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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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

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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the circuit court erred in dismissing the Respondent Trustees, previously joined as involuntary plaintiffs, from this case.

   a. In a suit where the plaintiff sues their closing attorney, alleging damages resulting from the defendant attorney's failure to disclose an easement across the plaintiff's property, whether the circuit court erred in failing to determine that Appellants, the lawyer defendants, have standing to challenge the validity of the dominant estate holders' (Trustees') purported easements.

   b. Whether the circuit court erred in determining that the Trustees are not necessary parties for the just adjudication of this case.

   c. Whether the circuit court's conflicting companion orders prevent just adjudication of this case and compliance with declaratory judgment law.

   d. Whether the circuit court erred in applying the wrong standard and civil procedure rule to the Trustees' motion for "non-joinder."

   e. Whether the circuit court erred in relying upon facts and allegations not in evidence in reaching her decision.

STATEMENT OF THE CASE

This matter is before the Court pursuant to an amended Notice of Appeal filed by the law firm Rogers Townsend & Thomas, P.C. and attorney Lisa Hostetler ("Appellants") on July 12, 2019, seeking review of two trial court orders. (R. at 0558.) The Honorable Deadra L. Jefferson, Circuit Court Judge, dismissed from this case two involuntary plaintiffs, 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 ("Trustees" or "Respondents"), previously joined as parties to this action by The Honorable Perry M. Buckner. (R. at 0001.) Judge Jefferson granted the Trustees' "Motion for Nonjoinder" by Form 4 order on May 9, 2019 and denied Appellants' motion for reconsideration by written order on June 26, 2019. (R. at 0003; 0009.)

This suit began by summons and complaint filed in Berkeley County on May 4, 2018. (R. at 0013.) The plaintiffs were captioned as Ronald L. Jones and Gaye Langley Jones ("Plaintiff Jones").[1] In her complaint, Plaintiff Jones sought damages from her closing attorney, her attorney's firm, the property surveyor, and his business (collectively, "Defendants"), on the basis that they failed to disclose an easement on her property during closing. (*See* R. at 0019, ¶ 24.)

On June 12, 2019, Appellant Rogers Townsend filed a motion to join the Trustees to the suit, pursuant to Rule 19, SCRCP, on the basis that, as the owners of the dominant estate possessing the alleged easement, they are necessary to the determination of this case. (R. at 0055–60.) Following a hearing on the motion, the Trustees were added as involuntary plaintiffs by order of Judge Buckner, dated August 6, 2018. (R. at 0001.) On March 29, 2019, the Trustees filed a "Motion for Non-joinder," arguing that they no longer had any interest in the case pursuant to a new recorded agreement which purportedly replaced the 2006 easement alleged in the complaint with a new one recorded March 22, 2019. (R. at 0061.) The Trustees argued that the replacement agreement cut off their interests in the prior easement and justified their removal from this suit. Judge Jefferson granted the Trustees' motion on May 9, 2019. (R. at 0003.) Appellants filed a motion for reconsideration, or to alter or amend the order, on May 20, 2019. (R. at 0260.) Judge Jefferson declined to reconsider her ruling on June 26, 2019. (R. at 0009.) This appeal followed.

On August 21, 2019, the Trustees filed a motion to dismiss this appeal, arguing that it was premature and interlocutory. Following the submissions of memoranda, the Court denied the motion to dismiss on December 13, 2019.[2] The Appellants' Brief follows.

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[1] Mr. Jones previously quitclaimed his interest in the property to Ms. Jones in 2012 and she is the one actively participating in this suit. Thus, for the sake of simplicity, Ms. Jones is referred to as the singular plaintiff.

[2] Appellants reserve the right to address the arguments about the immediate appealability of Judge Jefferson's orders in their reply brief if the Respondents choose to further press the issue. As,

STANDARD OF REVIEW

The standard of review in this case should be the one applied when the lower court dismisses a party. The Trustees filed the motion at bar with a citation to Rule 21, SCRCP. Judge Jefferson's Form 4 Order also cites to Rule 21, which does facially concern nonjoinder. (R. at 0003.) Notably, "nonjoinder" is defined as the "failure to bring a person who is a necessary party into the lawsuit." *Black's Law Dictionary* 1154 (9th ed. 2009); *see also United States v. Scarboro*, 352 F. Supp. 2d 714, 717 (E.D. Va. 2005) ("Upon non-joinder, the Court can merely add the necessary party in the action."). Conversely, *dis*joinder is the "undoing of the joinder of parties or claims." *Black's Law Dictionary* at 536.

There is sparse case law in South Carolina addressing the standard of review of a ruling under Rule 21. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018) (recognizing limited Rule 21 case law). This appears to be in part because the realignment of parties has not historically triggered much appellate review. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 241–43, 701 S.E.2d 5, 25–26 (2010) (ruling for the first time that South Carolina trial judges may use Rule 21, like the Federal courts do, to realign parties).

Generally speaking, a ruling regarding joinder is subject to the trial court's discretion. *See Demian v. S.C. Health & Human Servs. Fin. Com.*, 297 S.C. 1, 5–7, 374 S.E.2d 510, 512–13 (Ct. App. 1988) (applying abuse of discretion standard to Rules 20 and 21); *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) (applying abuse of discretion standard to Rules 19 and 24). However, this appeal is about the dismissal or *dis*joinder of parties, not a realignment, nor a substitution, nor even a severance. The Trustees did not seek to change their position in the case, or to substitute other parties as more suitably or accurately named, but

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however, it is Appellants' contention that this matter was properly appealable at the time this appeal was brought, the matter is not addressed in this brief where Appellants set forth the issues.

rather to remove themselves, and thereby *all* dominant estate-holders, from this easement-based case for substantive, not procedural, reasons.

Appellants contend 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. This contention is supported by this Court's ruling in the *Farmer* case in 2018. In that case, the Court reversed the trial court's Rule 21 decision to remove a party from the case when that ruling was based on a novel issue of law and an incomplete factual record. *Farmer*, 424 S.C. at 586, 819 S.E.2d at 146. The Court held that the motion before the trial court was "no place for novelty." *Id.* (citing *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001)). In the case at bar no depositions had been taken.

This Court further held that even if the issue at bar is a procedural defense (rather than a novel legal question), that defense is still more properly heard under a Rule 12(b)(6) motion, not a Rule 21 motion. *See id.*, 424 S.C. at 587, 819 S.E.2d at 146. Appellants contend that this appeal concerns, at the very least, issues properly cognizable as a motion to dismiss, and at most a novel legal question about the possibility of adjudicating the validity of the Trustees' purported easements without having them before the Court as the alleged dominant estate holders.

Under a traditional Rule 12(b)(6) review, the Court of Appeals "'applies the same standard of review as the trial court.'" *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.*

STATEMENT OF THE FACTS

On May 7, 2010, Plaintiff and her former spouse purchased the house and property at 145 Memes Way ("Lot 6B"), addressed in Charleston, South Carolina and located just inside the Berkeley County line. (R. at 0016, ¶ 9.) The property sits at the end of a semi-peninsular finger of land that runs along the edge of the salt marsh surrounding the Wando River. (R. at 0101.) Appellants served as the closing attorneys for Plaintiff Jones, while the Peabody Defendants completed the survey work. (*See* R. at 0017–18, ¶¶ 13, 19.) Plaintiff Jones' lot is identified in register of deeds documents as "Lot 6B," while the adjacent and slightly more inland, but still marsh-front, lot belonging to her neighbors, the Trustees, is called "Lot 6A." (R. at 0101.)

Approximately five years after moving into the residence on the property Plaintiff Jones learned of an alleged easement on her lot held by the Trustees. (R. at 0017, ¶ 15.) The language giving rise to the alleged easement as described in the Complaint was included in the legal description of a title recorded in 2006.[3] (R. 0017, ¶ 16.) The legal description in the 2006 deed provides:

> EXCEPT: A 25' Ingress/Egress Easement is hereby dedicated and given to all owners and successors of interest in Lot 6A (TMS # 263-00-03-068) 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), 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,

[3] The 2006 recording contained a legal description very similar to that of another title recorded in 2005, which also set forth easement language. Plaintiff Jones pleaded facts exclusively about the alleged 2006 easement in her complaint. (R. at 0015–0024.) For that reason, Appellants confine the discussion in this brief to the 2006 document, which is contained in the record for this case. (R. at 0095–0099.) The 2005 deed was not put before the circuit court. However, both the 2005 and 2006 deeds were included in the exhibits put before this Court during the briefing of the Trustee's Motion to Dismiss, in order to clarify some discrepancies in the record. For instance, yet another deed related to the property, dated in 2007, was included by the Trustees in their briefing of the Motion to Dismiss (presumably in error). That deed is not relevant to the easement alleged by Plaintiff Jones in the complaint. Notably, the new agreement entered into by the Trustees and Plaintiff Jones in March 2019, by its terms, releases only the 2005 easement, not the 2006 duplicate. *See* footnote 5, *infra*.

> 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 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 ON ROAD S-8-33, IN WANDO, BERKELEY COUNTY, SOUTH CAROLINA PRESENTLY OWNED BY DAVID E. HATCHEL AND JOSEPH 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 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. at 0098.) The subject property, Lot 6B, has a U-shape, where a good portion of the U is marsh front. The northern boundary of the property abuts Lot 6A. Thus, the language quoted above appears to intend that the owners of the neighboring lots were supposed to be able to traverse the marsh front edges of Lot 6B, or the U shaped portion of the property, while the northern boundary of the property, which adjoins Lot 6A, was excluded from the easement, with the exception of the edges where the U-shaped easement was to begin and end.

None of the other lot owners, aside from the Trustees, presently make a claim to the easement. (R. at 0020, ¶ 30.) The easement has never been tested in court, determined to be valid by a finder of fact, or determined to be in the proper chain of title for Lot 6B.[4] Nonetheless,

[4] There are numerous reasons why the lack of a court ruling on the validity of the easement is integral to this case, none of which have yet been addressed, given that this case is presently stayed in the discovery phase. For instance, if Plaintiff Jones has any valid defenses to the easement, she must mitigate her damages by asserting those defenses. Additionally, the easement must have been enforceable for it to have caused any damages to Plaintiff Jones. Further, if the easement was not recorded properly as part of the chain of title, Appellants would not have been the proximate cause of any harm to Plaintiff Jones. Moreover, if the dominant estate holders were not party to a ruling that the 2006 easement is not enforceable, they could continue to assert their claims against Plaintiff Jones, despite the Court's judgment. This is only emphasized by the contention of Plaintiff Jones that neither she, nor the Trustees are subject to the Court's ruling on the validity of the easement, as discussed *infra*.

Plaintiff Jones sued her closing attorneys and surveyors for damages caused by the alleged undisclosed easement. Plaintiff Jones did not name the Trustees as the alleged dominant estate holders in her suit, nor explicitly seek declaratory judgment as to the validity of the easement. (R. at 0015–24.)

Upon receipt of the suit, Appellants determined that the alleged dominant estate holders were necessary parties for the proper adjudication of the issue of the easement and for purposes of making binding whatever findings and conclusions were made by the court as to the enforceability of the easement. In order to prove the elements of professional negligence asserted against Appellants, Plaintiff Jones must necessarily establish the validity and enforceability of the Trustees' purported easement supposedly causing harm to her. Such a holding is akin to a declaratory judgment, which naturally requires that all affected parties be named. *See* S.C. Code Ann. § 15-53-80. Upon hearing Appellants' Rule 19 motion, Judge Buckner made the Trustees involuntary plaintiffs in this suit. (R. at 0001.) That order has not been appealed.

Plaintiff Jones has resisted the joinder of the Trustees to the case at all stages. Before Judge Buckner, Plaintiff Jones' counsel took the notable position that the Court has no place in determining the validity of a disputed easement, stating that there are "only two people who can make a determination as to whether or not an easement exists[, and that] is the dominant estate holder and the servient estate holder. And we both agree the same thing, we believe that the easement does exist." (R. at 0503, ll. 18–23.) Upon the joinder of the Trustees, Appellants proceeded with the defense of the case by commencing with discovery.

Seven months after the joinder of the Trustees, a new document was recorded with the Berkeley County Registrar of Deeds on March 22, 2019 called "Access, Maintenance and Joint Dock Use Agreement." (R. at 0067.) The Agreement purports to "terminate" the "Old Purported Easement" and establish a new one on Lot 6B, for the benefit of Lot 6A, as part of a larger plan to

build a joint dock extending from Lot 6B to the Wando River.[5] (*See* R. at 0070, ¶ 6.) The Trustees contend that this agreement allows them to exit the case, since their interest in the 2006 easement has been terminated as of 2019. Prior to the filing of the March 2019 "new easement," the parties agreed the Trustees would be deposed during the period of April 8–12, 2019. (R. at 0186.) After the filing of the new easement on March 22, 2019, the Trustees asked Appellants to consent to their dismissal and refused to appear at their scheduled depositions unless they were dismissed from the case. (R. at 0198.)

Appellants declined to voluntarily consent to the dismissal of the Trustees from the case, as a condition precedent set by their counsel for taking their depositions, believing that they remained necessary parties. (*See* R. at 0186.) The Trustees filed a motion seeking dismissal from the case captioned "Motion for Non-joinder." (R. at 0061.) Concurrently, Appellants filed a motion to amend their answer to include a formal petition for declaratory judgment that included the Trustees, as the dominant estate holders and the ones allegedly causing Plaintiff Jones harm. (R. at 0082.) Notably, the Jones complaint has not been amended, and thus, must be construed to continue asserting the same facts. Plaintiff Jones continues to argue in the pleading that the new agreement was entered into under the threat created by the 2006 easement and continues to assert damages based on validity on the 2006 easement and the Trustees' position regarding the same. (*See* R. at 0020, ¶¶ 31–32 (asserting that the Trustees will terminate the purported 2006 easement

[5] The Trustees represented to the lower court that they had released the old purported easement from 2006 and that "there is no longer an easement that threatens either Rogers, Townsend and Thomas' title insurer or threatens the Jones with anything." (R. at 517, ll. 23–24.) This is not correct. The Agreement defines the Old Purported Easement as the one recorded in 2005, not the later duplicated recording from 2006 (the one alleged in the Jones complaint). (R. at 0068.) The Trustees later stipulated in a filing before this Court that they "remise, quitclaim, terminate, cancel and forever release" the purported 2006 easement as well. (Mot. to Dismiss Appeal, Reply, p. 4, n.2.) However, this stipulation is not part of the chain of title as is the new agreement with the modified easement. Appellants continue to assert their rights to challenge the validity of the new agreement and its provisions, regardless of which easements it proposes to terminate and replace.

only in exchange for one of reduced size and scope, which continues to cause harm to Plaintiff); *see also* R. at 0534, ll. 4–6.)

Judge Jefferson heard the cross motions at the same time on May 7, 2019. Counsel for Plaintiff Jones, the Trustees, and Appellants appeared. (R. at 0510, ll. 1–22.) After argument, the circuit court granted Appellants' motion to amend their answer to include a declaratory judgment action and granted the Trustees' motion to be removed from the case. (R. at 0003–04; 0006.) Appellants filed a motion for reconsideration of, or to alter or amend, the order on the Trustees' motion. Judge Jefferson denied that motion and this appeal followed.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DISMISSING THE PLAINTIFF TRUSTEES FROM THIS CASE.

By virtue of the circuit court's appealed ruling, Appellants have been deprived of their right to defend against the allegations of the Plaintiff. The rights of the Trustees as dominant estate holders of their purported easement at the time Plaintiff Jones purchased Lot 6B (May 2010) must be determined before the rights of Plaintiff Jones can be determined. This is true because if the Trustees received no easement at all, Plaintiff Jones took the property unencumbered by the 2006 easement which is the subject of the case and the onus for the 2019 arrangement entered into by the Trustees and Plaintiff Jones. The Trustees are the source of this suit, yet the lower court refuses to keep them—the dominant estate holder of their purported easement—parties to this case, to which they must be joined for complete and binding relief to be granted.

a. The circuit court erred in failing to determine that Appellants have standing to challenge the validity of the Trustees' purported easements.

The foundational legal issue in front of the lower court is whether Appellants have standing to challenge the validity of the easements purported by the Trustees to cross Plaintiff Jones' property. Plaintiff Jones contends that Appellants, the defendant closing attorneys in this case,

lack such standing to litigate the enforceability of the purported 2006 easement of the Trustees or to litigate the validity or rationale for the new agreement and easement record in March 2019. (R. at 0501, ll. 8–13; 0514, ll. 17–19.) Plaintiff Jones and the Trustees assert that the new agreement moots the need for adjudication, by declaratory judgment or otherwise, the validity of the purported easement which forms the basis for Plaintiff Jones' claim against Appellants. If Plaintiff Jones is correct then there would be no place for the Trustees, the dominant estate holders of all concerned easements, to remain parties.

On the other hand, if Appellants do have standing, as the law dictates they must, to litigate the rights of the Trustees as they are alleged in the Plaintiff's complaint, then the Trustees must remain parties to the suit. 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. (R. at 0262–63, ¶ B.1.) In both motion hearings regarding the joinder of the Trustees, Counsel for Plaintiff Jones contended that only the two estate holders could contest the validity of the Trustees' easement, that they chose not to, and that Appellants, Plaintiff Jones' closing attorneys, had no standing to challenge the purported easements and must simply accept Plaintiff Jones' belief that the 2006 easement is valid. Counsel for Plaintiff Jones argued to Judge Buckner that "the law firm has no standing to request whether or not there's an easement or not. That's between the dominant and servient estate. They have no standing to say there's no easement." (R. at 0501, ll. 9–12.) This is a curious statement of the law, ignoring the fact that the plaintiff always has the burden of proving every element of their claim. Judge Buckner recognized this when he told Counsel for Plaintiff, "The law firm does have a right to raise the defense, first of all, there is no easement, which is in their pleading." (R. at 0501, ll. 17–19.)

Appellants have a constitutional right to put the facts alleged by Plaintiff before a trier of fact for their determination of the facts and before a judge for determination of the law. U.S. Const. Amends. VII & XIV § 1. To preserve these rights and accord with the rule of law, Plaintiff Jones must be required to prove her case and Appellants must be given the opportunity to rebut that case. In a legal malpractice or professional negligence case, the plaintiff is required by law to prove: "(1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) proximate causation; and (4) damage to the client." Sullivan & MacGregor, *Elements of Civil Causes of Action* § 25.B (5th ed. 2015). By allowing Plaintiff Jones and the Trustees to simply agree to the existence of the easement and "resolve this case between the two of us,"[6] the lower court is allowing Plaintiff Jones to jump directly to element four, damages, without requiring proof of all three preceding elements. Moreover, the court is allowing Plaintiff Jones and the Trustees to deprive Appellants of the findings of fact to which they are entitled by the Constitution, as well as the opportunity to bind the Trustees to those findings, pursuant to Rule 19. In order to ensure that those determinations are enforceable against all concerned, the Trustees must be parties to the ruling. Moreover, Plaintiff Jones' incorrect theory of the law has concerning public policy implications.

In a 2015 case, our Supreme Court ruled that legal malpractice claims cannot be assigned to opposing parties, in accordance with the majority rule across the country. *See Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 38, 775 S.E.2d 37, 39 (2015). The primary issue behind this ruling is a concern about possible collusion. Courts worry that given the opportunity to assign legal malpractice claims, a party may be motivated to join forces with their opposition to go after their own attorney. *Id.*, 413 S.C. at 36, 775 S.E.2d at 38. For instance, a defendant could stipulate

[6] (R. at 0535, l. 3.)

to artificially high damages for the plaintiff, assign any legal malpractice claim to the plaintiff, and leave the lawsuit while the plaintiff continues to prosecute the defendant's attorney for the damages to which their own client stipulated. *Id.* (citations omitted) (stating that a claimant should not be allowed to transfigure a claim against a poor defendant into one against that defendant's wealthier attorney based on theoretical negligence).

The labels in this case do not directly align with such a fact pattern, but this case nonetheless presents very similar circumstances with equal public policy concerns. That is, if we consider the Trustees the "plaintiffs," who seek to enforce an allegedly undisclosed easement against "defendant" Jones, while Jones is willing to stipulate to the enforceability of the purported easement in order to gain damages from her closing attorneys, the fact pattern is eerily similar. Notably, the new agreement entered into by the parties is of mutual benefit, as they have planned to construct, use, and maintain a dock together on Plaintiff Jones' property. But the agreement is, perhaps, even more beneficial to Plaintiff Jones if it functions as a stipulation to inflated damages—her tacit agreement to concede to the Trustees' demands in exchange for their cooperation in her suit against her closing attorney. Appellants can conceive of no other reason why Plaintiff Jones would not allow Appellants to challenge the Trustees' purported easement, based on its numerous defects, and thus clear her land of the encumbrance. If the Trustees' easement is the harm, it is illogical for Plaintiff Jones to continue opposing Appellants' attempts to cure the problem they supposedly caused. As the Court in *Skipper* recognized, such a scheme undermines the prerogative of the finder of fact, "both as to liability and the fixing of damages." *Id.* (citing *Prince v. Peterson*, 538 P.2d 1325, 1329 (Utah 1975)).

b. The Trustees are necessary parties to this suit if complete relief is to be afforded and duplicative litigation avoided.

The predicate issue that must be proved by Plaintiff Jones to establish her case is whether there is or was a valid and enforceable easement owned by the Trustees entitling them to walk the circumference of the Plaintiff Jones' property. Despite Plaintiff Jones' assertion of harm to her property because of this purportedly undisclosed easement, she continues to argue on the same side as the Trustees, instead of against them, which would be in her interests. After all, if the purported easement could be found to be invalid, there would have been no further encumbrance on Plaintiff's property. Instead, while a determination as to the Trustees' purported easement was pending before the trial court that could have cleared Plaintiff's property of the encumbrance, Plaintiff chose to enter into a new agreement, which further entrenched the questionable easement owned by the Trustees. Plaintiff Jones' Counsel states that Jones has acted to assist the Trustees because she wants to "be a good neighbor." (R. at 0536, l. 15.)

Nonetheless, the Trustees are necessary parties to this case. The issue of the validity of both the original 2006 purported and the modified 2019 one is foundational to Plaintiff's claims. Plaintiff Jones argues neither the Appellants nor the Court has the power to render a decision that the 2006 easement is invalid because the Trustees and Plaintiff have decided that it is in fact and law valid. (R. at 0514; 0534–35; 0536.) However, by all standards of the rule of law, Plaintiff must actually prove that a valid easement existed in order to prove her case against Appellants. If, as Appellants believe, Plaintiff could not prove the existence of an enforceable easement, it follows that 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. This would be unfair to Appellants, who deserve finality on the issue, and against the interests of judiciary, which deserves to be relieved of duplicative litigation.

All of these concerns are addressed in Rule 19, SCRCP, which contemplates adding parties needed for just adjudication. Case law provides that parties are necessary for the complete determination of the controversy at bar when "'they have ***rights which must be ascertained*** and settled before rights of parties to the suit can be determined.'" *See Hardwick v. Liberty Mut. Ins. Co.*, 243 S.C. 162, 169, 133 S.E.2d 71, 74 (1963) (quoting *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 55 S.E.2d 68 (1949)) (emphasis added). Under Rule 19, persons shall be joined if their absence prevents complete relief or if they claim "an interest relating to the subject of the action." Rule 19(a), SCRCP. A person claiming an interest is to be joined if their absence would impair or impede their ability to protect their interest or "leave any of the person already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" by reason of the claimed interest. *Id*. Indeed, the joinder of such persons is mandatory under the Rule. *Id.* (using the word "shall").

These reasons for joining non-parties formed the basis of Appellants' motion to add a party, which was concurrently filed with their answer. Judge Buckner granted the motion to add the Trustees as involuntary plaintiffs on the grounds that Appellants have a right to challenge the validity of the easement and that failure to join the Trustees to the suit would prevent complete relief and hinder Appellants' defense of the case by creating duplicative potential litigation. (R. at 0504–05.)

i. The dominant estate holders must be party to a suit where the validity of their easement is at issue.

In this case, the Trustees are the dominant estate holder for the 2006 purported easement asserted by Plaintiff Jones. 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 the Trustees' interests, per Rule 19. Complete relief—which is to say, the ability to

reach finality as to the rights and issues to be determined in this 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. This was acknowledged by Judge Buckner, but the judge for the May 2019 hearing chose to reverse his ruling, despite recognizing on the record that the new 2019 easement is largely the same as the old 2006 purported one. (R. at 0538, l. 25 ("I don't see it as depreciably different than the new one.").) Although there was an existing order on the record, and although the facts upon which that order relied were not materially different, the lower court chose to re-litigate the issue of joinder.

The purpose of Rule 19 is to ensure "'that whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had.'" *Ex parte Gov't Emples. Ins. Co.*, 373 S.C. at 136, 644 S.E.2d at 701 (quoting a note to Rule 19, SCRCP); *see also Philippines v. Pimentel*, 553 U.S. 851, 870, 128 S. Ct. 2180, 2193 (2008) (citation and internal punctuation omitted) (noting that the "social interest in the efficient administration of justice and the avoidance of multiple litigation is an interest that has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants"). A party is necessary when their rights must be determined before the remainder of the case can be decided. *See Hardwick,* 243 S.C. at 169, 133 S.E.2d at 74 (quoting *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 55 S.E.2d 68 (1949)). In this case, the gravamen of the suit is what rights did the Trustees have in the subject 2006 easement on May 7, 2010, if any.

The Fourth Circuit has ruled 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. A West Virginia homeowner filed a state suit against the builders and warrantors of her recently completed home. *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 430 (4th Cir. 2014). The warrantors filed a petition in federal court seeking the enforcement

of an arbitration provision. *Id.* Because the arbitration provision was in a warranty procured by the builders of the home, the Fourth Circuit found that the builders were necessary parties for a determination on the validity and enforcement of the arbitration provision. *Id.* at 434. The court reasoned that, even setting aside the need for the Builders to protect their own interests, Rule 19 provided another basis requiring the joinder of the Builders—that is, multiple lawsuits could arise from the agreement to arbitrate and multiple, conflicting interpretations of the arbitration provision could be applied. *Id.* at 434–35.

In a 1993 South Carolina Supreme Court case, the Court reversed the trial court for similar reasons. *See generally Bancohio Nat'l Bank v. Neville*, 310 S.C. 323, 426 S.E.2d 773 (1993). Oconee County filed an action to close a public road and failed to name the South Carolina Department of Transportation ("SCDOT") as a party. *Id.*, 310 S.C. at 325, 426 S.E.2d at 774–75. The Supreme Court found that the SCDOT would not be bound by a judgment in the suit, and thus the statutory duties of SCDOT would not be discharged, unless SCDOT was made a party. *Id.*, 310 S.C. at 328–29, 426 S.E.2d at 777.

In this case, similar reasoning applies. There are legal documents which must be reviewed for validity and enforceability. Those documents stem from the Trustees' relationship with Plaintiff, not Plaintiff's relationship with Appellants. Further, there is a property right at issue that must be decided on the basis of those documents, as well as the conduct of the parties. The Trustees will not be bound by a decision to which they are not a party. In such a case, refutation of the easement by the trial court, which Appellants believe is quite possible, would not be binding on the Trustees, who could continue to assert rights against Plaintiff from the purported easements. This result is inequitable and illogical because it prevents a final determination of the issues and leaves Appellants exposed to future litigation. In other words, a determination on the legal validity

of the easements alleged by Plaintiff is the right of Appellants as defendants in this case, but would be futile were the owners of the purported easements not a party to the ruling.

ii. Judge Buckner's finding that the Trustees are necessary parties is binding on the parties.

Judge Buckner had already determined the issue of non-joinder in August 2018. The Trustees' 2019 Motion for Non-joinder is an attempt to re-litigate matters already decided by Judge Buckner in an un-appealed order. Generally speaking, when an order remains un-appealed, it becomes final, binding, and the law of the case as to the issues addressed. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970)) (an un-appealed ruling is the law of the case); *Murphy v. Murphy,* 269 S.C. 101, 105, 236 S.E.2d 417, 418 (1977). Neither Plaintiff, nor the Trustees appealed Judge Buckner's order at the time it was issued. Moreover, none of Respondents cross appealed his order in the instant appeal. The Trustees were already determined to be necessary parties at the time they sought to be removed from the case; given that status, their removal should have been treated as a motion to dismiss, rather than an opportunity to re-litigate issues determined by Judge Buckner on materially similar facts.

c. The lower court's inherently contradictory companion orders prevent complete relief as to Appellants' petition for declaratory judgment.

The lower court heard two motions, both filed the same day, on May 7, 2019. (*See generally* R. at 0508–53.) Accordingly, she also issued two orders on May 9, 2019. In the appealed order, she determined that the Trustees could exit the case and be removed as involuntary plaintiffs. (R. at 0003–04.) In the other order, she granted Appellants' motion to amend their answer to include a petition for declaratory judgment. (R. at 0006.) These two rulings are inherently contradictory because the Trustees must be party to any declaratory judgment ruling about their purported easement.

Appellants' motion to amend their answer was made to formalize the requirement inherent in Plaintiff's negligence cause of action against Appellants that the existence of the offending easement be proven. Under S.C. Code Ann. § 15-53-20, *et seq.*, South Carolina courts have the authority to "declare rights, status and other legal relations whether or not further relief is or could be claimed," *i.e.*, to issue declaratory judgments. S.C. Code Ann. § 15-53-20. The statutory scheme for declaratory judgments specifically applies to deeds like the ones in this case. *See* S.C. Code Ann. § 15-53-30. The law also requires that all persons "who have or claim any interest which would be affected by the declaration" be made party to the suit. S.C. Code Ann. § 15-53-80.

Because the Trustees have rights in the purported easement(s) to be litigated in this case, they are necessary parties to a declaratory judgment action. Thus, the Trustees must be party to Appellants' declaratory judgment cause of action. Nonetheless, while granting Appellants' motion, the circuit court also dismissed parties necessary to the cause of action from the case. This is inherently contradictory and axiomatically paradoxical. Neither the Trustees, nor Plaintiff have appealed the order granting Appellants' motion to amend.[7] Thus, in order to enforce the un-appealed order regarding declaratory judgment, the Trustees must remain parties to this suit as they are statutorily necessary to adjudication of the same. *See* S.C. Code Ann. § 15-53-80 and Rule 19, SCRCP.

d. The Trustees' Motion for Non-joinder and the circuit court's resulting order do not comply with the South Carolina Rules of Civil Procedure or apply the correct standard.

Rules 19 through 21, SCRCP, address joinder of non-parties to existing suits. Rule 19 addresses parties that are necessary to the just adjudication of a suit, *i.e.*, mandatory joinder. This

[7] Plaintiff did not appeal the order or file a motion for reconsideration, choosing instead to file a motion to dismiss the petition for declaratory judgment, which has yet to be heard, given this appeal.

rule formed the basis of Appellants' original motion to add the Trustees, which was granted by Judge Buckner. Rule 20 addresses permissive joinder. Rule 21 addresses "mis-joinder" and "non-joinder." An examination of this rule and the definitions of the terms used therein shows that the rule allows the court to "drop" mis-joined parties—that is, parties that have been misidentified or misnamed. Conversely, the rule allows the court to "add" non-joined parties—that is, parties that should be a part of the suit, but are not. Additionally, Rule 24 allows non-parties to request on their own to be brought into a suit, while Rule 25 allows for a substitution of parties under certain circumstances. *None* of these rules apply to the motion and order at bar.

Non-joinder does not mean un-joining or dis-joining a party. Rather, non-joinder is a reference to the defect of not having joined necessary parties. *See Major v. Nat'l Indem. Co.*, 267 S.C. 517, 518, 229 S.E.2d 849, 849 (1976). This is the plain-language meaning of term—Black's Law Dictionary defines "nonjoinder" as the "***failure to bring a person who is a necessary party*** into the lawsuit." *Black's Law Dictionary* 1154 (9th ed. 2009) (emphasis added). Conversely, *disjoinder* is the "undoing of the joinder of parties or claims." *Black's Law Dictionary* at 536. Dis-joinder is not part of the relief offered by Rule 21. That rule addresses only non-joinder and mis-joinder. Black's Law Dictionary defines "misjoinder" as the "improper union of parties in a civil case." *Black's Law Dictionary* 1090 (9th ed. 2009). The mis-joinder contemplated by Rule 21 is "a slight procedural misstep." *Farmer*, 424 S.C. at 586, 819 S.E.2d at 145 (7 Wright & Miller, *Federal Practice and Procedure* § 1681 (3d ed.)). Parties are not mis-joined unless there is no common question of law or fact. *Id.*, 424 S.C. at 586, 819 S.E.2d at 146 (citing *DirecTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006) *and Demian v. S.C. Health & Human Servs. Fin. Com.*, 297 S.C. 1, 6, 374 S.E.2d 510, 512 (Ct. App. 1988)).

In this case, there is no question that the Trustees had already been the subject of a non-joinder motion and were made party to this case. The Trustees were not joined by the errant

procedural misstep of a plaintiff, but by the court. When the Trustees sought to be released from the case, they were not seeking non-joinder as their motion stated. Indeed, the Trustees could not even have been seeking relief from mis-joinder. Unquestionably, the Trustees were joined due to their inextricable connection to common questions of law and fact in this case. Plaintiff's claim turn on whether the Trustees have or have had a valid easement on Plaintiff's land. That question rises far above a simple common question to the level of interest contemplated by the necessary party standard. What the Trustees were asking for is a substantive, not mere procedural, dismissal from the case. Moreover, 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.

Under such circumstances, this Court has deemed the application Rule 21 as a mechanism for dismissal inappropriate. In the *Farmer* case, the issue before the circuit court pertained to the novel question of whether a previously self-insured unincorporated and voluntarily dissolved business trust could be sued in relation to workers compensation claims. *Id.*, 424 S.C. at 582, 586, 819 S.E.2d at 144, 146. The lower court granted the trust's motion under Rule 21. This Court reversed, holding "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.*, 424 S.C. at 586, 819 S.E.2d at 146 (citing *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001)).

Similar to the circumstances at bar, the cause of action in the *Farmer* case was one for declaratory judgment. *Id.*, 424 S.C. at 587, 819 S.E.2d at 146. The trust was not being sued for breach of contract, but for purposes of determining responsibility for workers compensation claims. *Id.* This Court concluded that dismissing the trust at an "early stage of the lawsuit jeopardize[d] the judicial economy Rule 21 and the Declaratory Judgment Act strive to foster." *Id.* The same result and reasoning would apply here.

In this case, once Judge Buckner joined the Trustees' to the case, it was procedurally inappropriate for a subsequent circuit court judge to relitigate the issue and dismiss parties under Rule 21, SCRCP. As this Court explained in the *Farmer* case, Rule 21 does not provide for the substantive dis-joinder or dismissal of parties. If the motion and order on appeal are cognizable under any standard, it is one under Rule 12 for a motion to dismiss. However, even under that standard, the lower court erred in dismissing the Trustees as parties to this case. The motion before the circuit court was not one relating to a minor procedural matter, but one concerning a substantive and *novel* question. The Court in *Farmer* held that not only is such a novel question not cognizable under Rule 21, it should also not result in a dismissal under Rule 12. *Id.*, 424 S.C. at 586, 819 S.E.2d at 146. Because the motion before the lower court in this case turned on the novel issue of whether an easement may be adjudicated without the dominant estate holders being a party, the motion was an improper avenue for consideration of the question. Moreover, the lower court based her ruling concerning this novel issue on flawed findings.

e. The circuit court erred by accepting the argument of counsel as proof that the Trustees no longer have an interest in the case without evidence or pleading.

In ruling for the Trustees on the motion, the lower court accepted argument of counsel as sufficient to establish certain key facts. "Arguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (footnote omitted). South Carolina courts have "repeatedly held that statements of fact appearing only in argument of counsel will not be considered." *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933). Furthermore, "[m]ere allegations, denied by the other party, are not evidence." *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). The Trustees relied on a sole document to support their main contention: the March 2019 agreement. That agreement, like the deeds before it, has not been tested by any court for validity or enforceability.

Indeed, no court has found the agreement to properly terminate the purported 2006 easement in the complaint.[8] The lower court erred in accepting without evidence the verbal representations of counsel for the 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. After all, Plaintiff Jones' pleadings in this case remain unaltered, while Appellants continue to deny her allegations.

i. The circuit court erred in determining, without evidence or allegation, that the Trustees were entitled to cross Jones' property "somehow."

In the hearing before Judge Jefferson, she erroneously ruled from the bench that "They got to come over the property somehow. So, they needed to resolve it." (R. at 0529, ll. 8–9 (referring first to the Trustees, then to both the Trustees and Jones).) This conclusion skips directly over many of the issues making the Trustees necessary parties, and does so without stopping to address the evidence. Neither Jones, nor the Trustees, have ever asserted, much less proven, that the Trustees *needed* to come over Jones property. The purported easement is not one of necessity and there was no evidence before the court that it was. There is no reason whatsoever that an easement of necessity would have been granted to the Trustees, nor has any party ever asserted otherwise. Further, no party has even asserted a prescriptive easement.[9] The purported easement at issue is

[8] As mentioned in footnote 5, *supra*, it would be difficult to so find, as on examination the March agreement reveals itself to only terminate the 2005 easement.

[9] "To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169–70 (2015) (citation omitted). In this case, Plaintiff Jones states she was unaware of the purported easement for a period of five years, during which time she resided on the property. (R. at 0017, ¶ 15.) Thus, it seems unlikely there was continued and uninterrupted use. Moreover, there was a *garage* in the area of the purported easement, which certainly would have stymied continued use. (R. at 0524, ll. 13–16 (Counsel for Plaintiff Jones stating, "there was a garage that was built inside the easement area . . . .").) Further, it has not even been twenty years between the recording of the purported 2006 easement and the alleged discovery of the same by

one of explicit grant, which, if not valid for any number of reasons, is easily repudiated. Thus, if Jones had successfully presented defenses to the purported easement, she would have been under no obligation whatsoever to enter into a new easement or otherwise let the Trustees onto her property for any reason. That being so, she would have no cause or harm to assert against Appellants. This is one of a number of reasons why the Trustees are necessary to the proper adjudication of this case.

CONCLUSION

In dismissing the Trustees from this case, the circuit court failed to address key legal issues, erroneously determined that the Trustees are not necessary parties, impeded Appellants' ability to prosecute their petition for declaratory judgment, applied rules and standards incorrectly, and relied on factual assertions not in the record. For these reasons, Appellants humbly request that this Court reverse the lower court's order and remand this case back to the Court of Common Pleas.

Respectfully submitted,

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Plaintiff Jones. (R. at 0017, ¶¶ 15–16.) It has not and could not be argued that the easement in question is prescriptive.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b), SCACR.

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Columbia, South Carolina
August 3, 2020