

**THE STATE OF SOUTH CAROLINA
Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

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JUL 01 2019

The Honorable Jennifer B. McCoy, Civil Court Judge
SC Court of Appeals

Appellate Case No: 2019-000574

Elizabeth Lofton.....Appellant

vs.

**Berkeley County Electric Cooperative Inc.
& John Lucas Tree Expert Company,.....Respondents**

INITIAL BRIEF OF APPELLANT



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STATEMENT OF ISSUES ON APPEAL

- I. DOES PLAINTIFF HAVE STANDING TO BRING SUIT WHILE SERVING AS SOLE TRUSTEE FOR THE IRREVOCABLE TRUST OF HER MOTHER?
- II. DID THE TRIAL COURT ABUSES ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR AN AMENDMENT?

STATEMENT OF THE CASE

On July 1, 2015 Elizabeth Lofton filed an action alleging fraud, conversion, trespass, and negligent misrepresentation against the Defendants/Respondents. More specifically, Elizabeth Lofton filed suit, alleging injury to property that belongs to the irrevocable trust of her late mother to which she is a beneficiary and sole trustee. Summary Judgment on this case was heard on November 26, 2018. By order of the court dated February 22, 2019, this action was dismissed on the basis that the Plaintiff/appellant did not have standing to bring the action.

FACTS

This matter came before the court for a hearing on November 26, 2018, pursuant to the Motion for Summary Judgment filed by the Plaintiff. **Order Granting Summary Judgment pg 1** The Honorable Judge Jennifer B. McCoy issued judgment in this matter on February 22, 2019, based upon the pleadings, affidavits and Depositions, as well as statements of counsel. **Order Granting Summary Judgment pg 1** Appellant was the sole trustee of her mother's irrevocable living trust. **Order Granting Summary Judgment pg 3** Appellant asserts that Respondents caused damage to property that she owns and brought the following causes of action based on the Respondents conduct: trespass, conversion, negligence/gross negligence, and violation of the South Carolina Timber statute, as well as an unfair trade practices action. **Order Granting Summary Judgment pg 1** The appellant further claims that she had been the victim of fraud whereby Respondent Berkeley obtained a right of way easement benefitting Respondent Berkeley. **See Plaintiff's Complaint pg 7** Respondent Berkeley and Respondent Lucas filed motions for summary judgment on August 31, 2018 and September 19, 2018

respectively, both relying on appellants authority as trustee. **Order Granting Summary Judgment pg 2** The Trial Court acknowledges Appellants status as Trustee and acknowledges that the property at issue is part of that trust. **Order Granting Summary Judgment pg 3** The trial court failed to acknowledge Plaintiff's standing stating that the trust did not specifically spell out any portion of the land that the Appellant actually owned. **Order Granting Summary Judgment pg 3.** With regard to the aforementioned the trial court made analysis of Appellant's standing pursuant to case law, but gave no deference to the statute regarding the powers and duties of a trustee (as they are enshrined in the specific powers of trustee). **Order Granting Summary Judgment pg 3** There is no analysis that shows the court took any notice of the statute. **See Generally Order Granting Summary Judgment**

STANDARD OF REVIEW

As to questions of law, this court's standard of review is de novo. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

On appeal from the grant of a summary judgment motion, this Court applies the same standard that the trial court applies under Rule 56(c), SCRPC. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Adamson v. Richland County School Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct.App.1998).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT APPELLANT DID NOT HAVE STANDING

Standing, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception. Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation. See *id.* at 194–95, 728 S.E.2d at 44–45. Without limiting the authority conferred by Section 62-7-815, a trustee may: (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties; SC Code 62-7-816 Specific powers of trustee (South Carolina Code of Laws (2018 Edition)).

It is undisputed that the appellant is the trustee. It is also undisputed that the property at issue is part of the trust. Further, it is clear that Appellant was bringing an action that was specifically to protect the trust property. As the sole trustee of the irrevocable living trust of Francis Irene Lofton, Appellant is the only person with the authority to sell any lands belonging to the trust. The respondents acknowledge that it is her authority as trustee, and that authority alone, which allows any possessory or non-possessory interests in land belonging to the trust. Respondents relied entirely on Appellant's authority as trustee to, however inadequately and fraudulently, execute and record an easement. The Respondents continue to rely on that authority in defending their own non-possessory interest, those activities enabled by that interest, and all future objectives that may more broadly rely on the continued possession of that interest. Respondents cannot assert Appellant's role and authority as trustee and, by extension, then challenge her capacity to bring and maintain an action on behalf of the affected property (to which she is not only trustee, but also beneficiary of). Her capacity to bring an action is well enshrined in the statute at hand, which was ignored by the trial court and constitutes reversible error.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING APPELLANT A CURATIVE AMENDMENT

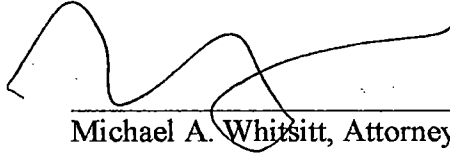
The law favors amendments over such drastic measures as Summary Judgment in order to avoid, wherever possible, depriving litigants of a trial on disputed factual issues and so starving any legitimate litigant of a remedy. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

In the case at hand, Appellant named herself as Plaintiff in the action at hand, but offered to the trial court the following amendment to cure any perceived error (it is appellants position that amendment is not necessary because of the statutory power granted to Trustees): To change the Plaintiff from herself to the Plaintiff as the named trustee acting on behalf of the trust. Such an amendment, if necessary, would have been curative and would not have prejudiced the Respondent. Respondents were already already aware of the nature of the claims being brought against them. See Generally Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (finding that the prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it). No prejudice would have resulted in the trial court allowing the Appellant to amend.

CONCLUSION

The trial court erred in granting Respondent's Motion for Summary Judgment on the grounds that Appellant did not have standing. The powers of a trustee are clearly spelled out in the statute and directly apply to the case at hand. Further, the court refused to apply the well settled holding to avoid summary judgment whenever possible, specifically when there was a 'curative' option that would not prejudice the Respondents; therefore, the Appellant requests that this court reverse the trial court's grant of Summary Judgment on the grounds that appellant has statutory standing and if necessary the ability to amend any pleadings without prejudicing the Respondents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael A. Whitsitt", is written over a horizontal line.

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**THE STATE OF SOUTH CAROLINA
Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

Jennifer B. McCoy, Circuit Court Judge

Case No: 2018-CP-10-00323

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SC Court of Appeals

Elizabeth Lofton,Appellant

vs.

**Berkeley County Electric
Cooperative Inc. and John Lucas
Tree Expert Company, Respondents**

PROOF OF SERVICE

The undersigned hereby certifies that on or before the 28 of June, 2019 he did serve a copy of the foregoing: 1) *Initial Brief of Appellant*; and 2) *Designation of the Matter to be Included in the Record on Appeal*.


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June 28, 2019



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June 28, 2019

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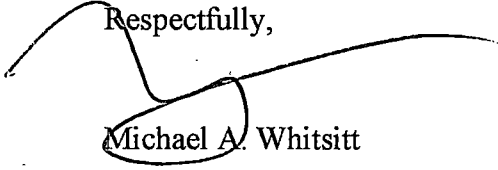
RE: Elizabeth Lofton vs. Berkeley County Electric Cooperative, Inc. and John Lucas Tree Expert, Co.; 2019-000574

Civil Action No.: 2018-CP-10-00323

Dear Ms. Kitchings,

Please find enclosed an original and one copy of the following: 1) *Initial Brief of Appellant*; 2) *Designation of the Matter to be included in the Record on Appeal*; and 3) *Proof of Service*. Please file the originals and returned the clocked copies to me in the self addressed posted envelope provided.

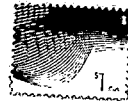
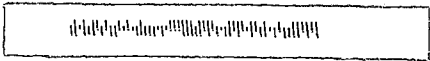
Respectfully,


Michael A. Whitsitt

Maw/me

CC: Helen Hiser, Esq.
Pope D. Johnson, III Esq.
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