IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Civil Action No.: 2018-CP-08-00817
Appellate Case No.: 2019-001140

Ronald L. Jones and Gayle Langley Jones, Thomas Huguenin Gaillard, as Trustee of The Thomas Huguenin Gaillard Revocable Trust, Dated April 3, 2007, Thomas W. Cone, Jr., as Trustee of The Thomas W. Cone, Jr. Revocable Trust Dated April 3, 2007, Respondents,

v.

Rogers Townsend & Thomas, P.C.; Lisa Hostetler; Alexander C. Peabody; and Peabody & Associates, Inc., Defendants,

Of Which Rogers Townsend & Thomas, P.C. and Lisa Hostetler are Appellants.

INITIAL BRIEF OF RESPONDENTS, RONALD L. JONES AND GAYLE LANGLEY JONES

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ISSUE ON APPEAL

Did the circuit court abuse its discretion in dismissing the Trustee, Respondents under Rule 21, SCRCP, where they were added as involuntary plaintiffs in this legal negligence action based on their status as dominant estate holders in an undisclosed easement in order to be bound by any determination regarding the easement and where they have disclaimed any interest in that easement?

No.

STATEMENT OF FACTS

This is a transactional legal negligence case. The Respondents, Gaye and Ronald Jones (collectively, "Respondents") allege that their closing attorney, Lisa Hostetler, and her law firm, Rogers Townsend & Thomas, P.C., (collectively, "Appellants") negligently failed to advise them of the existence of an easement encumbering the residential property they purchased in 2010 from E-Trade Bank. Complaint, ¶¶ 9-18; 24-27. Respondents also sued their surveyor, Alexander C. Peabody, and his company, Alexander Peabody & Associates, Inc., (collectively, "Surveyor") for failing to show the ingress-egress easement on the plat he prepared. Complaint, ¶¶ 19-23, 24, 28.

Respondents' U-shaped property—Lot 6B—is bounded on the north and east by residential properties and on the south and west by Wando River marsh. *See* Motion to Amend, Exhibits 2, 4. In their complaint, Respondents allege that Appellants breached the standard of care by failing to disclose the existence of a 25 foot wide ingress-egress easement that "will almost completely encircle Lot 6B except for its northern boundary." Complaint, ¶¶ 16-17. The undisclosed easement grants the owners of Lot 6A, located to the north, and to the owners of Lots 5, 6, and 7, located to the east, the most direct access to the Wando River. Complaint, ¶ 17; *See* Motion to Amend, Exhibit 2.

The Respondents' home is located on lot 6B, which abuts the southern boundary of Thomas Huguenin Gaillard, as Trustee of the Thomas Huguenin Gaillard Revocable Trust, and Thomas W. Cone, Jr., as Trustee of the Thomas W. Cone, Jr. Revocable Trust (collectively, "Trustees").' property. *See* Motion to Amend, Exhibits 2, 4.

The Respondents allege:

> 16. Upon information and belief a 25 foot Ingress/Egress easement was created by way of deed from James J. Monaghan to Benjamin J. Daniel, Sr. dated April 4, 2006 and recorded in the Office of the Register of Deeds for Berkeley County in Deed Book 5506 at page 12.
>
> Defendants admit the allegations of Paragraph 16 of the Complaint. Answer, ¶ 10.
>
> 17. The easement granted to the owners of Lot 6A (TMS # 263-00-03-068) Lot 5 (No. 108 Cainhoy Landing Road, TMS # 263-00-05-005) TMS Lot 6 (No. 110 Cainhoy Landing Road, TMS # 263-00-05-006) as shown on the above-referenced plat, and Lot 7, (112 Cainhoy Landing Road, TMS # 263-00-05-007) a 25' Ingress/Egress along the Northern boundary of the Lot 6B at the point labeled D and extending one-half the way to the point labeled A as shown on the Plat entitled "PLAT SHOWING A SUBDIVISION OF LOT 6, "RIVERVIEW VILLAGE", CREATING LOT 6A AND 6B, SITUATED AS SHOWN N ROAD S-8-33, IN WANDO, BERKELEY COUNTY, SOUTH CAROLINA. PRESENTLY OWNED BY DAVID E. HATCHELL AND JOESEPH BARTONE" and shall run down the sides of the Lot shown on said plat as going S 9° 22/10" W for 154.18', and then continuing on Lines L1, L2, L3,L4, L5, L6, L7,L8, L9, L10, and L1. Therefore, the Easement will almost completely encircle the Lot 6B except for most of the Northern boundary of the Lot. This easement is given in perpetuity and is to run with the land.
>
> Defendants admit the allegations of Paragraph 17 of the Complaint, except that the words "Ingress/Egress along the Northern Boundary" should read "Ingress/Egress beginning on the Northern Boundary" and the words "L10 and L1" should read "L10 and L11." Answer, ¶ 11.

18. The easement described in paragraph 17 herein was created by deed in the direct chain of title for the subject premises.

Defendants admit the allegations of Paragraphs 18 through 23 of the Complaint. Answer, ¶ 12.

...

24. Upon information and belief, the existence of this easement was not disclosed to the Plaintiffs prior to the closing on May 7, 2010 or any time after the closing by any of the defendants.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

...

26 The existence of the easement is and was a material fact that should have been disclosed to the Plaintiffs prior to closing on the property hereinabove referenced by the Defendants Rodgers, Townsend & Thomas, P.C. and Lisa Hostetler.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

27. The Plaintiffs are informed and believe that the Defendants Rodgers, Townsend & Thomas, P.C. and Lisa Hostetler did not disclose the encumbrance/easement on the property, nor, did the Defendants properly communicate and explain the existence of the easement.

Defendants admit the allegations of Paragraphs 24-28 of the Complaint. Answer, ¶ 13.

...

30. That subsequent to discovery of the easement, the Plaintiffs have terminated three (3) of the (4) properties that held and easement through agreements between the Plaintiffs and those lot owners. Complaint

Defendants denied the allegations of Paragraph 30 of the Complaint. Answer, ¶ 14.

31. That the owners of Lot 6A will not terminate their rights to the easement, but in the alternative, have agreed to reduce the size and scope of the easement.

Defendants denied the allegations of Paragraph 31 of the Complaint. Answer, ¶ 15.

34. Plaintiffs were foreseeable parties to suffer injury if the Defendants Rogers, Townsend, & Thomas, P.C. and Lisa Hostetler failed to perform their duties and meet the standard of care in their representations in the aforementioned property transaction.

> Defendants admit the allegations of Paragraphs 34 of the Complaint, but deny any damage to Plaintiffs. Answer, ¶ 18.

35. Defendants Rogers, Townsend & Thomas, P.C. and Lisa Hostetler owed a duty to meet the standard of care in their handling of the closing and transaction and to prevent foreseeable injuries to Plaintiffs.

> Defendants admit the allegations of Paragraphs 35 and 36 of the Complaint. Answer, ¶ 19.

36. The standard of care for Appellants representing a client in transactions in South Carolina requires a Appellants, among other things, to inform, consult, and communicate with the client as to a transaction about the means by which a client's objectives are to be accomplished, to keep the client reasonably informed about the status of the matter, and to explain to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

> Defendants admit the allegations of Paragraphs 35 and 36 of the Complaint. Answer, ¶ 19.

...

Appellants further deny that Respondents suffered any damages whatsoever as a result of their admitted failure to exercise due care. Answer, ¶¶ 18 and 20. As affirmative defenses, Appellants allege that the easement "never existed," or that, if it did exist, it was no longer enforceable or had been waived. Answer, ¶¶ 46-75.

Based on the pleading, Appellants do not dispute that the standard of care requires they explain matters to the extent reasonably necessary to permit the client to make reasonably informed

decisions and that it was foreseeable that Respondents would suffer injuries if Appellants failed to perform their duty and meet that standard of care. The terms of the undisclosed easement and that it was created by deed in the direct chain of title is not disputed. It is also undisputed that Appellants did not disclose the easement prior to closing or any time after closing, that Appellants did not properly communicate and explain the existence of the easement, and that the easement was a material fact that should have been disclosed prior to closing. *See* Complaint, ¶¶ 16-18, 24-27, 34-36; Answer, ¶¶ 10-13; 18-19. The issue in this case is whether and to what extent Plaintiffs suffered any damages caused by Appellants' admitted failure to disclose the easement.

Appellants filed a motion to add the Trustees as parties pursuant to Rule 19(a), SCRCP, arguing that if the undisclosed easement was somehow determined to be invalid or otherwise unenforceable, Trustees, as the dominant estate holders, would not be bound by the decision. Appellants did not move to add the owners of Lots 5 (No. 108 Cainhoy Landing Road, TMS # 263-00-05-005) TMS Lot 6 (No. 110 Cainhoy Landing Road, TMS # 263-00-05-006) as shown on the above-referenced plat, and Lot 7, (112 Cainhoy Landing Road, TMS # 263-00-05-007) even though they were also granted an easement by the 2006 deed.

The motion was heard by the Honorable Perry M. Buckner on August 6, 2018 who granted the Appellant's motion by Form 4 order filed on August 13, 2018.

On March 15, 2019, the Respondents and Trustees entered into an "Access, Maintenance and Joint Dock Use Agreement" (hereinafter, "the Agreement"). Motion for Non-Joinder, Exhibit A. The Agreement terminated the undisclosed 25 foot wide ingress-egress easement encircling lot 6B—identified as the "Old Purported Easement." Motion for Nonjoinder, Exhibit A, p. 2; ¶ 6. Specifically, Trustees agreed to

> ...remise, quitclaim, terminate, cancel, and forever release unto Plaintiffs, her heirs and assigns, all of [their] right, title and interest, if any, in and to the Old Purported Easement....

Motion for Nonjoinder, Exhibit A, ¶6. The existence of this agreement was specifically plead by the Respondents.

On March 29, 2019, Trustees filed a "Motion for Non-Joinder Pursuant to Rule 21, SCRCP," seeking to be dropped from the case.

In response, Appellants moved to amend their answer to add a claim for declaratory relief against Respondents and Trustees. Motion to Amend Answer, p. 1. Appellants new cause of action requests "that the Court determine the rights of the owners of Lot 6A and Lot 6B under the "Purported Easement." Amended Answer, ¶ 89.

The Honorable Deadra L. Jefferson heard Trustees' Motion for Nonjoinder and Appellants' Motion to Amend their answer on May 7, 2019. On May 9, 2019, Judge Jefferson issued a Form 4 Order dismissing Trustees from the action. On May 20, 2019, Appellants moved for reconsideration of Judge Jefferson's order dismissing Trustees from the action.

On July 12, 2019, Appellants filed notice of this appeal.

The Trustees' Motion to Dismiss the appeal was denied by this Court's order dated December 13, 2019.

I. THE STANDARD OF REVIEW FOR THIS APPEAL IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RELIEF TO TRUSTEES UNDER RULE 21, SCRCP.

Rule 21, SCRCP, provides:

> Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just.

Rule 21, SCRCP. A motion to dismiss under Rule 21 is addressed in the court's discretion. *Demian v. S.C. Health and Human Services Finance Comm'n.,* 297 S.C. 1, 374 S.E.2d 510, at 512 (Ct. App. 1988), *citing* 3A J. Moore, J. Lucas, and G. Grotheer, *Moore's Federal Practice*, Section 21.03 (2d ed. 1987) ("The Board's real complaint is that is does not need to be a named party in Demian's appeal because if performs a quasi-judicial function. The proper motion for the Board is a motion for misjoinder under S.C. R. Civ. P. 21. A motion to dismiss a party is addressed to the court's discretion.") *See also, Farmer v. CAGC Ins. Co.,* 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App., 2018).

Conceding that "a ruling regarding joinder is subject to the trial court's discretion," Appellants argue that the standard "should be the one when the lower court dismisses a party." Initial Brief, p. 3. This issue was neither raised by Appellants nor ruled on by the trial court in the proceedings below. Therefore, the issue has not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C.,* 372 S.C. 295, 641 S.E.2d 903, 907 (2007).

Appellants cite no authority for their proposition that the abuse of discretion standard is inapplicable when the trial court decides to drop a party that has been misjoined. Instead, citing *Farmer v. CAGC Ins. Co., supra*, Appellants argue that "removing all dominant estate holders from an action based entirely on the validity of an easement is a radical decision, reaching much farther than the scope of Rule 21." Initial Brief, p. 4.

Respondents' action is not based "entirely on the validity of an easement." Respndents' case is based on Appellants' admitted failure to disclose a material fact—the existence of a 25-foot wide ingress/egress easement that existed in their properties chain of title. Complaint, ¶¶ 16-18, 24-27, 34-36. One of the Appellants' *defenses* is based on the validity of the undisclosed easement. Answer, ¶¶ 10-13; 18-19. Appellants bear the burden of proving their affirmative

defenses. *See, e.g., Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924, 929 (Ct. App. 1994).

Farmer does not hold that Rule 21 motions involving novel questions are subject to a higher standard of review. In *Farmer,* the Court of Appeals found that because the circuit court determined that the motion involved a novel question, it had exceeded its discretion in deciding the issue with no factual record. *See id.*

There was no determination that the legal issues involved in in Trustees' motion were in any way novel. The circuit court did not, as Appellants claim, "remove all dominant estate holders based on the validity of an easement...." Initial Brief, p. 4. The court ruled that, based on the Agreement, Trustees had resolved the undisclosed easement with Plaintiffs by disclaiming their interests in the undisclosed easement. Order, pp.1-2; Motion for Nonjoinder, Exhibit A, ¶ 6. As such, Trustees no longer hold the dominant estate in the undisclosed easement because it had been terminated.

The proper standard for this appeal is whether the circuit court abused its discretion in dismissing Trustees from the case.

II. APPELLANTS FAIL TO ESTABLISH THAT THE CIRCUIT COURT ABUSED ITS DISCRETION BY DISMISSING TRUSTEES FROM THE CASE.

Appellants argue that they "have been deprived of their right to defend against the allegations of Plaintiff." Initial Brief, p. 9. The Appellants have consistently held the position that the Trustees should be named a party so that they can challenge the enforceability of the easement. Interestingly, it was the Appellants' conduct of not providing notice of the easement to the Respondents that has created this action and not the Trustees actions as they suggest. Furthermore, it would appear that it is the position of the law firm Appellant that the best course

of action would have been for the Respondent to sue their neighbors in hopes that the easement would somehow be adjudicated to be invalid. The Appellants and Trustees did what good neighbors should do in finding a compromising position for each side. That is exactly what the Respondents and the Trustees have done in this case. This is same rationale that the Court concluded when Judge Jefferson ultimately reached her decision.

Judge Jefferson stated that "nothing in the ruling has a preclusive effect on the Defendants pursuing any of its causes of action or defenses." *See* Transcript of May 1, 2019, 31:12-20, 35:10-36:8, 39:25-40; Form 4 Order Granting Trustees Motion, p.2; Order Denying Motion to Alter/Amend Judgement, pp. 2-3. Appellants further assert, without any supporting authority, that the rights of Trustees as dominant estate holders at the time Plaintiffs purchased Lot 6B must be determined before the rights of Plaintiffs can be determined. Initial Brief, p. 9. Again, it is interesting that Appellants have not named the three (3) owners of other lots that were purportedly given the same rights as the Trustees pursuant to the Deed in question. If the Respondents were so concerned with the joining all of the parties that were subject to the easement, then the other lot owners should have been joined in this case.

Appellants fail to establish why Trustees must continue as parties in the case in order for such a determination to be made. The Respondents agree with the Trustees that the rights of the dominant estate holders in the undisclosed easement when Respondents purchased Lot 6B in 2010 can be determined without the Trustees.

Appellants close with the astonishing claim that "Trustees are the source of this suit." Brief, p. 9. The Respondents were put in the position of having to deal with the existence of a recorded easement, that was admittedly undisclosed to them by their lawyers, with four lot owners. The Appellants misplace blame on the the Trustees when it was the law firm Appellants' failure

to disclose to the Respondents the very existence of the easement at closing. However, the other Lot owners named in the 2006 were not brought into this suit by Appellants, which seems to contradict the Appellants' argument.

A. The Circuit Court did not Err in Declining to Address Whether Appellants had Standing to Challenge the Validity of the Easements.

The issue of whether or not the Appellants had standing to challenge the validity of the 2006 easement or the validity of the recorded Agreement incorporating a new easement was an issue never raised by the Appellant during the hearing. The issue of standing was argued by the Respondents alone regarding the amendment of the pleadings.

Appellants assert:

> Whether Appellants have such standing is an essential component of the issues put before the lower court and encompassed by this appeal, but the lower court declined to address the question, despite Appellants' request in their Rule 59(e), SCRCP motion for reconsideration.

Initial Brief, p. 10.

Appellants never sought a ruling regarding standing in their written motion to amend their answer, during oral argument on the motion, or later, during oral argument on Trustees' motion for nonjoinder. Appellants did not move to alter or amend the court's order granting their motion to amend to address the standing issue. The Appellants first demanded a ruling on the issue in their motion seeking reconsideration of the court's grant of Trustees' motion. A party may not raise for the first time in a motion to reconsider, alter, or amend an issue that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Department of Revenue,* 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017).

Respondents agree with the Trustees proposition in its brief that his arguments regarding standing were directed toward the viability of Appellants' Motion to Amend, not Trustees' Rule

21 motion. t. *See* Transcript of May 7, 2019, 7:17-8:4; 24:6-9. Further, Judge Jefferson made it clear that the question of standing was for "another day." Transcript, May 7, 2019, 7:24-25. While plainly skeptical of whether Appellants could nullify the terms of a private agreement between Plaintiffs and Trustees, Judge Jefferson acknowledged that Appellants could litigate the validity and effect of the undisclosed easement and challenge Plaintiffs' claims of damages arising out of the Agreement. Transcript May 7, 2019, 27:18-28:13, 40:1-13.

Trustees' motion to be released as parties was not based on Appellants' lack of standing to challenge the undisclosed easement. The Circuit Court properly disregarded Appellants' demand that it rule on an issue that was not yet ripe for determination.

Appellants next contend that their rights under the Seventh and Fourteenth Amendments of the U.S. Constitution have somehow been compromised by "allowing Plaintiff Jones and Trustees to simply agree to the existence of the easement" and by allowing Plaintiffs to "jump directly" to damages with requiring proof of an attorney-client relationship, breach of duty, and proximate causation. Initial Brief, p. 11. This argument was neither raised by Appellants nor ruled on by the trial court in the proceedings below and has not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C., supra,* 641 S.E.2d 907.

Appellant has no right to a jury trial under the Seventh Amendment of the U.S. Constitution. Additionally, the Seventh Amendment has never been applied to the states. *See Walker v. Sauvinet,* 92 U.S. 90, 23 L.Ed. 678 (1875); *Minneapolis & St. Louis Railroad v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916); and *Hardware Dealers' Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.,* 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931). In South Carolina, the right to a jury trial is generally governed by the state constitution as well as by court

rules and case precedent. *Mims Amusement v. Law Enforcement Div.*, 366 S.C. 141, 621 S.E.2d 344, 346-348 (2005).

The Respondent is in further agreement with the Trustees that, the terms of the easement, its existence in direct chain of title, Appellants' failure to disclose the easement, the materiality of the easement, Appellants' breach of the standard of care in handling the closing, and the foreseeability of injury from that breach, have all been admitted by Appellants in their answer. Complaint, ¶¶ 16-18, 24-27, 34-36; Answer, ¶¶ 10-13; 18-19. Nothing in the U.S. Constitution, the South Carolina Constitution, South Carolina Rules of Court, or case precedent guarantees Appellants the right to a jury trial on factual and legal issues that have been conceded in the pleadings. Respondents will still have to prove that Appellants' negligence caused their claimed damages, and the circuit court's decision to leave the issue of standing undecided at this stage does not in any way alter Respondents' burden of proof.

Appellants claim that they have been denied their right to a jury trial is also without merit. As previously discussed, Appellants standing, or lack thereof, was not a basis for the circuit court's decision to drop Trustees from the case. The court did not abuse its discretion in disregarding Appellants' demand for a ruling on an issue that has yet to be resolved in this case.

Next, Appellants accuse Trustees of colluding with Plaintiffs over the easement. Citing *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 775 S.E.2d 37 (2015) Appellants argue:

> That is, if we consider Trustees the "plaintiffs" who seek to enforce an allegedly undisclosed easement against "defendant" Plaintiffs, while Plaintiffs is willing stipulate to the enforceability of the purported easement in order to gain damages from her closing attorneys, the fact pattern is eerily similar.

Initial Brief, p,. 12. The fact pattern of the personal injury litigation in *Skipper* is not even close to that of this action. Trustees have not sued the Respondents over the easement. *See id.*, 413 S.C.

35, 775 S.E.2d 37-38. There is no multimillion dollar confession of judgment by Respondents admitting liability to Trustees for their damages. *Id.* There has been no assignment of Respondents' malpractice claim to Trustees in exchange for a covenant not to execute against the non-existent confession of judgment. *Id.* Appellants' "eerily similar fact pattern" is completely without merit.

Appellants attempt to rationalize their baseless conspiracy theory:

> Appellants can conceive of no other reason why Plaintiffs would not allow Appellants to challenge Trustees purported easement based on its numerous defects, and thus clear the land of the encumbrance.

Initial Brief, p. 12. The Appellants claims of collusion in this matter is completely disingenuous. Quite simply, the Respondents hired the Appellants to represent them in a real estate transaction. In the scope of their representation, the Appellants failed to disclose the existence of a recorded easement that is clearly in the chain of title affecting their property. To resolve the issue of the easement with their neighbors, Plaintiffs have entered into an agreement with the Trustees to mitigate the easement, as well as entering into agreements with (3) other property owners. See Complaint.

Yet, the Appellants, who admit that they did not disclose the easement to the Respondents want the Respondents to sue their neighbors over the validity of the easement rather than resolve the matter by agreement.

An alternate reason exists that the Respondents resolved the easement issue with their Trustee neighbors: they attempted to avoid contentious, costly litigation with the adjacent property owners by entering into an agreement to limit the size and scope of the easement in order to resolve a problem that was inherited by the Respondents due to the Appellant's conduct.

The Respondents agree with the Trustees that the Appellants have hijacked this litigation by maneuvering to keep the Trustees in the case. The Respondents can find no legitimate reason that the Appellants would name only the Trustees and not the other three lot owners in this suit. It seems that the Appellants are content on trying to put a wedge between neighbors, by keeping them unnecessarily in this case.

The Court should affirm the circuit court's ruling dismissing Trustees from the case as involuntary plaintiffs.

B. Trustees are not Necessary to Accord Complete Relief to the Parties or Avoid Duplicative Litigation.

Appellants assert that "the predicate issue that must be proved by Plaintiff to establish her case is whether there is or was a valid and enforceable easement owned by Trustees." Initial Brief, p. 13. Appellants repeat this claim throughout their brief. *See, e.g.,* Appellants' Initial Brief, p. 6, fn.4, pp. 7, 13, 14, and 20. This argument—that Respondents have the burden of establishing that the easement was valid and enforceable—was neither raised by Appellants nor ruled on by the trial court in the proceedings below and has not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C., supra,* 641 S.E.2d 907. Rather, in Appellants' written motion to add a party, and during the hearings on Appellants' Rule 19(a) motion to add a party and on Trustees' Rule 21 motion seeking to be dismissed, Appellants argued the validity/enforceability issue was necessary to their defense and to their claim for declaratory relief. *See* Answer, ¶¶ 46-75; Transcript, August 6, 2018, 6:4-12, 7:17-20; Transcript, May 7, 2019, 19:13-20:17, 34:23-35:25, 40:9-15.

Appellants offer no support for their proposition that the validity of an easement must be established as a prerequisite for Respondents to prevail on their claim of transactional negligence. The Appellants have continually stated this misbelief throughout their initial brief. "Where a deed

is valid and regular on its face, it is presumed to be valid in all respects." *Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986). "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation omitted). The deeds in Plaintiffs' title and the easement reserved in those deed are presumed valid. [1]

Appellants have admitted that they breached their duty to act with due care in handling the closing and that it was foreseeable Plaintiffs would suffer injury if they failed to meet that standard of care. Complaint, ¶¶ 16-18, 24-27, 34-36; Answer, ¶¶ 10-13; 18-19. Had Appellants done their job, they would have explained the nature and effect of the easement to Plaintiffs. Equipped with the knowledge of the encumbrance, Respondents would have been in a position to decide whether to proceed with the transaction. The Seller would not have have been able to convey a marketable title as represented, and the Respondents could have made meaningful informed decision on how to address the situation. However, the failure to disclose the easement denied the Respondents any opportunity to consider the encumbrance prior to closing on the real property.

Whether the undisclosed easement "exists" and caused Respondents' damages are Appellants' defenses. *See* Answer, ¶¶ 46-60; Transcript, August 6, 2018, 6:4-12. The existence of an easement and proximate cause are questions of fact for the jury. *See Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710, 711 (1987); *Hurd v. Williamsburg County*, 363 S.C. 421, 611 S.E.2d 488, 492, (2005). As previously stated, Appellants bear the burden of proving their affirmative defenses. *Provident Life and Acc. Ins. Co. v. Driver, supra*, 317 S.C. at 451, S.E.2d at 929.

[1] The Expert Opinion Affidavit attached to the Complaint states "As a result of the failure to review the abstract and note the easements filed of record, the subject property was purchased and easements which exists as a matter of record affect the subject property but were not disclosed. ¶15 Charles Owen Nation Affidavit attached as Exhibit A to the Complaint

After a careful analysis of the pleadings, the Appellants have admitted that they did not disclose a material fact on title to a client during a real estate transaction. The fact that the Respondents were required to hire an attorney and expend legal fees to resolve the title issue alone would be considered damages for their negligence action.

Appellants inaccurately assert that Plaintiffs entry into the Agreement "further entrenched the questionable easement owned by Trustees." Initial Brief, p 13. Respondents have mitigated their damages by reducing the scope and size of the easement. The Agreement terminated the undisclosed easement and created a new easement with a limited scope. Motion for Nonjoinder, Exhibit A. The terms of the new easement are in no way contingent on a "questionable easement" or on the outcome of this litigation. *See* Motion for Nonjoinder, Exhibit A.

Appellants circle back to their earlier contention:

> If, as Appellants believe, Plaintiff could not prove the existence of an enforceable easement, it follows the dominant estate holders must be parties to the court's determination so that they may be bound. Otherwise, the issue may be subject to contradictory rulings and multiple adjudications.

Initial Brief, p. 13. Appellants misstate the preconditions for joinder under Rule 19(a), SCRCP. It is not merely that "the issue *may* be subject to contradictory rulings and multiple adjudications." Initial Brief, 13 (emphasis added). Rather, Rule 19(a) requires that a person be joined if:

> (1) in his absence, complete relief cannot be accorded among those already parties, or
>
> (2) he *claims* an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any persons already parties subject to a *substantial risk* of incurring double, multiple, or otherwise inconsistent obligations *by reason of his claimed interest.*

Rule 19(a), SCRCP (emphasis added). Appellants' statement that "the issue may be subject to contradictory rulings and multiple adjudications" fails to establish that Appellants or Plaintiffs "are

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations *by reason of Trustees' claimed interest.* Rule 19(a)(2)(ii), (emphasis added). "The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1280 (10th Cir. 2012) (quoting 7 Wright, Miller & Kane, *Federal Practice & Procedure* § 1604, (2d ed.1986)).

1. Trustees Are No Longer the Dominant Estate Holders of the Undisclosed Easement.

Despite all of the foregoing, Appellants steadfastly maintain that "Trustees are the dominant estate holder for the 2006 purported easement asserted by Plaintiffs." Initial Brief, p. 14. Based on this, Appellants conclude:

> Because there must be a valid, and not merely purported, easement before the closing attorney may be held liable for not disclosing it, the core issue in this case bears directly on Trustees' interests, per Rule 19.

Initial Brief, 14. Again, Appellants cite no authority for their claim that an easement must be proven valid before a closing attorney can be held liable for failing to disclose it.

Any decision regarding the validity of the undisclosed easement will have no effect on Trustees because they have extinguished any rights of the 2006 easement by agreement. There is no necessity for the Trustees to have to be parties in this action, but they can be fact witnesses.

There is no legitimate reason to force Trustees to continue as parties in order to be "bound" by any determination regarding the undisclosed easement.

2. The Circuit Court's dismissal of Trustees Pursuant to Rule 21 did not Reverse or Re-litigate the Order Adding Trustees as Parties Under Rule 19(a).

In section I(b)(i) of their brief, Appellants complain that the Judge Jefferson "chose to reverse" Judge Buckner's order granting their Rule 19 motion to add Trustees as parties, arguing

that "the facts upon which that order relied were not materially different." Initial Brief, p. 15. Similarly, in section I(b)(ii) of their brief, Appellants assert "Trustees' 2019 Motion for Non-joinder is an attempt to re-litigate matters already decided by Judge Buckner in an un-appealed order." Initial Brief, p. 17. These issues were neither raised nor ruled in the proceedings below and have not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C.,* 295, 641 S.E.2d, 907.

Judge Jefferson did not reverse Judge Buckner's ruling. Judge Buckner's ruling was based on Appellants' representations that Trustees, as the dominant estate holders, necessarily had an interest in the undisclosed easement. *See* Transcript, August 6, 2018, 5:9-7:7. Judge Jefferson ruled that Plaintiffs and Trustees had resolved any issues regarding the undisclosed easement. Form 4 Order filed May 9, 2020, pp. 1-2. Her ruling was grounded on the recorded Agreement attached to Trustees' motion, wherein Trustees' disclaimed their interests in the undisclosed easement. *See* Motion for Nonjoinder, pp.2-4 and Exhibit A, ¶ 6; Transcript, May 7, 2019, 19:16-21:24, 34:25-35:9, 39:25-40:4.

Judge Jefferson did not "relitigate" the arguments that formed the basis of Judge Buckner's ruling. Trustees' motion was based on new and different facts. *See* Motion for Nonjoinder, Exhibit A, ¶ 6. Further, Judge Buckner's order adding Trustees was not a decision on the merits and, like Judge Jefferson's ruling dismissing Trustees, was made without prejudice. Transcript, Aug. 6, 2018, 11:3-9; Order Denying Motion to Alter/Amend Judgement, pp. 2-3. *See DirecTV, Inc. v. Leto*, 467 F.3d 842, 845 (3rd Cir. 2006) ("When a court 'drops' a defendant under Rule 21, that defendant is dismissed from the case without prejudice."); *see also*, Rule 41(a)(2), SCRCP (order of court dismissing action or claim is without prejudice).

Appellants' correctly point out that Trustees did not appeal Judge Buckner's order adding them as parties to the case. Initial Brief, p. 17. It is well-settled that orders granting or denying motions to add parties are not "final" within the meaning of 28 U.S.C. § 1291. *Michelson v. Citicorp Nat. Services, Inc.*, 138 F.3d 508, 512-513 (3rd Cir. 1998); *see also, McClune v. Shamah*, 593 F.2d 482 (3d Cir.1979) (Noting that plaintiffs had not appealed from the district court's denial of their motion to amend the complaint to add a party, commented "nor could they [have appealed] since it is not a final order appealable under 28 U.S.C. § 1291."). Based on *Michelson* and , *McClune*, Judge Buckner's ruling was not final and therefore was not appealable.

As mentioned earlier, Trustees moved to dismiss this appeal on the grounds that Judge Jefferson's order was not immediately appealable under S.C. Code of Laws Anno. § 14-3-330(1)-(4). That motion was denied by order of this Court on December 13, 2019. However, the order specifies that "nothing prevents the parties from raising the issues of appealability in their briefs." Order, December 13, 2019.

Based on *Michelson* and *McClune*, *supra,* and based on the arguments and authorities previously set forth in their motion to dismiss, the Respondents agree with the Trustees that continue to maintain that Judge Jefferson's order dismissing Trustees pursuant to Rule 21, SCRCP, is not immediately appealable under S.C. Code of Laws §§ 14-3-330(1)-(4).

C. The Circuit Court's Order Dismissing Trustees' Does not Deny Complete Relief to Appellants' Under their Claim for a Declaratory Judgment.

In section I(c) of their brief, Appellants assert that Judge Jefferson's dismissal of Trustees is "inherently contradictory because Trustees must be a party to any declaratory judgment ruling about their purported easement." Initial Brief, p. 17. Appellants failed to raise this claim in their opposition to Trustees' motion for nonjoinder or during the hearing before Judge Jefferson. Appellants never argued that granting their motion to amend to add claim for declaratory relief

necessarily precluded dismissal of Trustees as parties. A party may not raise for the first time in a motion to reconsider, alter, or amend an issue that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Department of Revenue,* 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017).

Judge Jefferson' order dismissing Trustees' does not contradict her order allowing Appellants to amend their answer to add a cause of action for a declaratory judgment. Respondents agree with the Trustees, that they have no interest in any declaration of rights under an easement that they have disclaimed. To the extent Appellants' contrived claim for declaratory relief is allowed to move forward in this case, it simply will be without Trustees as parties. Judge Jefferson's ruling in this matter in no way denied Appellants complete relief as to their petition for a declaratory judgment.

D. The Trustees' Rule 21 Motion and the Circuit Court's Resulting Order Properly Complied with the South Carolina Rules of Procedure.

In section I(d), Appellants provide a brief overview of Rules 19-21, 24, and 25, SCRCP, and declare that "*none* of these rules apply to the motion and order at bar." Initial Brief, p. 19. Appellants failed to raise this claim in either their opposition to Trustees' motion for nonjoinder or during the hearing before Judge Jefferson. A party may not raise for the first time in a motion to reconsider, alter, or amend an issue that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Department of Revenue,* 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017).

The Respondents agree that the Trustees were misjoined in this case because they fail to satisfy the preconditions of Rule 19(a) and Rule 20(a), SCRCP. Trustees were misjoined because no relief was being sought from them in the case when they moved for dismissal. The Circuit

Court did not abuse its discretion in granting Trustees' motion to be released from the case pursuant to Rule 21, SCRCP.

Appellants have continuously made the contention that the Respondents' case turns on whether the Trustees have or had a valid easement on Plaintiff's land. Initial Brief, p. 20. The validity of the easement may be one element of the Respondents damages, but it is not inclusive of all damages suffered due to the Appellant's negligence. It is undisputed that an easement of record was in the chain of title affecting the Respondents property. It is also undisputed that this fact was withheld from the Respondents when they hired the Appellant to represent them in the purchase of the property. It is also undisputed that the Trustees no longer have an interest in the 2006 easement due to the agreement between the Respondents and the Trustees. The Appellants have raised the issue of the validity of the easement as a defense and that right has not been lost due to the dismissal of the Trustees.

The circuit court did not determine that "an action examining an easement may proceed without the dominant estate holders." The court determined, based on the recorded Agreement, that Trustees had resolved their interest in the undisclosed easement by disclaiming any interest in that easement. Order, pp.1-2; Motion for Nonjoinder, Exhibit A, ¶ 6.

Appellants assert that "similar to the circumstances at bar, the cause of action in the *Farmer* case was one for declaratory judgment." Initial Brief, p. 20. The case at bar is a tort action based on Appellants' failure to disclose an easement in Respondents' chain of title, not "one for declaratory judgment." Complaint, ¶¶ 16-18, 24-27, 34-36; Answer, ¶¶ 10-13; 18-19. It was only after Trustees disclaimed their interest in the undisclosed easement and filed their Rule 21 motion that Appellants found it necessary to amend their answer to add a superfluous cause of action for declaratory relief. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 585-586, 819 S.E.2d 145-146.

Appellants contend that "as this Court explained in the *Farmer* case, Rule 21 does not provide for the substantive dis-joinder or dismissal of parties." Initial Brief, p. 21. This argument was neither raised by Appellants nor ruled on by the trial court in the proceedings below and has not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C.,* 641 S.E.2d 907. Moreover, Judge Jefferson's decision to dismiss Trustees was no more "substantive" than Judge Buckner's initial decision to add Trustees to the case. Rules 19-21 require the courts to attempt to forecast the future course of this litigation in order to determine whether parties belong in the action. *See Home Buyers Warranty Corp. v. Hanna, supra,* 750 F.3d 427, at 434. Both Judge Buckner and Judge Jefferson took care to point out that they were not making any kind of decision based on the merits. Transcript, Aug. 6, 2018, 11:3-9; Form 4 Order, May 9, 2019, p. 2; Order Denying Motion to Alter/Amend Judgement, pp. 2-3. As stated in Rule 21, courts have broad authority to add or drop parties "on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Rule 21, SCRCP. Such ruling is without prejudice. "When a court 'drops' a defendant under Rule 21, that defendant is dismissed from the case without prejudice." *DirecTV, Inc. v. Leto*, 467 F.3d 842 (3rd Cir. 2006).

The circuit court did not abuse its discretion in dismissing Trustees from the case.

E. The Recorded Agreement Attached to Trustees' Motion is Sufficient to Support the Circuit Court's Ruling.

Appellants incorrectly argue that "the circuit court erred by accepting the argument of counsel as proof that Trustees no longer have an interest in the case without evidence or pleading." Initial Brief, p. 21. The proof supporting counsel's statement was the recorded Agreement between attached to Trustees' motion as Exhibit A. Motion for Nonjoinder, Exhibit A. Appellants never raised any objection to Trustees' submission of the Agreement in either their written opposition or during the hearing. A party may not raise for the first time in a motion to reconsider, alter, or

amend an issue that could have been presented prior to judgment. *Kan Enterprises, Inc. v. S.C. Department of Revenue,* 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017).

Appellants' argument on this issue is especially ironic, given that Judge Buckner's decision to add Trustees as parties under Rule 19 was based entirely on the arguments of Appellants' counsel. *See* Mem. In Support of Motion to Add a Party, pp. 1-3; Transcript, Aug. 6, 2018, 3:16-7:5; Order, Aug 6, 2018.

Appellants' provide no authority for their contention that the circuit court cannot rely on the Agreement as a basis for dismissing Trustees until it has first been "tested by any court for validity or enforceability." Initial Brief, 21. By Appellants' logic, Trustees should not have been added as parties because no court had yet "tested" Appellants' claims that Trustees were the dominant estate holders in the undisclosed easement, that the easement was invalid and unenforceable, or that Appellants would be denied complete relief or subject to inconsistent obligations without Trustees in the case.

Trustees' agreement to remise, quitclaim, terminate, cancel, and release their interest in the undisclosed easement is a matter of public record. *See* Agreement, ¶ 6. Appellants' argument that such a disclaimer must be "tested" is baseless. The Respondents agree that the Appellants can raise any defense with merit. Appellants do not have any legal right to object to an agreement between two landowners and how they resolve an easement that affects both properties, however. The Appellants cannot set aside an agreement between two landowners that have entered into an agreement that resolves an easement that is in both landowners' chain of title to protect its own interest.

Appellants erroneously contend that the Circuit Court "erred in accepting without evidence the verbal representations of Trustees and the Plaintiff that no further issue lies between them, that

the purported 2006 easement was both valid and terminated, and no further fact needed judicial determination" Initial Brief, p. 22. The evidence that the easement had been terminated was the recorded Agreement submitted to the Court. Motion for Nonjoinder, Exhibit A. The Court made no findings whatsoever regarding the validity of the undisclosed easement." Form 4 Order, May 9, 2019, p. 2; Order Denying Motion to Alter/Amend Judgement, pp. 2-3. Judge Jefferson stated that "the issue of the validity of any easements is viable to [Appellants] defenses" and "nothing in the ruling has a preclusive effect on [Appellants] pursing any of its causes of action or defenses." Form 4 Order, May 9, 2019, p. 2; Order Denying Motion to Alter/Amend Judgement, pp. 2-3.

The Circuit Court's decision to dismiss Trustees was premised on terms of the recorded agreement, not the factual statements of their attorney. *See* Motion for Nonjoinder, pp. 2-4 and Exh. A; Transcript, May 7, 2019, 19:16-21:24, 34:25-35:9, 39:25-40:4; Order, May 9, 2019, p. 2. The circuit court did not abuse its discretion in dismissing Trustees' under Rule 21, SCRCP.

F. The Circuit Court's Comments During the Hearing were not Rulings and do not Constitute an Abuse of Discretion.

Appellants' final contention is that Judge Jefferson erroneously ruled from the bench by making the following comments: "They got to come over the property somehow. So, they needed to resolve it." Initial Brief, p. 22. Based on this remark, Appellants argue that "neither Plaintiffs, nor the Trustees, have ever asserted, much less proven that Trustees *needed* to come over Plaintiffs property. Initial Brief, p. 22. This issue was neither raised by Appellants nor ruled on by the trial court in the proceedings below and has not been preserved for appeal. *See S.C. Dept. of Transp. V. First Carolina Corp. of S.C.,* 641 S.E.2d 907.

It is not clear what Judge Jefferson meant when she said: "They got to come over the property somehow. They needed to resolve it." What is clear is that she was not "ruling from the bench" that Trustees had an easement of necessity or a prescriptive easement over Plaintiffs'

property. Such easements were not raised by Trustees as a basis for relief under Rule 21. *See* Motion for Nonjoinder, pp. 1-4. Such easements were not addressed by counsel during the hearing. Judge Jefferson's remarks are not reflected in the terms of her order granting relief to Trustees under Rule 21, SCRCP. Form 4 Order, May 9, 2019, pp. 1-2. Of course there was a good reason that the Court did make a Ruling that the Trustees had an easement of necessity or a prescription easement, because she was presented with an agreement in which the Trustees disclaimed their interest in the 2006 easement and created a new more restricted easement. There was no valid reason to have to make any such ruling.

Appellants boast that the easement is "easily repudiated," and conclude "if Plaintiffs had successfully presented defenses to the purported easement, she would have been under no obligation to enter into a new easement." Initial brief., p. 23. This "easy repudiation," as Appellants argue, could only be accomplished by the Respondents suing their neighbor Trustees for a hopeful outcome. The Respondents and Trustees resolved the easement in a manner that was acceptable to both parties rather than litigate the matter

Nothing in the Judge Jefferson's ruling prevents Appellants from moving forward in this case and, as they claim, "easily repudiating" the easement. *See* Form 4 Order, May 9, 2019, p. 2; Order Denying Motion to Alter/Amend Judgement, pp. 2-3. Appellants' defenses to the undisclosed easement are not contingent on Trustees' continued participation in this action as parties.

Judge Jefferson's comments did not amount to a ruling from the bench and are not reflected in her order. Her comments do not constitute an abuse of discretion.

III. CONCLUSION

The Respondents fully support the arguments of the Trustees that the Court should affirm the circuit court's decision. The Appellant is taking great strides to keep the Respondents' neighbors involved in this case. Based on the foregoing, it is clear that the court did not abuse its discretion in dismissing Trustees' as involuntary plaintiffs pursuant to Rule 21, SCRCP.

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Attorney for Respondents Ronald L. Jones and Gayle Langley Jones

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Civil Action No.: 2018-CP-08-00817
Appellate Case No.: 2019-001140

Ronald L. Jones and Gayle Langley Jones, Thomas Huguenin Gaillard, as Trustee of The Thomas Huguenin Gaillard Revocable Trust, Dated April 3, 2007, Thomas W. Cone, Jr., as Trustee of The Thomas W. Cone, Jr. Revocable Trust Dated April 3, 2007, Respondents,

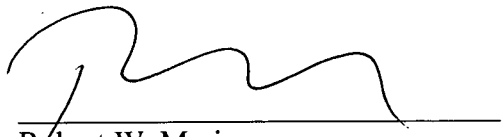
v.

Rogers Townsent & Thomas, P.C.; Lisa Hostetler; Alexander C. Peabody; and Peabody & Associates, Inc., Defendants,

Of Which Rogers Townsend & Thomas, P.C. and Lisa Hostetler are Appellants.

PROOF OF SERVICE

I certify that I have served a copy of Respondents' Ronald L. Jones and Gayle Langley Jones, Initial Brief and Designation of Matter to be Included in the Record on Appeal, with regards to the above cited matter on all parties by deposing a copy of said Initial Brief, in the U.S. Mail, postage prepaid May 13, 2020, addressed to counsel for Appellant, Warren C. Powell, Jr., Bruner Powell Wall & Mullins, LLC, Post Office Box 61110, Columbia, SC 29260-1110, and addressed to counsel for Respondents Thomas Huguenin Gaillard, as Trustee of the Thomas Huguenin Gaillard Revocable Trust Dated April 3, 2007, and Thomas W. Cone, Jr., as Trustee of The Thomas W. Cone, Jr. Revocable Trust Dated April 3, 2007, J. Jay Hulst, Post Office Box 1288, Moncks Corner, SC 29461, and on Defendants Alexander C. Peabody and Peabody & Associates, Inc., Post Office Box 22528, Charleston, SC 29413.



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* Certified Family Court Mediator

May 13, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Ronald L. Jones v. Rogers Townsend & Thomas, P.C.
Appellate Case No. 2019-00140

Dear Mr. Kitchings:

Please find enclosed herewith the Original and (1) Copy of the Initial Brief Of Respondents, Ronald L. Jones And Gayle Langley Jones, Designation Of Matter To Be Included In The Record On Appeal By Respondents Ronald L. Jones And Gayle Langley Jones, Proof of Service and Certificate of Counsel for the above referenced matter. Please return a clocked copy to this office in the self addressed prepaid envelope provided.

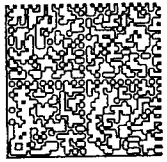
With kindest regards, I am

Very truly yours,

Robert W. Maring

cc: Warren C. Powell, Esquire
Jary J. Hulst, Esquire
Ryan A. Earhart, Esquire

UNITED WE STAND



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