THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Civil Court Judge

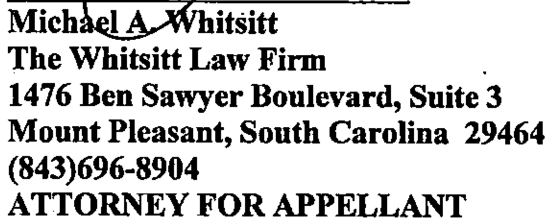
Appellate Case No: 2019-000574

Elizabeth Lofton..Appellant

vs.

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

REPLY BRIEF OF APPELLANT



Michael A. Whitsitt
The Whitsitt Law Firm
1476 Ben Sawyer Boulevard, Suite 3
Mount Pleasant, South Carolina 29464
(843)696-8904
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT HEAR AND RULE UPON PLAINTIFF'S STANDING AS TRUSTEE OF A TRUST?

II. DOES THE APPELLANT HAVE CONSTITUTIONAL STANDING?

FACTS

In ruling whether or not the Appellant had standing, the lower court acknowledged Appellant's 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 give proper weight to 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, but the arguments were recognized and ruled upon. **See Generally Order Granting Summary Judgment; See Also Tr Pg 6 12-13**

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), SCRCP. 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), SCRCP; Adamson v. Richland County School Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct.App.1998).

ARGUMENT IN REPLY

Without restating the issues (particularly the argument that trial judge abused her discretion) or making redundant the arguments which have been set forth in Appellant's opening brief, the Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents: 1) That the issue of whether or not the Appellant has standing is clear because the court heard the argument that she is trustee and ruled upon it and made reference to all of it in the order; 2) That all of Appellant's arguments regarding standing do not conflict and were properly before the trial court; and 3) Respondent's arguments as they relate to Rule 56 are erroneous, because the deposition testimony of the Appellant is properly part of the record.

I. APPELLANT HAS BOTH CONSTITUTIONAL AND STATUTORY STANDING BECAUSE SHE IS THE TRUSTEE OF THE TRUST AND BENEFICIARY OF THE TRUST.

A. APPELLANTS STATUTORY STANDING WAS PROPERLY BEFORE THE COURT IN THE FIRST HEARING AND THE COURT MUST APPLY AND GIVE EFFECT TO THE STATUTE IGNORED BY THE LOWER COURT.

As stated in Appellant's initial brief, 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. Freemantle v. Preston, 398 S.C. 186, 194-195, 728 S.E.2d 40, 44-45 (2012). Under Federal Rule of Civil Procedure 17(b), the capacity of a trust to sue or be sued is determined by the laws of the state where the court is located. Fed.R.Civ.P. 17(b). In South Carolina, that capacity is granted by statute to a trustee. See S.C. Code Ann. § 62-7-816. The overwhelming weight of authority holds that a trust, under state law, does not have the capacity to sue or be sued in its own name. ; See Bogert, Trusts & Trustees § 712 (rev.2d ed.1982); and IV Scott, Trusts § 280 (1989). There is no South Carolina case law that requires a trustee to bring an action in the name of the trust and the statutory provision conferring authority on a trustee is unambiguous. South Carolina law has consistently held that when the legislature delineated who would be able to bring a suit pursuant a statute, that the court

should decline to imply the language into a deliberate silence because to do so would be to rewrite the statute. Kubic v. Merscorp Holdings, Inc., 416 S.C. 161, 785 S.E.2d 595 (S.C., 2016) (holding that when a statute confers standing the court should not add additional requirements that render the statute mute). The code declares, without qualification or limitation, that in such a case the administrator "may sue," and we are not to narrow, by construction, the express statutory provision. See Generally Carroll v. Still, 13 S. C. 430 (S.C., 1880) (the court is citing the case of a bond given to man named Billings, who as commissioner in equity, had no interest in the bond except as a trustee of an express trust, and the bond had been transferred by operation of law to the clerk. Even so the court sustained the action in the name of Billings, the payee who brought suit in his **own** name, even after his office of commissioner had been abolished. The court in *Still* adopted the following reasoning: "It is possible that a strict compliance with mere technical form would have been better fulfilled if the complaint had been brought in the name of the clerk." So we may say in this case, that it is possible it would have been more technically correct if the action had been brought "on behalf of the trust"; but the code declares, without qualification or limitation, that in such a case the administrator (or in instant case, the trustee) "may sue," and we are not to narrow, by construction, the express statutory provision.) In the instance of the famous trust of James Brown, the court also sided with the Appellants who were also personally named, reasoning that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (this case is prior to the statute being amended in 2014, trustees now have this power by statute), and based on their official fiduciary capacities and pursuant to state law had standing. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (S.C., 2013)

1. APPELLANTS MATERIAL TESTIMONY SHOWING THAT SHE IS A TRUSTEE WAS PROPERLY PART OF THE RECORD AND RULED UPON BY THE LOWER COURT

In the case at hand It was respondent's counsel who first argued that the Plaintiff did not have standing along with several other grounds for summary judgment (which were all denied except as to the issue of standing), " It's rather a trust owns the land and

she is the trustee of the alleged trust. So, our first argument in asking for summary judgment is that plaintiff does not have standing to bring this claim. She has suffered no injury. In fact, whether -- rather if there is any injury it's the trust that's suffered" **Tr. Pg 4: 4-9.**

The issue of standing in this case is incredibly similar to the Still case. It is true, as a matter of technicality that Billings' case should have been brought in the name of the clerk, likewise, if the Appellant had originally brought her lawsuit "on behalf of the trust" it would be difficult for respondents to argue that she did not have standing. It is true that Appellants counsel argued that "whoever had this case first did not file it in the trust's name, and that was an error" **Tr. Pg 6: 8-9.** However, Appellants arguments that it was an error along with the statements regarding her not having standing to bring the suit personally as merely executor of her mothers estate are not inconsistent with Appellants arguments that the statute must be given effect and that ultimately she did have authority to bring the case as a trustee. At the hearing, the Appellant clearly argued that, "In terms of the authority that my client has to bring the lawsuit, she is indeed the trustee of the trust." **Tr. Pg 6: 12-13.** Appellant's counsel conceded that the case should have been brought differently, but maintained that she still had the authority to bring the suit and that any error was a mere technicality that could be solved by amendment if the court thought it necessary. Appellant's counsel had filed a motion to amend almost three months prior to the judge issuing a ruling. In that ruling, the court took up the issue of standing and even acknowledged Appellant as the trustee of the trust, but failed to ascertain the legal importance of her position. The court having been directly aware of the Appellant's status as trustee, instead ruled that the Appellant did not have standing citing only a constitutional analysis. Such a ruling constitutes plain reversible error, regardless of whether or not the statute that gave her authority to bring the lawsuit was directly discussed, because the ultimate facts regarding her position were properly before the court. The court in Still rejected any argument that would take away from the plain meaning of the statute that conferred standing regardless of error on the part of Billings' counsel to properly name him. This is the same result that was reached in the matter regarding the James Brown estate and is similar to the result in Kubic.

2. NO RULE 56 ARGUMENT IS PRESERVED BY THE RESPONDENTS BECAUSE THEY DID NOT OBJECT TO THE TESTIMONY BECOMING PART OF THE RECORD

Furthermore, the Respondents argue that the Appellant should have timely filed an affidavit, but this argument is erroneous because the Appellant did not need to file any affidavits. There was a response filed that contained portions of the sworn testimony of the Appellant that Respondents already had in their possession, eliminating the need for any affidavits. Appellant's counsel stated on the record the following: "And I did file a brief response to their motion for summary judgment that attaches as exhibits the selected portions of her testimony and I'm happy to pass that up to you." **Tr. Pg 10: 2-4** .The following conversation was recorded:

THE COURT: That would be great, yeah; thank you.
MR. WHITSITT: These are just the exhibits to it.
May I approach, Your Honor?
THE COURT: Uh-huh, (affirmative response). Thank you.
MR. WHITSITT: The rest of my response does not go to his motion but the other.
THE COURT: All right. Briefly, do you want to respond?
MR. RIBACK: Your Honor, in the event that it would be futile because our second point is that there's no genuine issue as to material fact as to John Lucas. Mr. Whitsitt talked a lot about the easement that Mr. -- whoever gave him, that all pertains to Berkeley County Coop, it did not pertain to John Lucas Tree Company. There's absolutely no evidence that he can point to or his client can point to that we went outside of the easement... **Tr. Pg 10: 2-19**

As demonstrated above, neither counsel for respondents objected to the short brief with attached deposition testimony becoming part of the record. Additionally, respondents' counsel, themselves, made Appellant's status as trustee part of the record.

B. THE LOWER COURT ERRED WHEN IT DETERMINED THAT APPELLANT DID NOT HAVE CONSITUTIONAL STANDING

The trial court erred in granting Respondent's Motion for Summary Judgment on the grounds that Appellant did not have 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. 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).

The Appellant is both a beneficiary and trustee of the trust property, which has been damaged. The Respondents also damaged appellant's personal property located on the trust property. Personal property aside, Appellant as a beneficiary of the trust has suffered a particularized harm when the trust is depleted or damaged (this is a direct causal connection between the injury and the challenged conduct), because this effectively disinherits her and her brothers.[1] If the Respondents are made to restore the trust property (by actual restoration or in money damages) and also made liable for the damage they caused, then the Appellant along with her two brothers will be properly redressed.

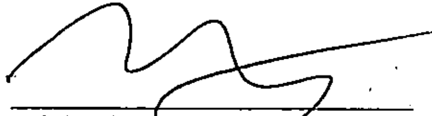
CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief the Appellant respectfully submits that the trial court erred in granting Respondent's Motion for Summary Judgment on the grounds that Appellant did not have standing. Not only should this court give proper deference to the statute, but they should also recognize the Appellants status as beneficiary of the trust. Further, the court refused to apply the well settled and long standing principles of South Carolina jurisprudence that the court

[1] South Carolina courts have held that third party beneficiaries can bring legal malpractice claims that damage the estate See Generally Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (S.C., 2014)

must avoid summary judgment whenever possible, specifically when there is 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, constitutional standing and the ability to amend any pleadings without prejudicing the Respondents.

Respectfully submitted,



Michael A. Whitsitt, Attorney
1476 Ben Sawyer Boulevard, Suite 3
Mount Pleasant, South Carolina 29464
(843)696-8904
ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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Case No: 2018-CP-10-00323

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 20 of August, 2019 he did serve a copy of the foregoing: 1) *Reply Brief of Appellant.*

Pope D. Johnson III, Esquire
1230 Richland Street
Columbia, South Carolina 29201

John B. Williams, Esquire
Williams & Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461

Helen F. Hiser, Esquire
McAngus, Goudelock & Courie, LLC
P.O. Box 650007
Mount Pleasant, South Carolina 29465

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August 20, 2019

Michael A. Whitsitt
S.C. Bar No.: 100323
The Whitsitt Law Firm
1476 Ben Sawyer Boulevard, Suite 3
Mount Pleasant, South Carolina 29464
(843)696-8904
ATTORNEY FOR APPELLANT

August 20, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. BOX 11629
Columbia, South Carolina 29211

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

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

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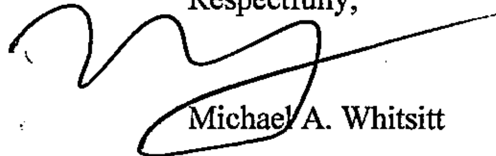
Dear Ms. Kitchings,

Please find enclosed an original and one copy of the following: 1) *Appellants Initial Reply Brief;* and 2) *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.
John B. Williams, Esq.

TheWhitsittLawFirm.com • 843 696 8904 • 1476 Ben Sawyer Boulevard, Suite 3
Michael A. Whitsitt, Attorney At Law

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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211