THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Civ. No. 2018-CP-10-00323

Elizabeth Lofton, ...Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

INITIAL BRIEF OF RESPONDENT JOHN LUCAS TREE EXPERT, CO.

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II. WHETHER THE CIRCUIT COURT PROPERLY DECLINED TO ADDRESS PLAINTIFF'S MOTION TO AMEND?

STATEMENT OF THE CASE

Appellant Elizabeth Lofton, Plaintiff below, filed a First Amended Complaint on January 19, 2016 in Charleston County Court of Common Pleas against Respondents John Lucas Tree Expert, Co. ("Lucas Tree") and Berkeley Electric Cooperative, Inc. ("Berkeley Electric"), alleging she was the owner of a piece of property located in Charleston County, South Carolina and/or that the title to the subject property was in Plaintiff's name. (Plaintiff's First Amended Complaint, filed Jan. 19, 2016, ¶¶6, 20, 27, 39) ("Complaint"). Plaintiff's Amended Complaint alleged causes of action against Lucas Tree sounding in trespass, conversion, negligence/gross negligence, and a violation of S.C. Code Ann. § 16-11-580.

Lucas Tree filed a timely Answer on March 14, 2016, raising, among other assertions and defenses, that Plaintiff had not demonstrated she owned the property that is the subject of her Complaint. (Answer to Plaintiff's First Amended Complaint, filed March 14, 2016, ¶8). Respondent Berkeley Electric Cooperative, Inc. ("Berkeley Electric") also filed a timely Answer on February 3, 2016. (Defendant's Answer to First Amended Complaint, filed Feb. 3, 2016).

Plaintiff was deposed on July 7, 2016. (cover page to Lofton Dep., taken July 7, 2016 and admitted into the record at the hearing). Thereafter, Lucas Tree filed a Motion for Summary Judgment along with a Memorandum in Support of Motion for Summary Judgment. In its Memorandum in Support, Lucas Tree argued, among other things, that Plaintiff lacked standing in her individual capacity to bring this claim because she does not own the subject property which, instead, is owned by the irrevocable Trust, of which she is the Trustee. (Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment, filed Oct. 3, 2016). Berkeley Electric filed its own Motion for Summary Judgment, adopting the arguments made by Lucas Tree. (Defendant Berkeley Electric Cooperative, Inc.'s Motion for

Summary Judgment, filed Oct 11, 2016).

The case was removed from the General Docket under Rule 40(j), SCRCP, pursuant to a Consent Order filed on October 28, 2016. (Consent Order for Dismissal Pursuant to Rule 40(j), filed Oct. 28, 2016). Plaintiff moved to restore the case to the active docket on September 28, 2017, again listing herself as Plaintiff in her individual capacity. (Notice of Motion and Motion to Restore Claim Pursuant to Rule 40(j), filed Sept. 28, 2017). The matter was restored on January 24, 2018. (Consent Order Restoring Case Pursuant to Rule 40(j), filed Jan. 24, 2018).

Lucas Tree again moved for summary judgment on August 31, 2018. (Defendant John Lucas Tree Expert, Co.'s Motion for Summary Judgment, and Memorandum in Support of Motion for Summary Judgment, both filed Aug. 31, 2018). Among other things, Lucas Tree argued as it had before that summary judgment was proper because Plaintiff lacks standing to bring this lawsuit because she does not own the property at issue. Berkeley Electric also moved for summary judgment on September 19, 2018, noting that Plaintiff continued to assert that she owned the property at issue and arguing, among other things, that she lacked standing to file suit because the Trust owned the property, not Plaintiff. (Defendant Berkeley Electric Cooperative, Inc.'s Motion for Summary Judgment and Memorandum in Support of Motion for Summary judgment, both filed Sept. 19, 2018). Prior to the scheduled hearing on these motions, Plaintiff failed to file any response or opposition to either Motion for Summary Judgment.

The parties were heard by the Honorable Jennifer B. McCoy on November 26, 2018. At the hearing, Plaintiff's counsel acknowledged that it had been error to bring this lawsuit in Plaintiff's name. (Tr. 6:6-9; *see also* 13:10-12 (Plaintiff's counsel conceding defense counsel "is correct in terms of the fact that [Plaintiff] simply lacks standing ..."); 15:18-20). In response to the Court's query as to why Plaintiff had not filed any affidavit in response to the summary

judgment motions, Plaintiff's counsel stated that she "had just gotten out of the hospital yesterday is my understanding," offering to "supplement the Court with any affidavits immediately." (Tr. 12:21-13:2). While Plaintiff's counsel argued that she should be allowed to amend her Complaint to allow her to bring her case as the Trustee, he acknowledged that no motion to amend was properly before the Court at that time. (Tr. 14:8-11).

That same afternoon, Plaintiff filed a Motion to Amend her Complaint "to change the named Plaintiff in the lawsuit to the Trust ..." (Plaintiff's Motion to Amend, filed Nov. 26, 2018). Plaintiff also, for the first time, filed a response to the two pending motions for summary judgment that were the subject of the hearing. Plaintiff again conceded that she lacked standing to bring her claims in her personal capacity, but argued that she should be allowed to amend her Complaint in order to correct that error. (Plaintiff's Response to Defendants' Motions for Summary Judgment, filed Nov. 26, 2018).

The Circuit Court issued an Order granting both Lucas Tree and Berkeley Electric's motions for summary judgment on the basis that Plaintiff lacked standing to bring her claims. (Order Granting Summary Judgment, filed Feb. 22, 2019). Plaintiff moved to reconsider the Order pursuant to Rules 59 and 60, SCRCP, arguing that the Circuit Court failed to analyze the standing issue in terms of her position as "Successor Trustee of the Living Revocable Trust of Irene Lofton." Plaintiff maintained that she should be allowed to amend her Complaint to bring the suit in the name of the Trust. Moreover, Plaintiff argued, for the first time, that amending her Complaint was not necessary because she could just "clarify in the pleadings" that, as "the successor trustee of her mother's revocable living trust ... she has the power to prosecute any claim on behalf of the trust in accordance with §62-7-816(24)." (Plaintiff's Notice of Motion and Motion to Reconsider Summary Judgment, filed March 4, 2019).

The Circuit Court denied Plaintiff's Motion to Reconsider in a Form 4 Order filed March 6, 2019, (Form 4 Order denying Plaintiff's Motion to Reconsider, filed March 6, 2019), and Plaintiff timely appealed to this Court.

FACTUAL BACKGROUND

At her deposition, Plaintiff readily admitted that she is not the owner of the property in question but, instead, the owner is the Irene N. Lofton Revocable Living Trust, of which Plaintiff currently is the trustee. (Lofton Dep., 8:25-9:3; 73:3-6; *see also* Deed of Distribution). Plaintiff testified that the Trust benefits herself, Sandy Lofton and Wayne Lofton. (Lofton Dep. 7:20-22). However, the Trust does not spell out any portion of the land that the Plaintiff owns in an individual capacity; instead, it merely states that the proceeds should be "divided equally or as [the beneficiaries] see fit." (Lofton Dep. 73:11-20). Plaintiff has never personally paid property taxes on the tracts of land in question but, instead, the Trust makes all such payments. (Lofton Dep. 74:2-8). Furthermore, the Trust has a 100% interest in the property. (*See* Deed of Distribution).

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. *Baughman v. AT&T*, 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991). That is, summary judgment is properly granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in a light most favorable to the non-moving party." *Baughman*, 306 S.C. at 115, 410 S.E. 2d at 545 (1991).

Although facts and inferences to be drawn must be viewed in the light most favorable to the non-moving party, the non-moving party still must produce some evidence to support each element of each claim against the moving party, and show a material issue as to the contested elements. *See, e.g., Board of Trustees for the Fairfield County Sch. Dist. v. State of S.C.*, 409 S.C. 119, 127, 761 S.E.2d 241, 245 (2014). In other words, a "party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 452 (Ct. App. 1988) (same). Furthermore, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010).

ARGUMENTS

I. The Circuit Court properly granted Respondents' Motions for Summary Judgment because Plaintiff lacks standing to bring this suit.

Standing to bring and maintain a suit "may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Plaintiff cannot establish standing under any of the avenues enumerated in *ATC South*[1] and, therefore, the Circuit Court properly granted Respondents' motions for summary judgment.

A. Plaintiff lacks constitutional standing.

In order for a plaintiff to establish constitutional standing, three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact, or a particularized harm.

[1] Plaintiff has not even attempted to argue the public importance exception.

Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury. A party seeking to establish standing bears the burden of demonstrating each of the three elements. *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In other words, "[t]o have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest." *Charleston County Sch. Dist. v. Charleston County Elec. Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). The real party in interest "has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Anchor Points v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992).

Here, Plaintiff filed suit in her individual capacity and not on behalf of the Trust. She readily admitted, however, that the Trust owns the property in question. She does not and has not ever owned or paid taxes on the subject property. (Lofton Dep. 73:3-74:8; *see also* Deed of Distribution).[2] At the November 26, 2018 hearing, Plaintiff's counsel conceded that it was error to have brought this lawsuit in Plaintiff's name. (Tr. p. 6:6-9; *see also* 13:10-12 (Plaintiff's counsel conceding defense counsel "is correct in terms of the fact that [Plaintiff] simply lacks standing ..."); Plaintiff's Response to Motions for Summary Judgment ("Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity")). As a result, Plaintiff lacks standing under the first element of the test articulated in *Sea Pines*. Plaintiff herself has not suffered an injury-in-fact. Rather, it is the Trust's property that allegedly has been harmed. Plaintiff cannot establish constitutional standing because she cannot prove any particularized

[2] Inexplicably, Plaintiff continues to state in the "Facts" section of her Brief that she "asserts that Respondents caused damage to property that she owns ..." (App. Br. p. 1). As noted herein, she has conceded the point that she does not own the subject property multiple times.

injury or harm that she has suffered as a result of Respondents' alleged actions. She has conceded as much on multiple occasions.

As a result, this Court should affirm the grant of summary judgment on the basis that Plaintiff lacks standing to bring or maintain this lawsuit.

B. Plaintiff's argument that she possesses statutory standing is not preserved for appellate review and, even if it were, she cannot establish statutory standing.

Plaintiff complains that the Circuit Court failed to address her statutory standing argument. However, the first time Plaintiff argued she possessed standing under S.C. Code Ann. § 62-7-816 was in her Petition for Rehearing, where she alleged she did not need to amend her Complaint to correct the named Plaintiff because she possessed statutory standing pursuant to Section 62-7-816. It is axiomatic that an issue or argument raised for the first time in a petition for rehearing is not preserved for appellate review. *Kiawah Prop. Owners Group v. PSC*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004), *citing McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (issues raised for the first time in a motion to amend a judgment are procedurally barred); *see also Kan Enters. v. South Carolina Dep't of Rev.*, 420 S.C. 596, 607-608, 803 S.E.2d 882, 888 (Ct. App. 2017) (finding issue raised for the first time on rehearing unpreserved for appellate review).

While Plaintiff's counsel suggested at the November 26, 2018 motions hearing that his "Client does have the right to bring that lawsuit on behalf of the trust as the trustee," that argument was made in the context of seeking the Court's permission to amend the Complaint in order to name the proper plaintiff. (Tr. 6:23-7:15; 13:10-16 (acknowledging his client lacks standing but arguing "if the plaintiff were given leave to file amended complaint where she's bringing the case as the trustee ...")). Plaintiff's counsel agreed, however, that that motion to amend was not properly before the Court. (Tr. 14:8-19).

Plaintiff filed her Motion to Amend to "change the named Plaintiff in the lawsuit to the Trust," on November 26, 2018, the afternoon of the hearing. (Plaintiff's Motion to Amend). On that same date, the day of the hearing, she filed her Response to Motions for Summary Judgment. While she argued in that Response that "she is the executrix of the estate and that she has the right to bring the suit as the executrix of her mother's estate," her current argument on appeal is not that she is entitled to bring this suit in her own name as executrix of her mother's estate. While she also stated that "she is also the trustee of the trust that holds the property at issue," that statement was made in the context of her request for "a simple amendment of the named Plaintiff [that] would remedy this defect." (Response to Motions for Summary Judgment). Thus, even in her belated response to summary judgment, Plaintiff did not argue that she had a statutory right to bring this lawsuit in her own name.

The first time Plaintiff raised any argument concerning the application of S.C. Code Ann. § 62-7-816 was in her Motion to Reconsider and, as a result it is not preserved for appellate review. *Kiawah Prop. Owners*, 359 S.C. at 113, 597 S.E.2d at 149; *McGee*, 321 S.C. at 347, 468 S.E.2d at 637; *Kan Enters.*, 420 S.C. at 607-608, 803 S.E.2d at 888. This rule is particularly applicable in this case where Lucas Tree raised the defense that Plaintiff lacked standing in its first Motion for Summary Judgment, filed October 3, 2016, which was joined by Berkeley Electric. After the case was restored to the active docket after having been removed for nearly a year, Lucas Tree and Berkeley Electric again moved for summary judgment, once more raising the argument that Plaintiff lacked standing. Not only did Plaintiff fail to raise the issue of statutory standing or attempt to amend or correct her Complaint, she failed to file any response at all to the motions for summary judgment prior to the motions hearing.

Furthermore, Plaintiff conceded numerous times below that it was error to bring this suit in her own name. (Tr. p. 6:6-9; *see also* 13:10-12 (Plaintiff's counsel conceding opposing counsel "is correct in terms of the fact that [Plaintiff] simply lacks standing ..."); Plaintiff's Response to Motions for Summary Judgment ("Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity")). Now, on appeal, she argues that she has a statutory right to bring this suit in her own name without adding or substituting the Trust as the proper Plaintiff. In effect, she is taking a different position on appeal than she took before the Circuit Court. Appellate courts routinely reject parties' attempts to argue inconsistent positions on appeal. *See, e.g., King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below).

Plaintiff's argument that she possesses statutory standing is not preserved for appellate review and, in addition, is inconsistent with the position she took before the Circuit Court. Consequently, this Court should affirm the Circuit Court's grant of summary judgment without considering that argument.

Nevertheless, and out of an abundance of caution, Lucas Tree addresses the substance of Plaintiff's statutory standing argument. Relying on *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), Plaintiff argues that she possesses statutory standing to bring her lawsuit under Section 62-7-816(24). That section provides that, "[w]ithout limiting the authority conferred by Section 62-7-815, a trustee may: 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." S.C. Code Ann. § 62-7-816(24).

While there are no South Carolina cases discussing whether Section 62-7-816(24) grants statutory standing for claims brought in the trustee's individual capacity and not in the name of the trust or on behalf of the trust, in other cases where the plaintiff was found to have statutory standing, the statutory provisions unambiguously granted that right to an individual suing in his or her own capacity. For example, *Freemantle* involved the South Carolina Freedom of Information Act, which in 2009 provided, in pertinent part, that "[a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases ..." S.C. Code Ann. § 30-4-100(a).[3]

Similarly broad language was held to grant grandparents standing to initiate a custody action in *Jobst v. Jobst*, 424 S.C. 64, 817 S.E.2d 515 (Ct. App. 2018). There, the relevant statute provided that "any person having knowledge or information of a nature which convinces such person that a child is neglected ... may institute a proceeding respecting such child." S.C. Code Ann. § 63-3-550. The Supreme Court held that the plain language of the statute as well as existing case law supported the conclusion that the grandparents had standing to institute the custody action before it. 424 S.C. at 75, 817 S.E.2d at 521.

In *Taylor v. Aiken County Assessor*, 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013), this Court considered S.C. Code Ann. § 12-60-2510(A)(4), part of the South Carolina Revenue Procedure Act ("SCRPA") that allows a property taxpayer to appeal the fair market value and resulting assessment of a property tax at any time in years when no new countywide assessment is performed. At issue was whether the plaintiff, who purchased property at a foreclosure sale after the 2010 tax had been levied but who was nonetheless liable for paying the tax assessment,

[3] That provision is substantively the same now, and provides that "[a] citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases ..."

had standing under the SCRPA to challenge the fair market assessment and subsequent assessment. This Court held that he did, relying on the definition of "property taxpayer" contained in S.C. Code Ann. § 12-37-30(22), which included both "(1) 'a person who is liable for ... any property tax imposed by this title'; and (2) 'a person ... whose property or interest in property[] is subject to ... a property tax imposed by this title.'" Because unpaid property taxes become a lien on property at the time they are assessed, the plaintiff qualified as a property taxpayer and had standing to challenge the assessment. *Taylor*, 402 S.C. at 562-563, 741 S.E.2d at 33.

Conversely, in *Youngblood v. South Carolina Dep't of Soc. Servs.*, 402 S.C. 311, 741 S.E.2d 515 (2013), the Supreme Court held that foster parents possessed neither statutory nor constitutional standing to petition the Department for adoption of a Child who had been in their care. The Family Court had held the foster parents had standing under S.C. Code Ann. § 63-9-60, because the Department had conducted a home study and qualified them for the adoption of a child, but not necessarily the Child they had fostered, before that Child was removed for adoption and permanent placement with her other siblings in another home. The plaintiffs pointed to Section 63-9-60(A)(1), which states that "[a]ny South Carolina resident may petition the court to adopt a child." However, as the Court pointed out, this broad grant of standing is restricted by subpart (B), which provides that, "[t]his section does not apply to a child placed by the State Department of Social Services or any agency under contract with the department for purposes of placing that child for adoption." S.C. Code Ann. § 63-9-60(B). And, because the Child had been "placed" for adoption by the Department with the family adopting her other siblings, the plaintiffs were excluded from the broad standing provisions of subpart (A). 402 S.C. at 318-319, 741 S.E.2d at 518-519. The Court pointed out that, "[w]hen no statute confers

standing, the elements of constitutional standing must be met." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. As explained above, and as conceded repeatedly by Plaintiff, she cannot demonstrate constitutional standing.

Here, Plaintiff baldly asserts that her "capacity to bring an action is well enshrined in the statute at hand," (App. Br. p. 3), but fails to explain how the statute allows her to bring and maintain a suit in her individual capacity as opposed to on behalf of the Trust. Pursuant to the tenants of statutory interpretation, "regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the general assembly." *Duke Energy Corp. v. South Carolina Dep't of Rev.*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016), *citing Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Instead, reading the statute as a whole, as opposed to concentrating on isolated phrases, courts will construe a statute "so as to escape the absurdity and carry the intention in to effect." *Duke Energy*, 415 S.C. at 355, 782 S.E.2d at 592.

Plaintiff points to seemingly broad language in Section 62-7-816(24) that allows a trustee to "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." Notably, the statute does not authorize a trustee to bring suit in the trustee's individual capacity as opposed to on behalf of or in the name of the trust. Coupled with a trustee's duty of loyalty enshrined in S.C. Code Ann. § 62-7-802(a), ("[a] trustee shall administer the trust solely in the interests of the beneficiaries"), allowing a trustee to sue in her own personal capacity risks violating that core duty. For example, should Plaintiff prevail in her lawsuit, any recovery would go to her directly and not to

the Trust itself.[4] Such an absurd result cannot have been what the Legislature intended. Instead, S.C. Code Ann. § 62-7-816(24) clearly allows a trustee to bring suit on behalf of the Trust, but does not allow a trustee to pursue personal, individual claims based on trust property.

Plaintiff argues that Respondents cannot both rely on the easement that Plaintiff executed in her capacity as Trustee and, at the same time, deny she has the capacity to bring this suit "on behalf of the protected property." (App. Br. p. 3). First, Plaintiff did not bring this suit on behalf of or in the name of the Trust but, instead, in her individual capacity. Second, Plaintiff's ability to enter into the easement is provided for under an entirely separate section of the enumerated powers of a trustee. Section 62-7-815(a)(2)(A) provides that a trustee "may exercise ... all powers over the trust property which an unmarried competent owner has over individually owned property." S.C. Code Ann. § 62-7-815(a)(2)(A). Thus, while Plaintiff possesses those powers, as Trustee, to acquire or sell property, collect or reject trust property and/or grant an easement over trust property, there is nothing in the code that allows her to bring suit in her individual capacity involving the Trust property. As noted above, allowing such would violate a trustee's basic duty of loyalty to act solely in the interests of the beneficiaries.

Because Plaintiff's argument that she possesses statutory standing pursuant to S.C. Code Ann. § 62-7-816(24) to bring this lawsuit in her individual capacity is not preserved for appellate review and, furthermore, lacks merit, this Court should affirm the Circuit Court's grant of summary judgment.

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[4] To the extent it is argued that, if Plaintiff failed to apply any recovery she obtained from the lawsuit to the Trust and/or Trust property itself, the other beneficiaries could sue her to force her to comply with her statutory duties, such a result would conflict with the basic tenants of trusteeship and would require the other beneficiaries to engage in further litigation that otherwise would have been unnecessary. Patently, if the lawsuit had been brought in the name of the Trust, as it properly should have been, there would be no question as to the disposition of any recovery.

II. The Circuit Court properly declined to address Plaintiff's Motion to Amend.

Alternatively, Plaintiff argues that the Circuit Court erred by failing to allow her to amend her Complaint to name the Trust as the Plaintiff. At the same time she argues that this constitutes reversible error, she also argues, as she did in her Motion to Reconsider, that amendment is not necessary because she possesses statutory standing. However, as this Court has observed, an appellant bears the burden of demonstrating that an error was prejudicial, and "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Either Plaintiff was prejudiced by the failure to allow her to amend her complaint, or there is no error in the Circuit Court denying her request to amend.

In any event, the request to amend, which was filed the afternoon of the hearing, was not properly before the Court, as Plaintiff's counsel conceded:

> THE COURT: Well, I really don't think that a motion to amend is properly before this Court at this time. Certainly --
>
> MR. WHITSITT: It's not at this time, no.
>
> THE COURT: Certainly the other parties would need to receive notice and an opportunity to prepare for such a hearing.
>
> MR. WHITSITT: Absolutely, and I will --
>
> THE COURT: So, I'm not prepared today to really move forward and make any kind of ruling on that.
>
> MR. WHITSITT: And I would state to the Court that I only just today filed that motion.

(Tr. 14:8-19). And, while Plaintiff did argue in her Motion to Reconsider that she should be allowed to amend her Complaint to correct the named Plaintiff, that argument was never properly before the Court to begin with. Parties are bound by concessions made by their counsel. *See, e.g., Pope v. Heritage Comm., Inc.*, 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App

2011); *Smith v. Pearson*, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound by its counsel's prior statement); *see also United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) ("statements by an attorney concerning a matter within his employment may be admissible against the retaining client").

As a result, because she has both conceded that this issue was not properly before the Circuit Court and now concedes that it does not matter, this Court should hold that the Circuit Court did not err or abuse its discretion in not allowing Plaintiff to amend her Complaint.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Circuit Court's grant of summary judgment because Plaintiff lacks standing to bring the claims asserted in her Amended Complaint. In addition, this court should hold that the Circuit Court did not err or abuse its discretion in not allowing Plaintiff to further amend her Complaint, and should dismiss this appeal with prejudice.

Respectfully submitted,

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July 29, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Civ. No. 2018-CP-10-00323

Elizabeth Lofton, ...Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

PROOF OF SERVICE

I certify that on the 29th day of July 2019, I served **the Initial Brief of Respondent John Lucas Tree Expert, Co.** and Respondent's **Designation of Matter** on the other parties to this appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following counsel of record:

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July 29, 2019

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Elizabeth Lofton vs. Berkeley County Electric Cooperative, Inc. and John Lucas Tree Expert, Co.
Civil Action No.: 2018-CP-10-00323 (Charleston)
Date of Incident: July 17, 2013
Carrier Claim No.: 20205054
MGC File No.: 20880.16001
Appeal No.: 2019-000574

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

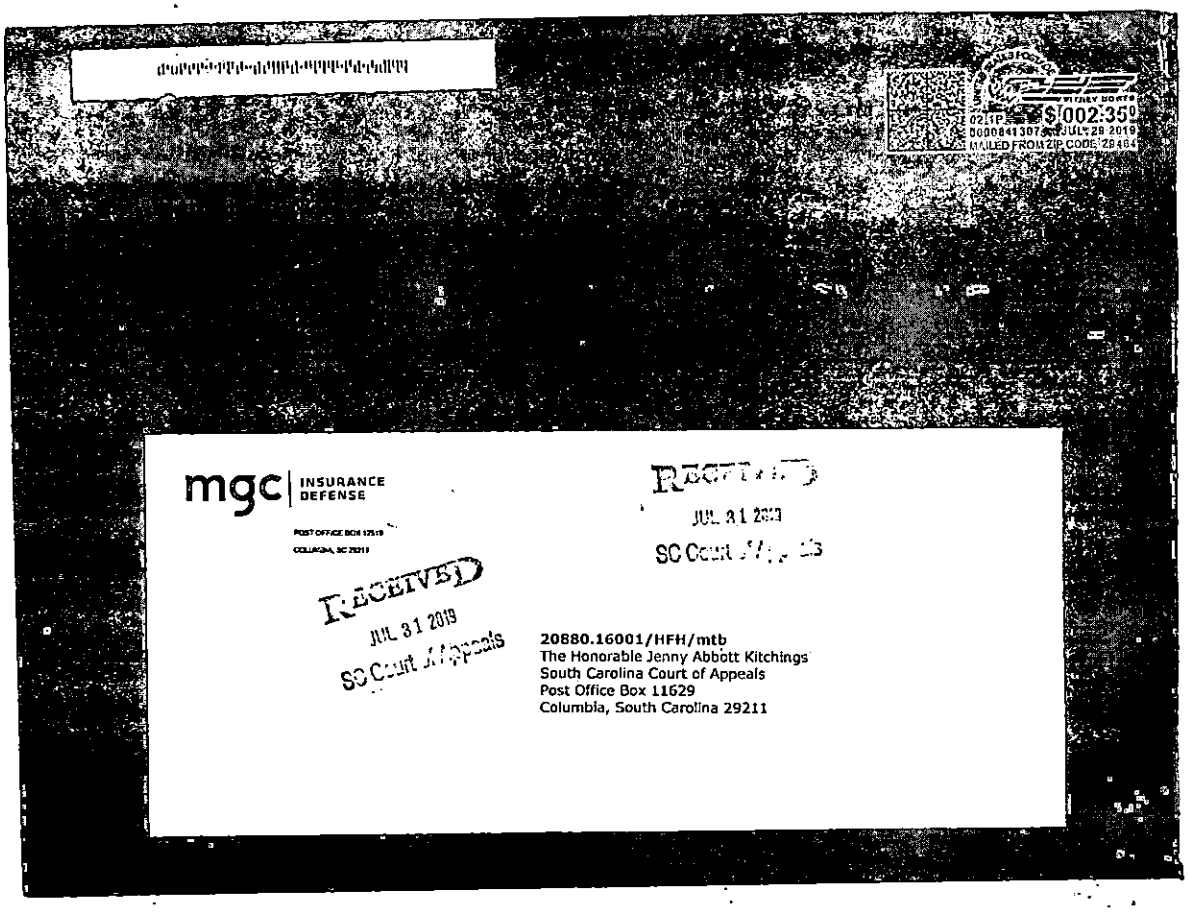
1. the original and one copy of the Initial Brief of Respondent John Lucas Tree Expert, Co.;
2. the original and one copy of Respondent's Designation of Matter to be Included in the Record on Appeal; and
3. the original and one copy of Respondent's Proof of Service concerning items one and two.

Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

Very truly yours,

Helen F. Hiser

Enclosures
cc: Michael A. Whitsitt, Esq.
Pope D. Johnson, III, Esq.
John B. Williams, Esq.



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