, that is, if its existence in a case will have some impact in deciding the facts of the case. Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160 (7<sup>th</sup> Cir. 1984); PPG Indus. V. Orangeburg Paint & Decorating Center, 297 S.C. 176, 375 S.E.2d 331, 332 (Ct. App. 1988). When the facts, and all reasonable inferences to be drawn from the underlying facts, are viewed in a light most favorable to the non-moving party, and the record nevertheless reveals that the opposing party would not prevail under any discernable circumstances, summary judgment is appropriate. Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). However, a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth specific facts showing a genuine issue for trial. Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329, 335 (2003).

To survive a summary judgment motion by the defendant in a lawsuit, the plaintiff must offer some evidence that a genuine issue of material fact exists for each element of the claim at issue except for those elements that are either uncontested or agreed to by stipulation. Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011). Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

## ARGUMENT

1. **The trial court did not rely solely on arguments of the Respondents' trial attorney and properly considered the state of the trial court record when it granted summary judgment in favor of the Respondents. (Appellant's Issue on Appeal No. 1).**

Pursuant to Rule 56(c), SCRCF, "summary judgment motions and, inferentially, supporting materials [are required] to be on file when they are to be relied upon at a summary judgment motion hearing." Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App.1991). This would also necessarily apply to materials in opposition to a summary judgment motion. The "on file" requirement is satisfied when (1) the document is filed with the clerk of court prior to the hearing; or (2) the document is delivered to and received by the trial judge at the time of the hearing. Id.

The materials that were "on file" at or during the November 9, 2011 summary judgment hearing were:

- Plaintiff's deposition transcript (R.p. 619, text lines 9-13; and p. 714, l. 12-20);
- The video disc or tape made by Appellant (R.p. 619, text lines 9-13; and p. 714, l. 12-20);
- Affidavit of Robert Breakfield, Personal Representative (R.p. 619, text lines 9-13; and p. 715, l. 2-9); and
- Plaintiff's Affidavit (R.p. 609; and p. 619, text lines 12-13.)

The Index page of the November 9, 2011 hearing transcript shows that "There were no exhibits marked." (R.p. 712.)<sup>2</sup>

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<sup>2</sup> The November 9, 2011 hearing transcript actually includes summary judgment arguments in two cases - the case *sub judice* and case no. four above (2011-CP-12-0323.) . The transcript contains 48 pages; pages 3 through 20 relate to the summary judgment motion in the above-captioned case, and pages 24 through 42 relate to the summary judgment motion in case no. four above.

Appellant's Complaint in the case was not verified. (R.p. 611-619.)

In the Order Granting Summary Judgment, the trial court noted that the Appellant's affidavit "contains nothing more than conclusory allegations that are not entitled to any weight when raised in opposition to a motion for summary judgment." (R.p. 620, 1. 1-2.) The Plaintiff's Response to the Twenty Page Memorandum of Law Served by Defendants on November 4, 2011 was actually a joint response to motions pending in three cases, one of which was the summary judgment motion herein. The caption on the Response bears three case numbers. (R.p. 601-610) The affidavit portion of the Appellant's Response, found on page 9, reads in its entirety:

After first being duly sworn, Mell Woods deposes and makes the following affidavit of his own personal knowledge:

Affidavit

Mell Woods is the true owner of the small amount of land described in the trespass to try title case;

After tacking the time of adverse possession by Mell woods, to that of Mrs. Reba Hinson, the total amount of adverse possession time is twenty six years;

Robert Breakfield lied to the Chester County Probate Court in order to get control of the Hinson Estate;

Mell Woods has examined the Probate Court documents marked as Exhibit A, side by side, with the ones in the court file, and swears that the copies and the originals, are one and the same.

Further, Affiant saith not.

(R.p. 609)

Not one of the four statements in the affidavit relate to the above-captioned tort case. Exhibit A to the affidavit is the Form 300 filed in the Chester County Probate Court in the Estate of Reba Hinson. Neither the Estate nor its personal representative is a party to this case.

Appellant appears to argue that the trial court judge could only have learned the content of the video tape by taking the time to watch the tape. What the judge needed to know was contained in

Appellant's deposition transcript where the content of the video tape was included verbatim. (R.p. 714, l. 12 to p. 715, l. 1; and R.p. 672, sub- p. 39, l. 12 to p. 676, sub-p. 53, l. 25.) Two different incidents were taped, one during the evening hours and one the next day. (R.p. 673, sub- p. 42, l. 4-13.) It is admitted that the behavior of the person on the tape, Richard Van Griffin, was obnoxious, but Appellant admitted during deposition questioning on the subject of the video that with respect to the evening incident, none of the Respondents were with Van Griffin who was there by himself, and Van Griffin did not mention any of the Respondents' names during his offensive remarks (R.p. 673, sub-p. 43, l. 7 to p. 44, l. 11.) Appellant admitted that Van Griffin was drunk. (R.p. 673, sub-p. 44, l. 2-11).

With respect to the second incident, the next day, Appellant again admitted that none of the Respondents were present and that Van Griffin did not mention any of the Respondents. (R.p. 673, sub-p. 44, l. 20 to p. 674, sub-p. 48, l. 5.)

When asked about evidence showing that the Respondents' had anything to do with Van Griffin's behavior on the two occasions on tape, Appellant said that Van Griffin had mentioned some connection with Respondent Danny Hinson "previously." (R.p. 673, sub-p. 43, l. 19-24 and p. 674, sub-p. 47, l. 12-22). Of course, what Van Griffin said, if anything, to the Appellant outside of court is hearsay, when offered by the Appellant, and is not proper evidence to consider when deciding a summary judgment motion. Materials used to support or oppose a summary judgment motion must set forth facts that would be admissible in evidence at trial. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); Moss v. Porter Bros., Inc., 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987).

When the trial judge said that he was granting the Respondents' summary judgment motion and in doing so he was adopting the arguments made by the Respondents (R.p. 751, l. 7-15), he was

saying that he was persuaded by the arguments of Respondents' attorney with respect to the materials "on file" with the court that related to the summary judgment motion.

The trial court record amply shows that the trial court did not rely solely on arguments of Respondents' attorney when granting the motion for summary judgment, but that the court also relied on and identified the materials "on file" that the parties submitted with respect to the motion.

**2. Appellants' Issue on Appeal No. 2 is not preserved for appellate review because Appellant's argument is so deficient as to constitute an abandonment of the issue.**

An appellate court will decline to consider an argument that is so conclusory as to be an abandonment of the particular issue on appeal. S. C. Dept. of Probation, Parole & Pardon Servs. v. Reynolds, 343 S.C. 465, 540 S.E.2d 480 (Ct. App. 2000); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (conclusory arguments constitute an abandonment of the issue on appeal.)


Appellant's purported "Argument" is found on page six of his Initial Brief - one paragraph; eight lines; no citation to anything in the record. This violates the letter and the spirit of Rules 208(b)(1)(D) and 208(b)(4), SCACR. What Appellant has provided is a conclusion, not argument. He does not identify a single piece of admissible evidence that was "on file" with the trial court that would require the Respondents' motion for summary judgment to be denied. Materials used to support or oppose a summary judgment motion must set forth facts that would be admissible in evidence at trial. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); Moss v. Porter Bros., Inc., 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987).

Respondents cannot possibly respond in this brief, which is the only brief allowed to the Respondents in the appeal process, to the general conclusion that there is “plenty of sworn testimony in the record.”

CONCLUSION

On Issue on Appeal no. 1, the trial court’s Order Granting Defendants’ Motion for Summary Judgment should be affirmed as having been based on materials on file with the court and not based solely on arguments of counsel.

If not earlier dismissed, Issue on Appeal no. 2 should be deemed abandoned for failure to make proper argument.

  
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Elaine H. Hensley, William C. Hinson, Jr., John Does, (1-5), Jane Does, (1-2) Respondents.

RULE 211(a)  
CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b),

SCACR.



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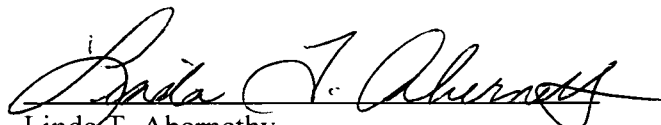
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**CERTIFICATE OF SERVICE**

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent in the above-captioned matter, do hereby certify that I have served the Appellant, Mell Woods, with copies of **Respondents' Brief**, postage prepaid and return address clearly indicated on said envelope, on this 20<sup>th</sup> day of June, 2013 at the following address:

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

  
Linda T. Abernethy