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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Circuit Court Judge for Beaufort County
Trial Court Case No.: 2009-CP-07-02573

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Appellate Case No.: 2012-213579

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CASHMAN PROPERTIES, LLC ..... Respondent

-vs.-

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 THE WILL OF E. OSWALD LIGHTSEY FOR THE BENEFIT OF CLAUDIA LIGHTSEY WARE ..... Appellants

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# FINAL REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENTS

## I. The trial court erred as a matter of law in declaring that Cashman Properties now has an ownership interest in Dock 3.

The trial court concluded as a matter of law as follows:

> ACCORDINGLY . . . I make the following conclusions of law:
>
> . . . .
>
> 3. Based on the totality of the circumstances, [Cashman Properties] demonstrated by clear and convincing evidence that Cashmans claimed a right to the aforementioned docks for approximately eighty (80) years.
>
> 4. Based on the totality of the circumstances, [Cashman Properties] demonstrated by clear and convincing evidence a substantial belief that Cashmans had the right to use the aforementioned docks to access the River [sic] and that their use and enjoyment continued uninterrupted for at least eighty (80) years.
>
> 5. [Cashman Properties and Lightsey Trusts] are co-owners as tenants in common of the entire pier and pierhead;[sic]
>
> 6. There has been no effective ouster. (R. pp. 4-11).

These conclusions, namely (1) Cashman Properties claimed a right to the docks for 80 years, (2) Cashman Properties had a substantial belief that it had the right to use the docks for 80 years, and (3) Cashman Properties had uninterrupted use of the docks for at 80 years, do not support a finding of ownership as a matter of law. Claiming a right to use property and holding a belief that you have a right to use property are only relevant to a claim for adverse possession or prescriptive easement. The trial court found no prescriptive easement, and Cashman Properties does not appeal that ruling. The adverse possession claim was withdrawn by Cashman Properties. (R. pp. 215-218, 233).

Therefore, use under a claim of right for any period of time is simply irrelevant and certainly does not equate to ownership.

Ownership of a property (real or personal) can be obtained in several ways:

- Construction/Creation: A person can build or create something and thus own it. In this case, the undisputed evidence establishes that the Lightsey family built Dock 3. Eugene Cashman, Jr., testified that the Lightsey family built Dock 3 and that he did not have any reason to believe the Lightsey family did not use its money to do so. (R. p. 125).

- Inheritance/Bequest: A person can inherit an ownership interest in property. However, Cashman Properties never made such an argument in this case.

- Gift: A person can be given an ownership interest. Cashman Properties did not allege, argue or offer evidence to support a gift.

- Adverse Possession: A person can obtain an ownership interest through adverse possession. Cashman Properties withdrew its adverse possession claim.

- Purchase: A person can buy an ownership interest in property. However, Cashman Properties never alleged, argued or offered evidence to support that it purchased an ownership interest.[1]

- Resulting Trust: A resulting trust can be found to effectuate the intention of the parties to a transaction. The trial court found no resulting trust, and Cashman Properties does not appeal that ruling.

Despite the above, the trial court declared that Cashman Properties was a co-owner of the dock based on the "totality of the circumstances," even though there is no

[1] Cashman Properties did purchase a small float and attached it to the side of Dock 3 with the written permission of Lightsey Trust. (R. p. 385). However the float washed away by no later than 2004, five (5) years before this suit was filed.

substantive legal theory to support such a finding. A review of the record reveals that the trial court did not cite a single case to support his declaration of co-ownership. The only statute cited was the Uniform Declaratory Judgment Act generally. However, "[t]he Uniform Declaratory Judgments Act does not create substantive rights or duties," and instead authorizes an action to "establish a party's entitlement to a pre-existing right." Harvey v. S.C. Dep't of Corrections, 338 S.C. 500, 506, 527 S.E.2d 765, 768 (Ct. App. 2000) quoting Felts v. Richland County, 299 S.C. 214, 216, 383 S.E.2d 261, 262-63 (Ct. App. 1989) aff'd 303 S.C. 354, 400 S.E.2d 781 (1991). Therefore, the trial court's declaration that Cashman Properties was a co-owner of Dock 3 was in error.

Allowing the trial court's order to stand would create significant confusion within declaratory judgment law and turn the Uniform Declaratory Act into a panacea. For example, with respect to this case, future litigants would be faced with many questions:

1. What "circumstances" must the court evaluate to determine that, based upon the totality of the circumstances, one party is a co-owner of property?
2. How can a defendant know what circumstances it must be prepared to defend against?
3. Other than requesting that a court "declare" that one party is a co-owner, what must be alleged in a pleading to establish co-ownership?
4. What conduct must be proved to establish co-ownership?
5. Who must engage in the conduct, the named plaintiff, a relative of a plaintiff, a relative's children?

6. How long must the conduct have occurred? Five years? Six months? Seventy years?
7. How long can a party wait before seeking to establish a co-ownership interest? Twenty years? More than eighty years? Ten years?
8. How does a defendant defend against a requested declaration of co-ownership when the request is not tied to an underlying legal theory for which a defendant has notice? What defenses would defeat such a declaration?

Of course, these questions can only be answered by tying a requested declaration of ownership to a known legal principle or claim such as adverse possession, prescriptive easement, or resulting trust. However, when these claims fail, the court cannot simply say, "I still declare you are a co-owner."

Ownership must come from somewhere. There must be a legal or equitable theory, standard, test or hurdle to establish ownership. Otherwise, a court could simply declare that a party owns something *ex nihilo*. Both parties recognized this basic concept in their opening statements:

> Counsel for Cashman Properties
>
> "we filed a Complaint asking for a declaratory judgment as to who has rights to this dock and the floating dock. The legal theories that we have filed are prescriptive easements, resulting trust and adverse possession." (R. p. 80).
>
> Counsel for Lightsey Trust
>
> a "[d]eclaratory judgment is the same thing. I don't think there is any way the Court can allow or find that the Cashmans have any interest in this dock unless it -- those [rights] would have to flow through" a legal theory pled in the complaint. (R. pp. 82-83).

The fallacy of the trial court's ruling can also been seen by examining how affirming this ruling might affect other types of cases. For example, in a car wreck case, a court could simply declare that a defendant owed a plaintiff money, even though negligence was alleged in the complaint, but not proven. In a dispute over a contract, a court could declare that a defendant was liable to a plaintiff for consequential damages, even though plaintiff alleged in the complaint, but failed to prove, breach of contract. Or as occurred here, a court could simply declare that a party is a co-owner of something, despite the fact that plaintiff alleged and failed to prove adverse possession or resulting trust. This cannot be the law in South Carolina.

## II. Cases from other jurisdictions are applicable and relevant.

Cashman Properties asserts that the cases cited by Appellants from other jurisdictions do not "inform the Court how to apply the South Carolina Declaratory Judge Act" and "none arise under a procedure akin to the Act or South Carolina's Rule." This contention is incorrect.

A comparison of the South Carolina Uniform Declaratory Judgment Act with the federal declaratory judgment statute and the declaratory judgment statutes and/or rules of Utah, Ohio, New York, Massachusetts, and Arizona, as included in the Attachment hereto, establishes that the declaratory judgment statutes are substantively identical. Further, Rule 57 of the Rules of Civil Procedures for these jurisdictions, which are also included in the Attachment hereto, are substantively identical to Rule 57, SCRCP. Since the statues and rules of these other jurisdictions and of South Carolina are substantively identical, the cases cited by the Lightsey Trusts in their brief are not only informative but persuasive.

Other jurisdictions expressly recognize that success on a declaratory judgment action is necessarily dependent on success of an underlying legal theory/claim. See Becker v. Kroll, 340 F. Supp.2d 1230 (D. Utah 2004) *aff'd in part, rev'd in part (on other grounds) and remanded* (holding that "Plaintiff's causes of action for declaratory judgment and injunction are, of course, dependent on the success of the underlying claims"); Days Inn Worldwide, Inc., v. Sai Baba, 300 F. Supp.2d 583 (N.D. Ohio 2004) (holding that a "request for declaratory judgment must accompany the substantive claim for which declaratory judgment is sought" and the Defendants "failed to state a claim on which relief can be granted by failing to link their request for declaratory judgment to an underlying substantive claim for relief"); Economic Opportunity Comm'n of Nassau County, Inc., v. County of Nassau, 106 F. Supp.2d 433 (E.D.N.Y 2000) (stating that "a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief"); Matos v. First Nat. Bank, 092681B, 2010 WL 3327725 (Mass. Super. June 16, 2010) (finding that because plaintiff's declaratory judgment claim is "dependent on the success" of plaintiff's underlying claims, the "failure of the Plaintiff's previous claims" means that the declaratory judgment claim "must also fail."); Repwest Ins. Co. v. Praetorian Ins. Co., 890 F. Supp. 2d 1168, 1183-84 (D. Ariz. 2012) (finding that "[d]eclaratory judgment is a remedy that is dependent on Plaintiff's success on an underlying cause of action. Because the Court has dismissed Plaintiff's only cause of action against Defendant Aon, its claim for declaratory relief must also be dismissed."). Because the declaratory judgment law in other states is substantively identical to the law in South Carolina, the Court should find the cases persuasive.

The Court can and should end its analysis here and reverse the trial court's Order based on this error of law.

## III. Lightsey Properties has shown that the trial court's factual findings were manifestly in error.

It is not necessary for Lightsey Trusts to show that the trial court's factual findings were in error because the trial court drew an improper legal conclusion from its factual findings. Nevertheless, Lightesy Trusts have shown that the trial court erred in finding that Cashman Properties used the docks for 80 years under a claim of right and that there was an 80 year pattern of joint use and ownership.

*a) Use under a claim of right.*

Eugene K. Cashman, Jr., and Betty Cashman Davis, based on their own testimony, could only have used Dock 3 as a matter of right from 1994 through 2005 (11 years), the time period they owned the Oyster Street property. (R. pp. 115-116 and 185; R. 544, Dep. p. 54, lines 7-13).

The Cashman children could have potentially attempted to "tack" their historical use onto the historical use of their father Eugene K. Cashman, Sr., who was their predecessor-in-interest. However, Eugene K. Cashman, Sr., did not testify at trial, and both Cashman children testified that it was their "understanding" that their father used the dock under a claim of right. (R. p. 111 and 183). This precise situation was addressed in Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997). There, this Court concluded that "the only evidence regarding Morrow's predecessor-in-interest was that Morrow 'thought' [his predecessor in interest] had a right-of-way across the property. This evidence is insufficient to establish that [the predecessor in interest] had a belief amounting to a claim of right." Id.

Just as in Morrow, simply because the Cashman children had an "understanding" their father used Dock 3 under a claim of right, this evidence is insufficient to establish that Mr. Cashman, Sr. had a belief amounting to a claim of right, especially since tacking requires proof of sufficient use for predecessors-in-interest as well. This failure of evidence is even more significant when you consider that although he is still alive, Mr. Cashman, Sr., was not called as a witness at trial.

Based on the above, the trial court erred when it found that Cashman Properties demonstrated by clear and convincing evidence that the Cashmans had the substantial belief that they had the right to use Docks 1, 2 and 3 for eighty (80) years.

*b) Use was with permission.*

The Lightsey family gave express written permission for the Cashman family to use Dock 3. "I, Oswald Lightsey, do hereby give permission to Eugene K. Cashman to attach a floating dock and ramp to dock as mentioned in above application for permit." (R. p. 385). Importantly, Eugene Cashman, Jr. acknowledged that this document, drafted by his father and signed by a member of the Lightsey family, constituted his father requesting, and Oswald Lightsey granting, permission for Eugene Cashman Sr. to use Dock 3:

> Q. Well Mr. Lightsey actually says he gives permission to Eugene K. Cashman. He is giving your father permission, right?
>
> A. That's correct.

(R. p. 118).

Importantly, permissive use can never ripen into an ownership interest. See Paine Gayle Properties, LLC, v. CSX Transportation Inc., 400 S.C. 568, 584, 735 S.E.2d 528,

537 (Ct. App. 2012) (finding that obtaining permission "stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.") (internal citations omitted); Young v. Nix, 286 S.C. 134, 135, 332 S.E.2d 773, 774 (Ct.App. 1985) (holding that "[w]here one enters land under permission . . . the possession can never ripen into an adverse title unless a clear and positive disclaimer of the title under which entry was made is brought home to the other party."). Accordingly, the trial court erred in finding Cashman Properties used Dock 3 without permission from Lightsey Trust.

*c) No cooperative pattern of ownership.*

The trial court's finding that there was a consistent and cooperative pattern of ownership relating to all three docks for eighty years is not supported by the evidence. First, the evidence presented establishes that Cashman Properties was a permissive user of Dock 3. Second, Cashman Properties contended at trial that it was the owner of Dock 2. Betty Cashman Davis testified that her grandfather was the owner of Dock 2 because he built Dock 2. (R. pp. 180, 186-188). Significantly, she did not testify that Dock 2 was jointly owned by the Cashmans and the Lightseys. Third, the evidence established that in the 1940's, the Lightsey family had its own dock and the Cashmans had a dock. Mr. Cashman, Jr., testified about photographs that showed the "Lightseys' spare dock" and Dock 2. (R. p. 99; R. pp. 626-655). In 1946, Thomas O. Lawton, an original developer and owner of the Brighton Beach development, gave written permission to a Mr. Sanders to build the dock "any where [sic] to the right of the Lightsey dock will be satisfactory to me. Do not build it to the left of the Carter-Cashman dock." (R. pp. 357-362). Thus, the

evidence presented does not support a finding of cooperative use and ownership for eighty years.

## CONCLUSION

For the reasons contained herein and in Appellants' Brief, the Order of the trial court should be reversed.

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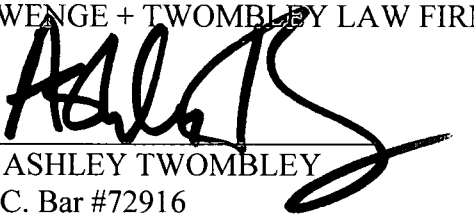
BY: 

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February 3, 2014

ATTACHMENT

Declaratory Judgment Statutes

- S.C. Code Ann. § 15-53-20: "[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. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree."

- 28 USC § 2201(a): "[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

- Utah Code § 78B-6-401(1): "[e]ach district court has the power to issue declaratory judgments determining rights, status, and other legal relations within its respective jurisdiction. An action or proceeding may not be open to objection on the ground that a declaratory judgment or decree is prayed for."

- Ohio Rev. Stat. § 2721.02(A): "courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree."

- NY Civil Practice Law and Rules § 3001: "the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

- Mass. Gen. Laws. ch. 231A § 1: Massachusetts courts "may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such. . . ."

- Ariz. Rev. Stat. § 12-1831: "[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. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

Rules of Civil Procedure

- Rule 57, SCRCP: "[t]he procedure for obtaining a declaratory judgment pursuant to Code §§ 15-53-10 through 15-53-140, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner

provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

- Rule 57, FRCP: "[t]hese rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action."

- Rule 57, URCP: "[t]he procedure for obtaining a declaratory judgment pursuant to Utah Code Title 78B, Chapter 6, Part 4, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

- Rule 57, ORCP: "[t]he procedure for obtaining a declaratory judgment pursuant to Sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may advance on the trial list the hearing of an action for a declaratory judgment."

- Rule 57, MRCP: "[t]he procedure for obtaining a declaratory judgment pursuant to General Laws c231A shall be in accordance with these rules, and the right to trial by jury

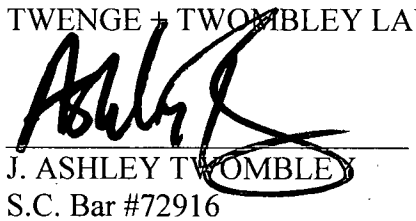
may be demanded under the circumstances and in the manner provided in Rules 38 and 29. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

- Rule 57, ARCP: "[t]he procedure for obtaining a declaratory judgment shall be in accordance with these Rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rule 38 and subdivisions (a), (h), and (k) of Rule 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

## CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombley, certifies that the herein Final Reply Brief of Appellants complies with Rule 211(b) the South Carolina Appellate Court Rules.

TWENGE + TWOMBLEY LAW FIRM

BY: 

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## CERTIFICATE OF SERVICE

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The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Appellants, and that on the 3rd day of February 2014, a true and accurate copy of the attached of Final Reply Brief of Appellants was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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