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SC Court of Appeals

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, and 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.

BRIEF OF 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

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ISSUE ON APPEAL

Did the circuit court abuse its discretion in dismissing Respondents under Rule 21, SCRCP, where they were joined as necessary parties in this legal malpractice action based on their status as the dominant estate holders in an undisclosed easement and where they have disclaimed any interest in that easement?

No.

STATEMENT OF FACTS

This is a transactional legal malpractice case. Plaintiffs Gaye and Ronald Plaintiffs (collectively, "Plaintiffs") 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. (Record on Appeal, hereinafter, "R.," p. 16, ¶ 9-p. 18, ¶18; p. 19, ¶¶ 24-27.) Plaintiffs 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. (R. p. 18, ¶ 19; p. 19, ¶¶ 23-24, 28.)

Plaintiffs' 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. (R. p. 101; p. 117.) In their complaint, Plaintiffs 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." (R. p. 17, ¶16-pp.17-18, ¶ 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. (R., pp. 17-18, ¶17; p. 101.)

Respondents in this appeal are 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"). Their home is located on lot 6A, which abuts the northern boundary of Plaintiffs' property. (R. p. 117.) Trustees did not create the easement at issue in this case. They have not filed any action against Plaintiffs to enforce its terms nor have they ever asserted any kind of claim against Appellants. Trustees are not responsible for Appellants' failure to disclose the easement nor for Plaintiffs' decision to sue Appellants for malpractice. Trustees have been dragged into this action based on Appellants' claim that they must be parties to the case or they will not be "bound" by any adverse decision regarding validity or enforceability the undisclosed easement.

In their complaint, Plaintiffs allege—and in their answer, Appellants admit—the following:

> 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. (R. p. 32, ¶ 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) Lot 6 (No. 110 Cainhoy Landing Road, TMS # 263-00-05-006) 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." (R. p. 32, ¶ 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. (R. p. 32, ¶ 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. (R. p. 32, ¶ 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. (R. p. 32, ¶ 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. (R. p. 32, ¶ 13.)

...

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. (R. p. 32, ¶ 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. (R. p. 33, ¶ 19.)

36. The standard of care for Appellants representing a client in transactions in South Carolina requires 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. (R. p. 32, ¶ 19.)

...

Appellants deny that Plaintiffs suffered any damages whatsoever as a result of their admitted failure to exercise due care. (R. p. 32, ¶ 18; p. 33, ¶ 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. (R. p. 35, ¶ 46-p. 37, ¶ 75.) Based on the pleadings, 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 Plaintiffs would suffer injuries if Appellants failed to perform their duty and meet that standard

of care. There is no dispute about the terms of the undisclosed easement or that it was created by deed in the direct chain of title. It is also undisputed that Appellants did not disclose the easement to Plaintiffs 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 to the Plaintiffs prior to closing. (R. p. 17, ¶ 16-p. 18, ¶ 18; p. 19, ¶¶ 24-27; p. 20, ¶¶ 34-36; p. 32, ¶¶ 10-13, 18; p. 33, ¶ 19.) The only remaining issue in this case is to what extent Plaintiffs suffered any damages caused by Appellants' admitted failure to disclose the easement.

Along with their Answer, Appellants filed a motion to add Trustees as parties under 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. (R. pp. 58-59.) Based on this, Appellants argued:

> If the unbound dominant property owner asserts rights in the easement over the Plaintiffs' property, Plaintiffs may bring an action against the title insurer to defend Plaintiffs or enter suit against the alleged dominant estate holder, which could lead to additional actions against Movant, unless completer [sic] is not afforded here.

(R. pp. 58-59.)

The motion was heard by the Honorable Perry M. Buckner on August 6, 2018. At the hearing Appellants' counsel theorized about what might happen if they won the case:

> Mr. Powell: And the problem is, Your Honor, and I would submit that here, if, for example, we win, say we win, this lawsuit, that there is no easement, well, the dominant estate owner is not a party. And he should be made a party in order to, whatever the result, to bind him to the result. If he doesn't care, he doesn't care. But at least he's bound by the result.
>
> The Court: Which is exactly what you believe is the reason for Rule 19?
>
> Mr. Powell: Yes sir.

> The Court: Because complete relief can't be given absent the joinder?
>
> Mr. Powell: Yes sir, or also avoids inconsistent results. If we win and then there is a subsequent action between these two, for whatever reason, and then the dominant stakeholder wins, then you've got inconsistent results. And that's not supposed to be.

(R. p. 500, line 14-p. 501, line 5.)

In response, Plaintiffs argued that Appellants lacked standing to dictate how Plaintiffs and Trustees interpret the terms of an easement affecting their properties. (R. p. 501, lines 8-13.) Plaintiffs' counsel further argued that his clients' sought damages from Appellants based on their negligence in failing to disclose an easement that was of record—regardless of whether it was valid or enforceable. (R. p. 502, lines 1-7.) Because Plaintiffs believed that the easement was valid and enforceable, they had no reasonable basis to bring Trustees into the lawsuit. (R. p. 503, lines 18-23.) Plaintiffs' counsel denied Appellants' claim that they might be subject to inconsistent obligations:

> "… [T]he reason that they are asking for these clients to be brought in is that somehow going to be prejudiced because of some right that the dominant estate holder is going to have. The only person the dominant estate holder can assert any action against is my clients. They can't bring an action against the law firm. There's no shoe to fall later for the law firm in this case."

(R. p. 503, lines 5-11.)

Based on these arguments, Judge Bucker made his decision:

> The Court: I'm granting your motion because I don't believe that with the disposition of this action complete relief can be granted. And it impairs your ability to raise the defense because you would then have to do it in multiple actions.

(R. p. 504, line 24-p. 505, line 2.) Judge Buckner's Form 4 order, filed a week after the hearing, simply stated:

> The Motion of Rogers, Townsend and Thomas P.C. to Add a Party is GRANTED. The Additional parties will be made a Plaintiff pursuant to Rule 19, SCRCP.

(R. p. 200.)

On March 15, 2019, Plaintiffs and Trustees entered into an "Access, Maintenance and Joint Dock Use Agreement" (hereinafter, "the Agreement"). (R. pp. 66-78.) The Agreement terminated the undisclosed 25 foot wide ingress-egress easement encircling lot 6B—identified as the "Old Purported Easement." (R. p. 70, ¶ 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….

(R. p. 70, ¶ 6.)

On March 22, 2019, a copy of the recorded Agreement was emailed to all parties with a request that they stipulate to the dismissal of Trustees based on their termination of any right, title, or interest in the easement at issue in the action. (R. pp. 437-450.) Surveyor's attorney agreed to the proposed stipulation that same day. On March 27, 2019, Appellants' counsel advised that he would not respond to Trustees request until he had deposed the parties. (R. p. 81.) When Trustees' attorney requested a more definitive response, Appellants' counsel replied:

> The issues in a case are framed by the pleadings. The subject post pleading document signed by the plaintiffs a most [sic] relate to but do not discard matters in the pleadings. **If your clients would be willing to admit by affidavit and a request to admit that upon reflections since the suit was filed they now realize that prior to the document executed this month they had no easement across the Ms. Plaintiffs [sic] property then we may have something to talk about. This would indeed shorten the duration of their depositions and greatly improve their exit from the case.** I'm certain that a fine Appellants such as yourself is aware of all the various arguments in the case so you need no sermon for [sic] me on the matter. Let me know. Best, Warren

(Emphasis added.) (R. p. 80.)

On March 29, 2019, Trustees filed a "Motion for Non-Joinder Pursuant to Rule 21, SCRCP," seeking to be dropped from the case. The motion was miscaptioned and actually sought relief under Rule 21 based on Trustees' misjoinder in the case. (R. pp. 61-81.) Attached to the motion was a copy of the recorded Agreement between Plaintiffs and Trustees showing that Trustees had formally "remised, quitclaimed, terminated, cancelled, and forever released" their interest as dominant estate holders in the easement at issue in the case. (R. p. 70, ¶ 6.) Trustees asked the Court to release them as parties because they had resolved their interest in the undisclosed easement and because they neither asserted any claims nor had any claims been asserted against them. (R. pp. 62-63.)

In response, Appellants moved to amend their answer to add a claim for declaratory relief against Plaintiffs and Trustees. (R. p. 82-83.) 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." (R. p. 93, ¶ 89.) In other words, Appellants ask that a court determine the very issues raised in the complaint and their answer. (R. p. 35, ¶ 46-p. 37, ¶ 75.)

The Honorable Deadra L. Jefferson heard Trustees' motion for nonjoinder and Appellants' motion to amend their answer on May 7, 2019. After extensive argument concerning Appellants' motion to amend, Judge Jefferson indicated that she was inclined to grant the motion:

> Mr. Maring: Well, they have no standing to bring this argument, Your Honor. He is asking for a declaratory judgment action as to the validity ---
>
> The Court: But is that the standard? Wouldn't that be a defense?
>
> Mr. Maring: Well, it's not just that, Your Honor. It's also under mootness and—because what he's basically saying is ---
>
> The Court: I don't have to determine the merits. That is for another day. The standard is whether he is entitled to it, whether you're prejudiced, which means lack of opportunity—lack of notice and lack of opportunity to refute it. I'm supposed to grant all amendments, really.

Mr. Maring: I do understand that.

The Court: Whether they're valid or not.

...

The Court: The standard is notice and lack of opportunity to defend. I think he is entitled to amend it. Now, whether it has any validity, that's another day.

Mr. Maring: That's fine, Your Honor.

(R. p. 514, line 17-p. 515, line 4; p. 531, lines 6-9.)

Judge Jefferson then addressed Trustees' Rule 21, SCRCP, motion:

The Court: So you're saying, pursuant to Rule 21 they're not—and Rule 19 they're not necessary for this case to be adjudicated?

Mr. Hulst: They are not necessary based on—

The Court: And you have eliminated their need to be a part of it because you all have basically dealt with this impediment by drafting a new easement and filing it?

Mr. Hulst: That's exactly right.

(R. p. 533, lines 18-24.)

Appellants' counsel responded:

Mr. Powell: All we seek from Mr. Hulst's client—and the reason his clients need to be in the case—is a declaration as to the validity of the easement, because—because he was the recipient of the 2006 easement; whether or not he continues to have any interest in it is of no moment as far as the declaratory judgment is concerned. That the Court can resolve, and he would be bound by it through the declaratory judgment, and that would be that. Your Honor is right in that respect. It won't affect them as to the status of the—

The Court: I don't even know that you need a dec. action for that purpose—to propound that defense.

Mr. Powell: Well, Your Honor, that is the way we have it framed. If—if later it—if they want to claim that it's inappropriate they can move as Your Honor—

The Court: I suspect they're going to and I don't know how that is going to turn out, but I don't know that you necessarily need that to advance your defense. [1]

Mr. Powell: Well—

The Court: I assume you have experts.

Mr. Powell: It is—it is necessary, Your Honor. It would be necessary to include that, because what that would do would—it would forever resolve the validity of the '06 easement. If the Court says that the '06 easement is not good then—

The Court: I don't know—

Mr. Powell: —this case is over.

(R. p. 542, line 10-p. 543, line 8.)

After further argument, Judge Jefferson started to wrap things up:

The Court: They don't claim an interest. They have resolved it.

Mr. Powell: But they—no, they claim in this suit, or outside this suit they claim the right to traverse the property.

The Court: They have the right to traverse it, because they have entered into an agreement to do so.

Mr. Powell: That—that may be, but Ms. Jones sues us for that. She seeks damages for us for something she agreed to do.

The Court: She says y'all made that her only option. People are going to get ingress/egress on property.

Mr. Powell: And that's the issue, Your Honor. You put your finger on it, because if the 2006 easement is not valid, she did not have to do it. She didn't have to do it at all.

---

[1] Plaintiffs filed a motion to dismiss Appellants' cause of action for declaratory relief on June 5, 2018. The hearing on that motion has been stayed pending this appeal.

> The Court: You can still litigate that. I don't think there's anything that precludes you from litigating that as a defense.

(R. p. 546, line 25-p. 547, line 13.)

Appellants' counsel was not yet finished:

> Mr. Powell: I would like to depose Trustees as parties.
>
> The Court: I don't know that it matters one way or the other. The fact witnesses either way. I don't know that it makes any appreciable difference whether they're parties or non-parties. It's about their factual knowledge of the issues.
>
> Mr. Powell: Yes ma'am, but—
>
> The Court: And frankly, I don't know that it matters.
>
> Mr. Powell: Well see, it matters this way: If they're parties, when we go to trial I don't have to subpoena them. I won't be able to use the depositions at trial. [2]

(R. p. 549, line 22-p. 550, line 6.) So, at the end of the day, Trustees must shoulder the burden and expense of remaining in the case as parties is because it is more convenient for Appellants.

On May 9, 2019, Judge Jefferson issued a Form 4 Order dismissing Trustees from the action. The order states:

> "Parties may be dropped or added by order of the court 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; *see Branham v. Ford Motor Co.,* 390 S.C. 203, 242, 701 S.E.2d 5, 26 (2010). The Court finds that the Trustee Plaintiffs are no longer indispensable parties and their presence is not required to resolve the dispute. Per Mr. Hulst, Trustees assert that their rights are not affected and that they have resolved the underlying easement issue by entering into a new easement with Plaintiff Jones, thereby resolving and determining their interests in this matter. While the issue of the validity of any easements is viable to Defendant RT&T's defenses, it is not viable or dispositive of the Trustee Plaintiffs' interest in the property. Moreover, the

[2] Trustees provided available deposition dates to Appellants on May 23, 2019. Appellants had seven weeks to depose Trustees *as parties* prior to filing their notice of appeal on July 12, 2019. Appellants made no effort to schedule any depositions after this hearing.

> Court was advised that Defendants Alexander Peabody and Peabody Associates, Inc., stipulate to the Trustee Plaintiffs dismissal as parties.

(R. pp. 3-4.) Judge Jefferson's order granting Appellants' motion to amend was filed shortly thereafter. (R. p. 6.)

On May 20, 2019, Appellants moved for reconsideration of Judge Jefferson's order dismissing Trustees from the action. (R. pp. 260-371.) Trustees filed an opposition to Appellants' motion for reconsideration on May 29, 2019. (R. pp. 372-494.) On June 26, 2019, Judge Jefferson issued an order denying Appellants' motion without a hearing:

> The Defendants' motion seeks to reargue the issues on the same basis previously presented, presents no novel facts, arguments, or theories in support of the Motion to Reconsider, Alter, or Amend the Judgment. The Defendants have not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. However, Defendants' motion seeks to have the Court make additional findings of fact and conclusions of law wholly unrelated to the interpretation and application of Rule 21, SCRCP. As such the Court declines to make any additional findings of fact unrelated to the motion originally before it. Further, the Court would note as it did in the original Order that nothing in the ruling has a preclusive effect on the Defendants pursuing any of their causes of action or defenses.

(R. pp. 10-11.)

On July 12, 2018, Appellants filed notice of this appeal. Trustees then moved to dismiss the appeal, arguing that the circuit court's order dropping Trustees from the case under Rule 21 was not immediately appealable pursuant to S.C. Code of Laws Anno. §§ 14-3-330(1)-(4). *See* Memorandum of Points and Authorities in Support of Respondents' Motion to Dismiss Appeal, filed August 21, 2019, p. 2. In their return to the motion, Appellants asserted, for the first time, that "there were two purported easements in the Lot 6B chain of title." Appellants' Return to Respondents' Motion to Dismiss Appeal, filed on October 9, 2019, p. 7. Based on that claim, Appellants argued:

> Accordingly [Trustees'] contentions that they no longer have any interest in the purported easements over Lot 6B is patently incorrect because Trustees disclaimed only the easement alleged to have been created in the 2005 deed and not the easement alleged to have been created in the 2006 deed, the one addressed in the Plaintiffs' Complaint.

Appellants' Return to Respondents' Motion to Dismiss Appeal, p. 7.

There are not two separate 25-foot wide ingress-egress easements in Lot 6B's chain of title. Rather, as set forth below, the 2005 and 2006 deeds in Plaintiffs' chain of title simply reference the same easement. Plaintiffs' complaint alleges that the undisclosed easement "was created by way of a deed from James J. Monaghan to Benjamin L. Daniel, Sr., dated April 4, 2006...." (R. p. 17, ¶ 16.) However, as indicated in the expert affidavit attached to Plaintiffs' complaint, this easement first appeared in their chain of title a year earlier, on April 8, 2005, in a deed from Coastal Plains Development Co., Inc., ("Coastal Plains") to James J. Monaghan. (R. pp. 27-29, ¶ 9(b); pp. 562-566.) The language reserving the easement in the 2005 deed (from Coastal Plains to Monaghan) is exactly the same as the language set forth in the 2006 deed (from Monaghan to Daniel):

> EXCEPT a 25' Ingres/Egress Easement is hereby dedicated and given to all owners and successors of interest in Lot 6A (TMS # 263-00-04-068) as shown on the above-referenced plat, Lot 5 (No. 108 Cainhoy Landing Road, TMS # 263-00-05-005) as shown on the above-referenced plat, 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) as shown on a plat dated 9/1/86 by Carolina Surveying& Mapping, William H. Dennis, RLS, and entitled "Plat of 45.02 Acres Known as Cainhoy Landing Containing 30 Lots and Depicting As Built Locations of Roads and Easements Located in Berkeley County, South Carolina," as recorded in Plat Cabinet G, page 6, in the RMC Office for Berkeley County. This Easement shall begin on the Northern boundary of the Lot 6B at the point labeled D and extending one-half the way to a 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 show 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 L11. 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.
>
> ...

(R. p. 98; p 565.)

The 2005 deed from Coastal Plains to Monaghan obviously preceded the 2006 deed from Monaghan to Daniel. Coastal Plains held title to both Lots 6A and 6B when it deeded Lot 6B to Monaghan. Monaghan did not have title to Lot 6A when he deeded lot 6B to Daniel. Therefore, easement was *created* in the April 8, 2005, deed from Coastal Plain conveying Lot 6B to Monaghan.[3] Monaghan's subsequent deed of Lot 6B to Daniel on April 4, 2006, merely references and confirms the existing easement.

To remove any doubt, Trustees provided the following disclaimer to Appellants in their reply:

> However, to make it crystal clear for Appellants, Respondents hereby remise, quitclaim, terminate, cancel and forever release unto Plaintiffs, her heirs and assigns, all of Respondent's right, title, and interest, if any, in the 25-foot wide ingress/egress easement described in the 2006 deed from Monaghan to Daniels, attached as Exhibit B to Appellants' Return.

Respondents' Reply in Support of Motion to Dismiss Appeal, p. 4, fn. 2.

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

[3] In fact, Appellants reference the Coastal Plains easement from 2005 in their Answer. (R. p. 35, ¶¶ 46-51.)

> 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 to 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 nonetheless argue that the standard "should be the one when the lower court dismisses a party." Appellants' 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."[4] Appellants' Brief, p. 4. Plaintiffs' action is not based "entirely on the validity of an easement." Plaintiffs' case is based on Appellants' admitted failure to disclose

[4] Trustees own one of four properties granted ingress-egress rights under the undisclosed easement. (R. p. 17, ¶ 17; p. 6, ¶ 30.) Appellants have not sought to join any of the owners of the other three properties in the case.

a material fact—the existence of a 25-foot wide ingress/egress easement. (R. p. 17, ¶¶ 16-18; p. 19, ¶¶ 24-27; p. 20, ¶¶ 34-36.) Appellants' *defense* is based on the validity of the undisclosed easement. (R. p. 32 ¶¶ 10-13; pp. 32-33, ¶¶ 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).

In *Farmer*, CompTrust, a dissolved unincorporated business trust, moved for dismissal under Rule 12(b) and Rule 21, SCRCP. *Farmer v. CAGC Ins. Co.,* at 584. The circuit court dismissed CompTrust despite finding that the motions raised novel issues, including whether an unincorporated trust can be sued after it has voluntarily dissolved. *Id.* The Court of Appeals reversed the dismissal of CompTrust under both Rule 12(b) or Rule 21, SCRCP. *Id.,* at 585-589. Regarding dismissal under Rule 21, the Court observed:

> It appears that the circuit court was persuaded CompTrust was misjoined not because CompTrust had no connection to the factual or legal issues in the action, but because it had been dissolved. As the circuit court pointed out, whether an unincorporated business trust can be sued after it has voluntarily dissolved is a novel question in South Carolina. We do not believe it was within the court's discretion to answer this question of first impression with no factual record while ruling upon a Rule 21 motion. Motions to dismiss are no place for novelty.

Id., 586.

Farmer does not hold that Rule 21 motions involving novel questions are subject to a higher standard of review. Rather, the Court of Appeal 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 below 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...." Appellants' Brief, p. 4. Based on the Agreement,

the court ruled that Trustees had resolved the undisclosed easement with Plaintiffs by disclaiming their interests in the undisclosed easement. (R. pp. 3-4; p. 70, ¶ 6.) As such, Trustees no longer held the dominant estate in the undisclosed easement.

Appellant's claim that a higher standard of review should apply to this case is nonsense. The proper standard for this appeal is whether the circuit court abused its discretion in dropping Trustees from the case.

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

Appellants preface their arguments with the proclamation that they "have been deprived of their right to defend against the allegations of Plaintiff." Appellants' Brief, p. 9. On the contrary, as repeatedly pointed out by Judge Jefferson throughout the hearing on Trustees' motion, in her order granting the motion, and in denying Appellants motion for reconsideration, "nothing in the ruling has a preclusive effect on the Defendants pursuing any of its causes of action or defenses." (R. p. 538, lines 12-20; p. 542, line 10-p. 543, line 8; p. 546, lines 25-40; p. 4; pp. 10-11.) 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. Appellants' Brief, p. 9. Appellants fail to establish why Trustees must continue as parties in the case in order for such a determination to be made. The rights of the dominant estate holders in the undisclosed easement when Plaintiffs purchased Lot 6B in 2010 can be determined without Trustees. Appellants conclude their introduction with the astonishing claim that "Trustees are the source of this suit." Appellants' Brief, p. 9. Appellants' admitted negligence in failing to disclose the easement is the source of this suit.

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

Appellants grumble about arguments raised by Plaintiffs' counsel during the hearing—that Appellants lacked standing to litigate the enforceability of the undisclosed easement or the validity of the recorded Agreement incorporating a new easement. Appellants' Brief, p. 10. 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.

Appellants' 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. Rather, 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).

Plaintiffs' counsel does not represent Trustees, and his arguments regarding standing were directed toward the viability of Appellants' motion to amend, not Trustees' Rule 21 motion. (R. p. 514, line 17-p. 515, line 4; p. 531, lines 6-9.) Further, Judge Jefferson made it clear that the question of standing was for "another day." (R. p. 514, lines 24-25.) While plainly skeptical of Appellants' authority to 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. (R. p. 534, line 18-p. 535, line 13; p. 547, lines 1-13.)

Trustees' motion to be released as parties was not based on Appellants' lack of standing to challenge the undisclosed easement. (R. pp. 61-64.) Judge Jefferson's order dismissing Trustees' from the case is not based on the issue of standing. (R. pp. 3-4.) At this stage in case, Appellants' standing to attack Plaintiffs' efforts to deal with the undisclosed easement or to challenge the terms of the Agreement between Plaintiffs and Trustees remain open questions. 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. Appellants' 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 have no right to a jury trial under the Seventh Amendment of the U.S. Constitution. Unlike most of the provisions of the Bill of Rights, the Seventh Amendment of the 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 right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.)

As previously discussed, 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. (R. p. 17, ¶ 16-p. 18, ¶ 18; p. 19, ¶¶ 24-27; p. 20, ¶¶ 34-36; p. 32, ¶¶ 10-13, 18; p. 33, ¶ 19.) Nothing in the U.S. Constitution, the South Carolina Constitution, our court rules, or case precedent guarantees Appellants the right to a jury trial on factual and legal issues that have been conceded in the pleadings. Plaintiffs will still have to prove that Appellants' negligence caused their claimed injuries and damages, and the circuit court's decision to leave the issue of standing undecided at this stage of the litigation does not in any way alter Plaintiffs' burden of proof.

Appellants have not been denied their right to a jury trial. 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 about 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" Jones, while Jones 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.

Appellants' Brief, p. 12. The fact pattern of the personal injury litigation in *Skipper* is not remotely similar to the facts and circumstances of this transactional malpractice case. Trustees have not

sued Plaintiffs over the easement. *See id.,* 413 S.C. 35, 775 S.E.2d 37-38. There is no multimillion dollar confession of judgment by Plaintiffs admitting liability to Trustees for their damages. *Id.* There has been no assignment of Plaintiffs' 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" has no basis whatsoever in fact.

Appellants attempt to rationalize their baseless conspiracy theory:

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

Appellants' Brief, p. 12. Trustees do not speak for Plaintiffs, but the obvious response is that Appellants already have done enough damage. Plaintiffs retained legal counsel and, based on their attorney's advice, believe the easement to be valid. Plaintiffs have moved forward and resolved any potential issues that might arise out of undisclosed easement with their neighbors. Appellants refuse to accept responsibility for their negligence and blame Plaintiffs and Trustees for the consequences. Appellants' preoccupation with Trustees has completely sidetracked this litigation. It is therefore difficult to conceive of any reason why Plaintiffs would want to side with Appellants.

Appellants' baseless conspiracy theory provides no support for their claim that the circuit court abused its discretion in declining to rule on the issue of standing. 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." Appellants' Brief, p. 13. Appellants repeat this claim throughout their brief. *See, e.g.,* Appellants' Brief, p. 6, fn.4, pp. 7, 13, 14, and 20. This argument—that Plaintiffs 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.* (R. p. 35, ¶ 46-p. 37, ¶ 75; p. 500, lines 4-12; p. 501, lines 17-20; p. 526, line 13-p. 527, line 17; p. 541, line 23-p. 542, line 25; p. 547, lines 9-15.)

Appellants offer no support for their proposition that the validity of an easement must be established as a prerequisite for Plaintiffs to prevail on their claim of transactional malpractice. "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 deeds are presumed valid.

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. (R. p. 17, ¶ 16-p. 18, ¶18; p. 19, ¶¶ 24-27; p. 20, ¶¶ 34-36; p. 32, ¶¶ 10-13, 18; p. 33, ¶ 19.) Had Appellants done their job, they would have been able to explain the nature and effect of the easement to Plaintiffs. Equipped with an understanding of the encumbrance, Plaintiffs might have terminated of the contract, sought a reduction in price or other concessions, or made an informed decision to proceeded with the closing according to the originally agreed terms.

Appellants' admitted breach of duty denied Plaintiffs any choice in the matter and left them to deal a surprise easement as best they could.

While proof of a valid and enforceable easement would likely enhance Plaintiffs' damages claim, whether the undisclosed easement "exists" and caused Plaintiffs' damages are Appellants' defenses. (R. p. 35¶ 46-p. 36, ¶ 60; p. 500, lines 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.

As for Trustees, they have no interest in whether Plaintiffs are able to establish any injury or damages resulting from Appellants failure to disclose the easement. It does not matter to them whether or not the undisclosed easement is proven valid or enforceable.

Appellants complain that Plaintiffs argue "on the same side as Trustees instead of against them, which would be in [their] interests." Appellants' Brief, p. 13. Appellants might prevail on the invalidity of the easement, but they might not—an outcome that Appellants consistently choose to ignore. Had Plaintiffs adopted Appellants' position, sued Trustees, and lost on the easement's validity, they would be stuck with a 25-foot wide easement encircling their property and a ruined relationship with their neighbors. It was in Plaintiffs' interest to manage their risk and reasonably resolve the easement with their neighbors.

Appellants inaccurately assert that Plaintiffs entry into the Agreement "further entrenched the questionable easement owned by Trustees." Appellants' Brief, p 13. Plaintiffs have mitigated their damages. The Agreement terminated the undisclosed easement, created a new, less extensive easement, and provides a comprehensive framework to manage the encumbrance. (R. p. 66-78.)

The terms of the new easement are in no way contingent on a "questionable easement" or on the outcome of this litigation. (R. pp. 66-78.)

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.

Appellants' 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." Appellants' 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' bare 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)).

Trustees do not claim any interest relating to the *subject* of the action—i.e., Plaintiffs' malpractice claim for damages based on Appellants' failure to disclose an easement. *See* Rule 19(a)(2). Trustees claim no interest in the undisclosed easement. (R. p. 70, ¶ 6.) Appellants' conjecture as to what might happen fails to establish that Trustees are necessary to accord complete relief to the parties or avoid duplicative litigation.

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." Appellants' 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.

Appellants' 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. Appellants' conclusion that the "core issue in this case bears directly on Trustees' interests" is, as just discussed, not the standard under Rule 19(a)(1) and (2), SCRCP.

Appellants contend that complete relief—"the ability to reach finality as to the rights and issues to be determined in the case—cannot be afforded unless the parties whose interests are most central to Plaintiff's burden of proof are joined and bound by the court's rulings." Appellants' Brief, pp. 14-15. Trustees have no interest in or "central to" Plaintiffs' burden of proof in this legal malpractice action. Trustees are bound by their recorded disclaimer of any interest in the undisclosed easement. (R. p. 70, ¶ 6.) Trustees participation in the case as parties will not make the undisclosed easement any more or any less valid. Plaintiffs' malpractice claim against Appellants will be resolved regardless of which party prevails on the issue of validity. The

Agreement between Plaintiffs and Trustees has resolved the possibility of any dispute between them over the undisclosed easement. Trustees have no claim against Appellants for their failure to disclose the easement. Appellants have no legitimate claim whatsoever against Trustees. Trustees' absence from this case in no way denies Plaintiffs or Appellants complete relief in this case. The rights and issues in this case can be fully and finally determined without Trustees as parties.

Citing the "similar reasoning" of *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427 (4th Cir. 2014) and *Bancohio Nat'l Bank v. Neville,* 310 S.C. 323, 426 S.E.2d 773 (1993), Appellants assert that Trustees must remain in the case because "there are legal documents which must be reviewed for validity and enforceability," and "a property right at issue that must be decided on the basis of those documents, as well as the conduct of the parties." Appellants' Brief, p. 16. Neither case was cited by Appellants in the proceedings below. The holdings of these cases and their applicability to the issues in this action were not raised to or ruled on by circuit court 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 903, 907.

Home Buyers Warranty Corp. v. Hanna involved Hanna's state court claim alleging home construction defects against numerous defendants including Home Buyers Warranty Corporation, which issued a warranty on Hanna's home. *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d at 430. Home Buyers filed a petition in federal court to compel Hanna to arbitrate under the terms of the warranty. *Id.* Hanna sought to dismiss the petition on the grounds that Home Buyers failed to join non-diverse parties, including Builders, Lamp, and Innovative under Rule 19, FRCP. *Id.,* at 432.

The *Home Buyers'* court began its analysis by observing that Rule 19 "decisions must be made pragmatically, in the context of the 'substance' of each case, … and courts must take into account the possible prejudice to all parties, including those not before it." *Id.,* 433, citing *Owens-Illinois v. Meade,* 186 F.3d 435, 441 (4th Cir. 1999). In considering the non-joined party's ability to protect its interest, the *Home Buyers* court found that Builders had "a direct pecuniary interest in the arbitration dispute and were actively contesting their liability in state court with respect to Hanna's claims against them under the [warranty] contract." *Id.*, 434. The court further noted that because Builders' warranty did not contain an arbitration agreement and the warranty at issue provided construction defect coverage, Builders had "a natural interest in any adjudication of the terms of that contract." *Id.*, 430-431, 435. The court also found that Lamp and Innovative were critical to the question of whether the arbitration clause was enforceable due to Hanna's alleged lack of consent. *Id.*, 435 Because "the outcome of the petition could very well turn on the determination" of consent, "such a ruling could have a significant impact on Builders' potential liability in state court. *Id.*

The *Home Buyers* court next considered the need to protect existing parties from "incurring otherwise inconsistent obligations because of the non-joined parties' interest." *Id.* (internal punctuation omitted). The court found that the existence of two concurrent proceedings created a "high likelihood" that one or more of the parties would be subject to conflicting obligations. *Id.* Finally, in regard to whether the court could accord complete relief among the existing parties, the court concluded that, based on their above determinations, it was clear that Builders must be present "to address to fully resolve the dispute arising from the alleged construction defects in Hanna's home." *Id.*

Home Buyers did not rule, as Appellants simplistically assert, "that where a particular document is disputed before the court, all parties involved with that document should be joined for precisely the purpose of obtaining a complete determination." Appellants' Brief, p. 15. *Home Buyers* addresses the facts and circumstances to be considered in determining whether a party is necessary under Rule 19(a).[5] According to *Home Buyers*, the decision to add a party must be "made pragmatically, in the context of the substance of each case." *Id.*, 433. Appellants' bare claim that "the issue may be subject to contradictory rulings and multiple adjudications" is utterly insufficient to invoke joinder under Rule19(a). *See* Appellants' Brief, p. 13.

Unlike Builder in the *Home Buyer* case, Trustees have not been sued by Plaintiffs. Trustees have no direct pecuniary interest in the outcome of Plaintiffs' malpractice action. *See id.*, at 434. Trustees are not involved in any other proceeding involving the undisclosed easement. *See id.*, at 435. Plaintiffs' malpractice action does not involve concurrent state and federal claims. *Id.* As discussed above, Trustees' absence from the case will not subject any party to a substantial risk of inconsistent rulings or obligation. *See*, pp. 25-26, *supra.* Employing the analytical framework of *Home Buyers*, complete relief can be accorded to Plaintiffs and Appellants in Trustees' absence. *See id.,* 434-435.

Appellants' reliance on *Bancohio Nat'l Bank v. Neville*, *supra,* 310 S.C. 323, 426 S.E.2d 773, is likewise misplaced. That case involved an action to close a state road that had been maintained and repaired by the S.C. Dept. of Transportation ("SCDOT") pursuant to its statutory

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[5] "Rule 19 addresses whether a party should be joined; it does not expressly authorize the dismissal of a party whose presence is not essential to the litigation. The trial court's authority to permit dismissal of a party is derived from either Rule 21, FRCP, Misjoinder and Nonjoinder, or Rule 15, Amended and Supplemental Pleadings. … Rule 19 is relevant to the determination whether dismissal is appropriate under either Rule 21 or Rule 15…." *Caperton v. Beatrice Pocahontas Coal Co.*, 585 Fed. 2d 683 (1978) fn. 23 (citations omitted).

duties. *Id.*, 774-775. The action was tried without SCDOT and the party challenging the road closure appealed. *Id.* Noting the highway department's statutory interest in the roads it maintains and case precedent establishing that where the State is the presumed owner of or has a proprietary interest in property it must be joined as a party defendant, the Supreme Court reversed and remanded the matter back to the trial court for joinder of SCDOT and a new trial. *Id.,* 777-778, citing *Coburg v. Lesser,* 309 S.C. 252, 422 S.E.2d 96, (1992).

Trustees are not state entities. They have no statutory duties under the undisclosed easement. They have disclaimed their interests in the easement. (R. p. 70, ¶ 6.) Any decision regarding the validity of the undisclosed easement will have no effect on Trustees.

Appellants' reliance on *Home Buyers* and *Bancohio* is misplaced. The cases actually support the circuit court's decision to drop Trustees from the case. There is no legitimate reason to force Trustees to continue as parties just to be "bound" by a potential determination regarding an easement they have disclaimed.

2. The Circuit Court's dismissal of Trustees pursuant to Rule 21 did not reverse or relitigate 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." Appellants' 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." Appellants' 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. (R. p. 499, line 9-p. 501, line 7.) Judge Jefferson ruled that Plaintiffs and Trustees had resolved any issues regarding the undisclosed easement. (R. pp. 3-4.) Her ruling was grounded on the recorded Agreement attached to Trustees' motion, wherein Trustees' disclaimed their interests in the undisclosed easement. (R. pp. 62-64 and p. 70 ¶ 6; p. 526, line 16-p. 528, line 24; p. 541, line 25-p. 542, line 9; p. 546, line 25-p. 547, line 4.)

Judge Jefferson did not "re-litigate" the arguments that formed the basis of Judge Buckner ruling. Trustees' motion was based on new and different facts. (R. pp. 61-64 and p. 70, ¶ 6.) Further, Judge Buckner's order adding Trustees was not a decision on the merits and, like Judge Jefferson's ruling dropping Trustees, was made without prejudice. (R. p. 505, lines 3-9; pp. 10-11.) *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.")[6]; *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. Appellants' 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.[7] *Michelson v. Citicorp Nat. Services, Inc.,* 138 F.3d 508, 512-513 (3rd Cir. 1998); *see also, McClune v.*

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[6] Because few South Carolina decisions have interpreted our Rule 21, and none to any degree pertinent here, we look to federal cases construing their almost identical Rule 21." *Farmer v. CAGC Ins. Co.,* 424 S.C. 579, 586, 819 S.E.2d 142 (Ct. App., 2018).

[7] 28 U.S.C. § 1291 provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

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 this appeal, it remains Trustees' position 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). That issue has been fully briefed by the parties, and Trustees hereby refer to and incorporate by reference their memorandum of points and authorities in support of their motion to dismiss filed with the Court of Appeals on August 21, 2019, Appellants' return to the motion filed on October, 9, 2019, Trustees' reply filed on October 18, 2019, and the supporting affidavits and exhibits presently on file with this Court.

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." Appellants' 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).

Appellants filed their motion to amend six hours after Trustees filed their motion seeking be dropped as parties pursuant to Rule 21, SCRCP. (R. p. 61 (file stamp) and p. 82 (file stamp).) By the time Appellants moved to amend, Trustees had already "remised, quitclaimed, terminated, cancelled, and forever released" to Plaintiffs their interests as dominant estate holders in the "purported easement" pursuant to the terms of the Agreement recorded on March 22, 2019. (R. pp. 66-78.) *See also*, Rule 41(a)(2), SCRCP (dismissal of action proper if counterclaim has not been pled prior to the service of a motion to dismiss).

Appellants' cause of action for a declaratory judgment "request[s] that the Court determine the rights of the owners of Lot 6A and 6B under the purported easement." Amended Answer attached to Motion to Amend. Appellants incorrectly conclude that because S.C. Code of Laws Anno. § 15-53-80 requires all persons "who have or claim an interest which would be affected by the declaration" to be made parties, and because "Trustees have rights in the purported easement(s) to be litigated in the case, they are necessary parties to the declaratory judgment action." Appellants' Brief, p. 18. Trustees do not "have or claim an interest" under the undisclosed easement that would be "affected by the declaration." *See* S.C. Code of Laws Anno. § 15-53-80. As such, Trustees are not "statutorily necessary to adjudication of the same." Appellants' Brief, p. 18.

The purpose behind the Declaratory Judgment Act is to "provide for declaratory judgments without awaiting a breach of existing rights." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C.

414, 423, 593 S.E.2d 462, 466 (2004). Appellants seek a declaratory judgment on the issues already raised by the denials and defenses in their answer. None of Appellants' legal rights are being or will be abridged in this action. *See Kubic v. Merscorp Holdings, Inc.*, 416 S.C. 161, 785 S.E.2d 595 (S.C. 2016). Appellants' claim for declaratory relief is a sham—a facile attempt to allege some "right to relief" against Trustees just to keep them in the case.

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. Trustees 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 can proceed 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." Appellants' 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).

Trustees acknowledge that the caption of their Rule 21, SCRCP, motion references "non-joinder" rather than "misjoinder." Motion for Nonjoinder, p. 1. However, the term "non-joinder" does not appear anywhere in the body of Trustees' motion. (R. pp. 61-64.) Trustees' motion

plainly seeks an order releasing them as parties because the basis for their Rule 19 joinder—that they held the dominant estate in the undisclosed easement and therefore needed to be bound by any decision—no longer existed. (R. pp. 62-64 and p. 70, ¶ 6.) As such, Trustees were "being forced to spend time and money participating as Plaintiffs in an action where they have asserted no claim and have had no claims asserted against them." (R. p. 63.)

Appellants contend that "Trustees could not even have been seeking relief from misjoinder" because of "their inextricable connection to the common questions of law and fact in this case." Appellants' Brief, p. 20. Misquoting *Farmer v. CAGC Ins. Co.*, *supra,* 424 S.C. 579, 819 S.E.2d 142, Appellants dismissively assert that "the misjoinder contemplated by Rule 21 is a 'slight procedural misstep.'"[8] Appellants' Brief, p. 19. Appellants further claim that, according to the holdings of *Farmer* and *Demian v. S.C. Health and Human Services Finance Comm'n., supra,* 297 S.C. 1, 374 S.E.2d 510, "parties are not mis-joined unless there is no common question of law or fact." Appellants' Brief, p. 19. Appellants' half-definition of misjoinder is incorrect.

As the Court in *Farmer* observed:

> Although Rule 21 does not define misjoinder, "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Wright & Miller, *Federal Practice and Procedure* § 1683 (3d ed.)
>
> ...
>
> Misjoinder therefore "occurs when there is no common question of law or fact or when ... the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction."

Farmer v. CAGC Ins. Co., 586, citing *DirecTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006).

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[8] The actual quote is: "Like many of the Federal Rules of Civil Procedure, Rule 21 was designed to remove the traps of common law pleading, where a slight procedural misstep like misjoinder could doom the entire action. 7 Wright & Miller, *Federal Practice and Procedure* § 1681 (3d ed.)." *Farmer v. CAGC Ins. Co, supra,* 424 S.C. 585-586, 819 S.E.2d 145.

Farmer and *Damien* both involved the joinder of defendants. Trustee were joined in this case as plaintiffs. Rule 20(a), SCRCP, provides: "All persons may join in one action as plaintiffs if they assert any right to relief... in respect of or arising out of the same transaction, occurrence ... and if any question of law or fact common to all these persons will arise in the action. The rationale of *Farmer*, however, still applies: Parties must satisfy *all* of the preconditions of Rule 20(a) *to join* an action as plaintiffs; parties are *misjoined* as plaintiffs if they fail to satisfy *either* of the preconditions for permissive joinder set forth in Rule 20(a)—i.e., if they assert no right to relief arising out of the same transaction or occurrence or if there are no common questions of law or fact with other plaintiffs in the action. *See id.*

In *Demian*, the Court of Appeals addressed first whether the S.C. Budget and Control Board was a necessary party claim under Rule 19(a), SCRCP:

> The South Carolina Rules of Civil Procedure address the concepts of necessary and permissive parties and provide guidance for a determination of whether the Board should be a party....
>
> The Board is not a necessary party to the appeal. "Ordinarily, an administrative review board is not a necessary party for purposes of judicial review." *Owen Steel*, 281 S.C. at 85, 313 S.E.2d at 639.

Demian v. S.C. Health and Human Services Finance Com'n, 297 S.C. 6, 374 S.E.2d 512. The Court then analyzed the whether the preconditions for permissive joinder applied under Rule 20, SCRCP:

> S.C.R.Civ.P. 20(a) addresses permissive joinder of parties. The question of law concerning punitive reclassification appears common to the Commission and the Board. The trial court order indicates reclassifications not involving a lower rate of pay are common in state government. Since the Board reviews grievances it should have an interest in the issue. Demian seeks the same relief from the Commission and Board, i.e., a hearing on his grievance. The trial court did not find any prejudice to the Board by its continued presence in the case. The record reveals no abuse of discretion by the trial court in this finding. We specifically note the State Employee

> Grievance Committee was a named party in the trial court in *State Department of Mental Retardation v. Glenn.*

Id. The lower court did not abuse its discretion in denying defendant Board's motion to dismiss under Rule 21 because the preconditions for joinder under Rule 20 had been satisfied. *See id.*

Based on *Farmer* and *Damien*, Trustees were misjoined as plaintiffs in this action because they do not to satisfy any of the preconditions of either Rule 19(a) or Rule 20(a), SCRCP. The inapplicability of the preconditions of Rule 19(a) was addressed in subsection B, *supra,* at pp. 22-29. Applying the preconditions of Rule 20(a), Trustees did not seek joinder with Plaintiffs in this case nor have they ever asserted any "right to relief." *See id.* Also, because Trustees disclaimed their interest in the undisclosed easement, there is no question of law or fact that is common to both Trustees and Plaintiffs that will arise in the action. *See id.* Further, Plaintiffs assert no *right to relief against* Trustees in this action, so they cannot be joined as defendants under Rule 20(a). *See id.* (emphasis added.)

Moreover, Federal courts have routinely held that dismissal under Rule 21 is proper as to nominal parties from whom no relief is sought. *See, e.g., Great American Ins. Co. v. Louis Lesser Enterprises, Inc.*, 353 F.2d 997, at 1001 (8th Cir.1965); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F.Supp. 578, 584 (E.D.Pa.1982) ("where certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted."); *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 12 V.I. 325, 371 (D. V.I. 1975) (a misjoinder of parties under Rule 21 may be declared when no relief is demanded from one or more of the parties joined as defendants.); *Moubry v. Kreb*, 58 F.Supp.2d 1041, 1048 (D. Minn. 1999) ("Rule 21 of the Federal Rules of Civil Procedure is the proper vehicle for dismissing parties who were improperly joined—either because they fail to satisfy any of the conditions of permissive joinder under Fed.R.Civ.P. 20(a) or because

no relief is demanded from them or no claim of relief is stated against them. 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1683 at 443-44.").

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 they neither sought relief nor was any relief being sought from them in the case when they moved for dismissal. The circuit court did not abuse its discretion in granting Trustees' motion asking to be released from the case pursuant to Rule 21, SCRCP.

Appellants again raise the argument that the circuit court's decision involved a novel question. Relying on *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142, Appellants claim that "the substantive question to be addressed—whether an action examining an easement may proceed without the dominant estate holders—appears to be novel in this state." Appellants' Brief, p. 20. This argument was neither raised to 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.*, 295, 641S.E.2d 907.

Appellants misapprehend and misapply the Court of Appeals' decision in *Farmer*. This is a legal malpractice action. Plaintiffs seek damages for Appellants' failure to disclose a material easement prior to closing. Appellants have asserted various affirmative defenses alleging that undisclosed easement did not exist or had been waived. (R. p. 34, ¶ 35-p. 37, ¶ 75.) Plaintiffs' claims in this case and Appellants' defenses to those claims are not novel.

Appellants mischaracterize the circuit court's ruling in an attempt to create novelty that does not exist. 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. (R. pp. 3-4; p. 70, ¶ 6.) Based on that disclaimer, Trustees were no longer the dominant estate holders.

Appellants assert that "similar to the circumstances at bar, the cause of action in the *Farmer* case was one for declaratory judgment." Appellants' Brief, p. 20. The case at bar is a tort action based on Appellants' failure to disclose an easement in Plaintiffs' chain of title, not "one for declaratory judgment." (R. p. 17 ¶ 16-p. 18, ¶ 18; p. 19, ¶¶ 24-27; p. 20, ¶¶ 34-36; p. 32, ¶¶ 10-13, 18; p. 33, ¶ 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 disjoinder or dismissal of parties." Appellants' 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. (R. p. 505, lines 3-9; p. 4; pp. 10-11.) 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).

Appellants conclude section I(d) by recycling contentions argued earlier in their brief. They again claim that it was "procedurally inappropriate for a subsequent circuit court judge to relitigate the issue and dismiss parties under Rule 21, SCRCP." Appellants' Brief, p. 21. Trustees addressed this argument at pp. 29-31, *supra.* Appellants also argue, again, that Trustees' Rule 21 motion should have been considered under the Rule 12 dismissal standard. Trustees addressed this argument at pp. 14-17, *supra.*

As set forth above, Trustees' Rule 21 motion and the resulting order of the circuit court complied with the South Carolina Rules of Civil Procedure. 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." Appellants' Brief, p. 21. The proof supporting counsel's statement was the recorded Agreement attached to Trustees' motion as Exhibit A. (R. pp. 65-78.) 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. (R. pp. 58-60; p. 497, line 16-p. 501, line 5; pp. 1-2.)

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." Appellants' 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. (R. p. 66; p. 70, ¶ 6.) Appellants' argument that such a disclaimer must somehow be "tested" is baseless. Appellants can challenge the validity of the undisclosed easement and the effect of the Agreement on Plaintiffs' alleged damages, but they have no authority to step between Plaintiffs and Trustees and dictate whether or how they resolve the undisclosed easement or otherwise decide to use their private property.

Appellants misleadingly contend that the circuit court "erred in accepting without evidence the verbal representations of Trustees and Plaintiff Jones that no further issue lies between them, that the purported 2006 easement was both valid and terminated, and no further fact needed judicial determination" Appellants' Brief, p. 22. The evidence that the easement had been terminated was the recorded Agreement submitted to the circuit court. (R. p. 66-78.) The court made no findings whatsoever regarding the validity of the undisclosed easement." (R. p. 4; pp. 10-11.) On the contrary, Judge Jefferson emphasized 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] pursuing any of its causes of action or defenses." (R. p. 4; pp. 10-11.)

Appellants argue that the Agreement "reveals itself to only terminate the 2005 easement" and that "no court has found the agreement to properly terminate the purported 2006 easement in the complaint." Appellants' Brief, p. 22, fn. 8. Trustees addressed this specious claim at pp. 12-14, *supra.* Further, as conceded by Appellants in footnote 5 of their brief, Trustees have "stipulated to this Court "that they remise, quitclaim, terminate, cancel, and forever release unto Plaintiffs" their rights in the 2006 easement. *See* Respondent's Reply in Support of Motion to Dismiss, p. 4 fn. 2.

The circuit court's decision to dismiss Trustees was premised on terms of the recorded agreement, not the factual statements of their attorney. (R. pp. 62-78; p. 526, line 16-p. 528, line 24; p. 541, line 25-p. 542, line 9; p. 546, line 25-p. 547, line 4; pp. 3-4.) 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 remark: "They got to come over the property somehow. So, they needed to resolve it." Appellants' Brief, p. 22. Based on these comments, Appellants argue that "neither Plaintiffs, nor the Trustees, have ever asserted, much less proven that Trustees *needed* to come over Plaintiffs property. Appellants' 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.

Judge Jefferson's comments deserve to be considered in context:

> The Court: I don't know. It sounds to me like they're trying to make lemonade out of lemons. They got to come over the property somehow. So, they needed to resolve it. I commend them for doing it, because most people—unfortunately, this week I have been hearing a lot of boundary

> disputes with people that are making each other sick fighting all day long over 20 feet of property.
>
> So, if they were able to resolve it I commend them for it, because it means, then, that they have finality in their life about it, and they don't have to go back and forth about it for the next three or four years.
>
> Mr. Powell: Your Honor, ---
>
> The Court: I don't have a problem with people resolving disputes.
>
> Mr. Powell: Well, Your Honor, I ---
>
> The Court: That are mutually beneficial to them, and I don't know that it really makes a difference as to your liability or non-liability.
>
> Mr. Powell: Well, it would, but in any event, Your Honor, ---
>
> The Court: No. Either you did what you are supposed to do or you didn't. It's a standard. It's about whether you met your duty of care or whether you didn't.

(R. p. 529, lines 7-24.)

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 basis for relief under Rule 21. (R. pp. 61-64.) Judge Jefferson's remarks are not reflected in the terms of her order granting relief to Trustees under Rule 21, SCRCP. (R. pp. 3-4.)

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." Appellants' Brief., p. 23. Of course, had Appellants met the standard of care and disclosed the easement, Plaintiffs would have been able to deal with the encumbrance on the front end of the transaction and would not have had to sue Appellants. Instead

of casting blame, Appellants should be grateful that Plaintiffs have mitigated the impact of the easement that they failed to disclose.

Nothing in the Judge Jefferson's ruling prevents Appellants from moving forward in this case and, as they claim, "easily repudiating" the easement. (R. pp. 3-4; pp. 9-11.) Appellants' defenses to the undisclosed easement are not contingent on Trustees' continued participation in this action as parties. Judge Jefferson's offhand comments did not amount to a ruling from the bench and are not reflected in her order. Her remarks do not constitute an abuse of discretion.

III. CONCLUSION

The time, energy, and resources that have been squandered on what is essentially a sideshow in this case beggars belief. The arguments advanced by Appellants in this appeal only serve to underscore their senseless fixation on keeping Trustees in the case regardless of the cost.

Trustees respectfully request that this Court affirm the circuit court's decision. 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. Pursuant to Rule 220(c), SCACR, Trustees ask that the Court also affirm the circuit court's ruling on any other ground appearing on the record.

Alternatively, Trustees request that the court dismiss this appeal as premature pursuant to S.C. Code of Laws §§ 14-3-330(1)-(4).

WILLIAMS AND HULST, LLC

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