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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 REPLY 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.

ARGUMENT

The appeal concerns an alleged easement and two neighboring landowners, allegedly the dominant estate-holders, seeking to be removed from this case, even though it requires the adjudication of their property interests. Gayle Jones ("Plaintiff" or "Jones") owns a marsh-front property in Berkeley County, which she used to share with her former spouse. Her neighboring landowners are 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 (the "Trustees;" collectively with Plaintiff, "Respondents"). The Appellants herein, Rogers Townsend & Thomas, P.C. and Lisa Hostetler, were sued by Plaintiff for failure to disclose during closing an alleged easement on her property held by the Trustees. (*See* R. at 0019, ¶ 27.) Appellants sought to join the Trustees to the case as necessary parties and succeeded. (R. at 0056.) The Trustees then recorded a new document with

the county registrar that they contend ends their interest in the alleged easement. (R. at 0066.) On this basis the Trustees sought to leave the case and obtained a "nonjoinder" order allowing their exit. (R. at 0061.) This appeal arose. For the sake of brevity, Appellants incorporate herein by reference their prior statements of the case and facts from the Appellants' Brief and addresses the Respondents' Briefs of the Trustees and Plaintiff below.[1]

I. THE RESPONDENTS' BRIEFS INACCURATELY RECITE ADMISSIONS OF ALLEGATIONS IN THE COMPLAINT.

In each filed Respondents' Brief there is a lengthy recitation of allegations with responses from Appellants' answer. (Pl. In. Resp. Br. at pp. 2–4; Trustees In. Resp. Br. at pp. 2–4.) This recitation is a mischaracterization of the state of the pleadings in this case. Appellants filed their original answer on June 12, 2018 and this is the document quoted in the briefs. (*See* R. at 0031.) However, after further developments in the case, Appellants moved to amend their answer on March 29, 2019, attaching to the motion a proposed amended answer to the filing to show all the requested changes. (R. at 0082; 0084.)

The motion to amend was heard concurrently with the Trustees' motion for "nonjoinder" on May 7, 2019. (*See generally* R. 0508–53.) Judge Jefferson granted the motion for amendment from the bench (followed later by a Form 4 order) and the amended answer was accordingly filed later that same day on May 7, 2019. (R. at 0531, l. 10; 0542, l.9; 0006; 0046.) There has been no motion to reconsider that ruling; rather, Jones accepted the ruling and filed a motion to dismiss the counterclaim for declaratory judgment included in the Amended Answer. Thus, the Amended Answer stands as the current reflection of the admissions and denials of Appellant. *See Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 541–42, 524 S.E.2d 115, 117 (Ct. App. 1999)

[1] The surveyor defendants, Alexander C. Peabody and Peabody & Associates, Inc., are not participating in this appeal.

(quoting *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) (recognizing the general rule that the parties to an action are bound by their pleading *unless withdrawn, altered, or stricken by amendment* or otherwise).

The Amended Answer materially changes the responses cited by Respondents and there is no acknowledgement of those changes in the Respondents' briefs, even though the Amended Answer is cited elsewhere.[2] The Amended Answer makes significant changes in the responses to Paragraphs 17, 18, and 26 of the Complaint. Additional qualifying statements about Complaint Paragraph 17 are added to Answer Paragraph 11, along with a partial denial. (*Compare* R. at 0032, ¶ 11 *to* 0047, ¶ 11.) The responses to Complaint paragraphs 18 and 26 both change from admission to total denial. (*Compare* R. at 0032, ¶¶ 12, 13 *to* 0047, ¶ 12, 14.)

Thus, Appellants request that the Court consider only those responses contained in the Amended Answer, rather than the original answer, should review of any pleadings be necessary. It is also worth noting that in both answers Appellants assert that the purported easement never existed. (R. at 0034–36, ¶¶ 35–60; 0049–51, ¶¶ 35–60.) Simply because Appellants might admit that the piece of paper with the purported easement exists or that some of its words have been recited in the complaint, does not mean Appellants admit that the piece of paper or the words have any legal effect. (*See* R. at 0047, ¶ 11.) Appellants have always asserted and continue to assert that the purported easement never existed, ceased to exist, or is unenforceable. By so doing, Appellants are not just asserting a defense; they are holding Plaintiff to her burden to prove there was a viable easement that was not disclosed, *and* that easement caused her damages. *See* Trial Handbook for South Carolina Lawyers—*Party with burden, civil cases* § 9:3 (5th ed.) (citation

[2] For purposes of this argument, Appellants assume this omission is an oversight, rather than a violation of Rule 3.3, RPC, Rule 407, SCACR.

omitted) ("A general denial, however, puts the claim in issue and places the burden of proving the claim on the plaintiff.").

II. THE SUBJECT LOWER COURT ORDER WAS IMMEDIATELY APPEALABLE.

The Trustees previously moved to dismiss this appeal on the grounds that the appealed order is interlocutory. Following briefing on the motion, this Court denied the motion to dismiss. The Trustees again raise this argument in their Brief. Appellants maintain their prior contention: the lower court's order ended the case as to the Trustees, foreclosed critical questions on the merits of the case, and is immediately appealable. To avoid unnecessary repetition, Appellants incorporate their prior briefing on this issue here by reference and offer the following as a summary.

a. The lower court's order is appealable under S.C. Code Ann. § 14-3-330(1).

Appealability of a lower court order is generally governed by S.C. Code Ann. § 14-3-330, which provides four different categories of orders for immediate review. Subsection (1) provides for appeal of final orders "in a law case involving the merits in actions commenced in the court of common pleas . . . ." S.C. Code Ann. § 14-3-330(1). An order involving the merits is one which "must finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . ." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (citations omitted). In this case, the lower court's order dismissed the dominant estate holders of an easement that is vigorously contested in this suit. When an easement is in contest, the facts that must be determined concern whether, and to what extent, the adjacent and purportedly dominant estate holder may traverse the land of its neighbor, the purported servient estate holder. This evidentiary dynamic of such a determination concerns the conduct of the dominant estate holder, and particularly the intended use, the actual use, a change of use, non-

use, or possible abandonment of the purported easement. All of these concerns are related to an examination of the dominant estate holder and their property, even more so than the servient estate. After all, Jones' continued use of her property has relatively little effect on the easement.

Without the dominant estate holders as parties to this case, necessary special interrogatories needed to ascertain the validity of the easement would involve a determination of the conduct, actions, and rights of nonparties—something the trial judge may in fact reject. The factual and legal questions necessary to determination whether the purported easement(s) were valid in the first instance, or have ceased at any point to be enforceable since that time, must be put before the lower court in order for Appellants to receive a fair trial on the elements of duty, breach, causation, and damages. By dropping the Trustees from the case, the lower court decided critical questions about the purported easement and thereby has also decided fundamental elements of Plaintiff's case and Appellants' defense. Thus, the lower court's order is appealable under Subsection (1).

b. The lower court's order is appealable under S.C. Code Ann. § 14-3-330(2).

Subsection (2) of the appellate jurisdiction statute provides for the appeal of an "order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . . ." S.C. Code Ann. § 14-3-330(2); *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012). Whether the question of the validity of the easement is stylized as part of Plaintiff's burden of proof or part of Appellants' defense, the result in the same: the circuit court's order deprived Appellants of a substantial right and has prevented a further appealable final judgment on a critical issue in the case. The effect of the lower court's order is final as to the Trustees, who, by virtue of the order, have no further role in this case.

This is illustrated by the declaratory judgment principle that parties whose rights are in contest, namely the rights of the dominant estate holders, must be a party to the case. *See* S.C.

Code Ann. § 15-53-80. The only outstanding pleading by Plaintiff in this case alleges that the Trustees were and continue to be dominant estate holders of the subject easement, which results in damage to her. Whether or not the Trustees continue to hold any interest at all in the easement that gave rise to this litigation is an issue to be tried before the court. The lower court's order dismissing the purported dominant estate holders decided on its own accord that this issue need not be tried with the necessary parties in the case. This was error which affected a substantial right and foreclosed any future appealable order as to the Trustees. Thus, the lower court's order merits immediate appeal.

c. Failure to appeal the lower court's order would have resulted in waiver.

The appropriateness of an immediate appeal of the lower court's order is particularly perceptible when a waiver analysis is applied. For instance, when an order ends the case as to a particular party, it is a final order, regardless if the action continues with other parties; thus, a party must appeal that order or risk waiver. *See Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 213, 544 S.E.2d 38, 48 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003)[3] (concluding that a grant of summary judgment finally fixed the rights as between parties and that such an order should have been immediately appealed); *see also Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780, 783 (1933) (finding party estopped from appeal where appeal was not contemporaneously made from an order substituting parties). The lower court's order finally affixed the rights of the parties as to the Trustees by ending their participation in the case. As such, the order is immediately appealable and it would have been waiver to have acted otherwise.

[3] The Supreme Court later found the plaintiff's underlying claim was defective but did not vacate the Court of Appeals' finding regarding immediate appealability.

III. A DETERMINATION OF THE STANDARD OF REVIEW IS PROPERLY BEFORE THE COURT.

The question of how Rule 21, SCRCP, is applied and which standard of review is applied to Judge Jefferson's order is integral to the review of this appeal. As such, Appellants specifically addressed the applicability and interpretation of Rule 21, SCRCP, in their filings before the circuit court, despite Respondents' contentions otherwise. (*See* R. at 0122 (pointing out that Rule 21 must be viewed in the context of other rules of civil procedure and that Trustees have failed to provide case law supporting their use and interpretation of Rule 21); 0264–65, ¶¶ 5–9 (describing applicability of Rule 19 and pointing out that Trustees have failed to provide case law supporting their use and interpretation of Rule 21).) Apparently recognizing the confusion surrounding their motion and the resulting order, the Trustees themselves have now stated that they meant to move for "misjoinder," rather than "nonjoinder," which is what was stated on the motion. (*See* Trustee In. Resp. Br. at p. 8.)

However, even if preservation were somehow lacking, the question of the applicable rule or standard cannot simply be disregarded as a mere unpreserved "issue." As this Court has previously pointed out, it is free to address "the interplay and applicability" of rules or laws necessary to the analysis of a case notwithstanding preservation. *S.C. Dep't of Motor Vehicles v. Dover*, 423 S.C. 153, 160 n.3, 813 S.E.2d 532, 535 n.3 (Ct. App. 2018). This case cannot be reviewed by this Court without assessing whether the correct rule and correct standard of review is applied. Moreover, the standard of review in an appeal is not an "issue" which must be preserved before the trial court—in appellate opinions the standard of review is a foundational matter determined by and stated by the appellate court before that court ever reaches the issues on appeal. For that reason, it was addressed in the standard of review portion of Appellant's Brief, rather than in the argument section.

IV. THE *FARMER* OPINION SHOWS THE CORRECT STANDARD OF REVIEW.

Respondents assert that Rule 21, SCRCP, and an abuse of discretion standard are the proper rule and standard to apply to this case. However, Rule 21, SCRCP, should not be applied to novel questions, nor should it be applied without first considering its companion rules regarding joinder.

In the first instance, the Trustees did not even move for the correct relief under Rule 21, SCRCP. The Trustees moved for "nonjoinder," which would never apply to the circumstances in this case. Moving for nonjoinder is a request to add a party. The Trustees now assert that they meant to move for "misjoinder," rather than "nonjoinder," which is what was stated in their motion. (*See* Trustee In. Resp. Br. at p. 8.) This does not change Appellants' position on the correct rule and standard. Indeed, given that the Trustees had already been joined as a party by Judge Buckner, it was arguably not within Judge Jefferson's power to make a finding of "misjoinder" when the joinder itself was accomplished by the ruling of another circuit court judge.[4] *See State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985) (citing *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); *Sheppard v. Kimbrough*, 282 S.C. 348, 318 S.E.2d 573 (Ct.App.1984)) ("It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.").

In any event, Rule 21 was still not the appropriate vehicle to resolve the issues put before the lower court by the Trustees' motion, nor is abuse of discretion the proper standard. There is no authority in South Carolina case law that addresses the unusual and novel question presented by this appeal: is it possible to adjudicate the validity of a contested easement without the dominant estate holders named as a party in the lawsuit? This is likely because no one has ever tried to

[4] No doubt Respondents will argue that the material facts had changed between the rulings of Judge Buckner and Judge Jefferson, but that is not true. Plaintiff had already alleged in her complaint that the Trustees had agreed to a smaller easement, which is in part what the "new" agreement sought to accomplish. (*See* R. at 0135, ¶ 31.)

pursue a case in such a posture. As such, this question raises a novel issue. This novel issue was not appropriate for Rule 21 review and Rule 21 is not a mechanism by which a necessary party can simply be dropped. This Court addressed these issues in the *Farmer* case.[5] The Court found it to be improper to resolve a novel issue on a Rule 21 motion. *See Farmer*, 424 S.C. at 586, 819 S.E.2d at 146. Given the novel question in this case, the proper standard is that of a motion to dismiss, as Appellants have previously stated.

Additionally, the Court in *Farmer* noted that civil procedure joinder rules are meant to avoid previously drastic results when parties were not properly named and to avoid multiple lawsuits connected to the same facts. *See id.*, 424 S.C. at 585–86, 819 S.E.2d at 145. The Trustees now assert that they sought to leave the case because they were misjoined. However, "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)." *Id.*, 424 S.C. at 586, 819 S.E.2d at 145 (internal punctuation and citation omitted).

This is an important distinction and one of the reasons Appellants have cited the *Farmer* opinion numerous times in this case: to be dropped under Rule 21, a party does not have to show that they *should* not be joined under Rule 19; they have to show they *could* not be joined under Rule 20. It is difficult to believe that a party previously be deemed *necessary* under Rule 19, could fail to meet the *permissive* joinder standard of Rule 20 shortly thereafter. Rule 20(a), SCRCP, provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action . . . . A plaintiff

[5] *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018), *cert. dismissed* (Apr. 25, 2019).

or defendant need not be interested in obtaining or defending against all the relief demanded.

The Plaintiff has pleaded that the Trustees are asserting the right to use their easement and have agreed only to modify that easement, which is what they have purportedly done. The Trustees *have not* ever stipulated that they never had any right to use the purported easement. It matters not that the Trustees now say they do not care about the outcome of a determination regarding the easement. What matters is that they refuse to stipulate that they were not and are not entitled to the relief of using the easement. As such, the lower court erred both by applying Rule 21 to a novel question and by failing to consider the proper interpretation of Rule 21 as previously set out by this Court.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY DISMISSING THE TRUSTEES FROM THIS CASE.

Even if the Respondents are correct and the proper standard of review in this case is abuse of discretion, Appellants still prevail. "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016) (citation omitted). The lower court abused its discretion by, *inter alia*, granting a Rule 21 motion on a novel question, by failing to address the requirements under Rule 21 for misjoinder, and by relying on unproven or mistaken facts.

a. The circuit court's comments at the hearing illustrate abuse of discretion.

Respondents have dismissed the lower court's hearing comments as not relevant to the court's ruling. However, given the brevity of the order, these comments give great insight into the factual problems inherent in the ruling. The lower court made a false assumption when it indicated that it believed the easement in question is one of necessity. (*See* R. at 0529, ll. 8–9 ("They got to come over the property somehow.").) There is not even an allegation that the easement in question

is one of necessity. Indeed, it could not be, given the *situs* of one lot relative to the other. (R. at 0101 (plat).)

This inattention to the factual basis for the case was further evidenced when the lower court confused the meaning of "dominant estate." (*See* R. at 0523, ll. 19–24.) This is particularly critical because the nature and enforceability of an easement relies very heavily on an analysis of the dominant estate holder's use or lack of use. An easement of necessity is based on the access of the dominant estate holder's land. *See Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 420–21, 633 S.E.2d 136, 141–42 (2006). An easement of prescription is "'established by the conduct of the dominant tenement owner.'" *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015) (quoting *Boyd v. BellSouth*, 369 S.C. at 419, 633 S.E.2d at 141). Whether an easement by grant is appurtenant or in gross depends greatly on the use intended for the dominant estate holder. *See Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009) (quoting *Tupper v. Dorchester County*, 326 S.C. 318, 325–26, 487 S.E.2d 187, 191 (1997). These and other factors related to the Trustees alone will be conclusive as to the Trustee's rights in the purported easement. This is further reason why the Trustees are a necessary party and the failure to consider these issues by the lower court demonstrates an abuse of discretion.

b. The lower court failed to apply the correct legal standards to its ruling, thus abusing its discretion.

Appellants have already outlined several ways in which the lower court improperly applied the law and will not further belabor the point other than to point to sections of their briefs which address the correct rule to be applied, the correct standard of review for a novel question, the application of the companion joinder rules, and issues of standing. (*See, e.g.*, App. Brief, §§ I.a, I.b, & I.d; Reply Br. §§ III, IV, & VI.)

c. The lower court relied on legal argument of counsel on facts, thus abusing its discretion.

The lower court accepted representations of counsel as proof that the issue of the purported easement had been resolved and that the new agreement accomplished that resolution. Indeed, the court specifically stated as much in its order: "*Per Mr. Hulst*, the 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." (R. at 0003–04 (emphasis added).) No one offered an affidavit or testimony to support the factual averments made by counsel and arguments made by counsel are not evidence. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (South Carolina courts have "repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Moreover, it was an error of law to allow the Respondents to determine their own rights, rather than properly reserving that decision for the court.[6] *See Ralph v. McLaughlin*, 428 S.C. 320, 351, 834 S.E.2d 213, 230 (Ct. App. 2019), *reh'g denied* (Nov. 15, 2019), *cert. granted* (Apr. 24, 2020) (validity of easement when allegedly abandoned was a matter of law for the court even when existence of easement is undisputed). Indeed, the court itself seemed to recognize that the decision was one for the court, when she indicated that the validity of the easement would be a non-jury matter. (R. at 0537, l. 25–0538, l.3.)

[6] On page 26 of their initial brief, the Trustees assert that failure to cite a case regarding legal review of documents prevents an issue from being preserved. Our Supreme Court has indicated that, while issue preservation rules apply in appeals, the application of those rules cannot be overly finicky. *Conits v. Conits*, 422 S.C. 74, 77, 810 S.E.2d 253, 254 (2018) (citing *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011)) (quoting a prior case for the proposition that courts should "approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"). If preservation rules reflected the level of discrimination that the Trustees assert, a party could never add a single citation to its brief that was not included in lower court filings.

A comparison of the facts as they were alleged at the first hearing and at the second hearing further illustrates the error of relying on counsel's assertions. Judge Buckner's ruling was predicated on the allegations of Plaintiff in her complaint. Taking into account the facts as pleaded, the Trustees are necessary parties. That complaint has not changed, and thus the facts supporting the Trustees' joinder have not changed. Particularly when it is noted that the *complaint had already anticipated the modification* of the purported easement. (*See* R. at 0020, ¶ 31.) Any further factual averments by counsel that the alleged course of action has been executed do not change the original Rule 19 analysis.

d. The circuit court's rulings impair Appellants' ability to pursue their rights in this case and demonstrate an abuse of discretion.

Appellants assert that it is an abuse of discretion to arbitrarily make two decisions that are inherently conflicting. In the May hearing, Judge Jefferson heard both the Trustees' motion for nonjoinder and Appellants' motion to amend their answer and assert a counterclaim for declaratory judgment on the easement issues. Under the terms of the Uniform Declaratory Judgment Act, the Trustees must be named parties. *See* S.C. Code Ann. § 15-53-80 ("When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."). By simultaneously dropping the Trustees and approving a cause of action naming them, the lower court entered inherently contradictory rulings. In a criminal case, our Supreme Court has noted that an abuse of discretion includes circumstances where a "ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (citing *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 n. 6 (2d Cir.2001)). In administrative cases, a "decision is arbitrary if it is without

a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citations omitted). Additionally, this Court has previously vacated a factual finding that was repugnant to another finding in the same order. *See Oien Family Investments, LLC v. Piedmont Mun. Power Agency*, 424 S.C. 168, 187, 817 S.E.2d 647, 657 (Ct. App. 2018), *reh'g denied* (Aug. 16, 2018). In this case, the two inherently incompatible orders entered by the lower court show that the decisions were made without reference to the relation of the standards and determining principles applicable to both decisions and without rational basis. As such, the decision to drop the Trustees from the case was an abuse of discretion.

VI. THE VALIDITY AND ENFORCEABILITY OF THE EASEMENT MUST BE PROVEN AS PART OF PLAINTIFF'S CLAIM AND APPELLANTS HAVE STANDING TO CHALLENGE THE SAME.

Respondents are continuing to maintain an unreasonable view of the basic legal principles that form the basis of civil litigation. Plaintiff contends that she does not have to prove her own case;[7] rather, Respondents contend, Appellants must disprove it as an "affirmative defense."

a. Plaintiff must prove that the purported easement caused her compensable harm.

The elements of professional negligence for an attorney are well established. A plaintiff must 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 (S.C. Bar 5th ed. 2015). Perhaps the first question that should be answered in assessing a malpractice claim is whether any damage resulted. It is certainly the first

[7] Even if this were so, the question of the validity of the easement would still become part of Appellants' defense, of which they should not be deprived under these facts.

question a plaintiff's tort lawyer would assess. In this case, for there to be damages stemming from the alleged failure to disclose the purported easement, there must have been some resulting harm that satisfies the element of damages. Yet, Respondents assert "that [Plaintiff seeks] damages from Appellants based on their negligence . . . regardless of whether [the easement] was valid or enforceable." (Trustees' Resp. In. Br. at p. 6.)

b. There can be no damages if an unenforceable easement is not disclosed.

This strained interpretation of the law is the bedrock of the dispute in this appeal. Under existing law, if there is no valid or enforceable easement, there can be no harm to Plaintiff for the failure to disclose.[8] If Plaintiff cannot prove there is harm, there can be no damages. If there are no damages, there is no cause of action. This burden of proof is hornbook law. 31A C.J.S. *Evidence* § 191 ("The burden of proof or persuasion as to a fact or issue generally rests on the party asserting or pleading it, or having the affirmative of the issue as determined by the pleadings, and remains on that party throughout the trial."); Trial Handbook for South Carolina Lawyers, *Burden of proof—Damages* § 9:6 (5th ed.) ("The person claiming damages has the burden to convince the fact finder, by the greater weight of the credible evidence to reasonable certainty, that such person has sustained damages with respect to each and every element thereof, and the amount thereof.").

In a similar vein, Plaintiff's attorney argued to Judge Buckner that Appellants have no standing to obtain a ruling on "whether or not there's an easement or not" because Plaintiff and the Trustees *believe* there is an easement. (*See* R. at 0501, ll.8–13; 0503, ll.18–23.) This is a curious but pivotal assertion, akin to arguing that a plaintiff may sue a purported at-fault driver for

[8] Perhaps even more fundamentally, there must be a real easement that was not disclosed. In the words of Judge Buckner, "If there is no easement, they had no duty to disclose[.]" (R. at 0502, ll. 9–10.)

negligence because he or she *believes* there was a car accident or *believes* his or her leg was broken. Respondents are again seeking to proffer the idea that there is some legal distinction between Plaintiff suing for failure to disclose an easement and the existence of the easement itself, arguing that the existence or enforceability of the easement is a "defense." This simply is not how the burden of proof for a cause of action functions. Plaintiff must prove that there was an easement, in order to prove that (a) Appellants breached a duty and (b) that any harm came from such breach. Jones and the Trustees do not simply get to *allege* an easement and corresponding damages and wait for Appellants to *disprove* those allegations. Rather, Plaintiff has the burden of proving the elements of her case and a mere stipulation with the Trustees as to the existence of an easement is not sufficient to prove anything against Appellants, who are entitled by the rule of the law to a juristic determination. However, if Plaintiff is correct as to Appellants' lack of standing, that would explain why Plaintiff maintains in this appeal that the dominant estate holders of the easement need not be parties to this case. By trying to skip over these foundational issues, Plaintiff is seeking to use the damages she "believes" in to collect funds where there quite possibly was no harm at all. Appellants are entitled under all legal authority to seek proper adjudication on all these questions of law and fact. This cannot be accomplished without the purported dominant estate holder being named as a party.

c. The Trustees still maintain an interest in the easement.

The Trustees assert that they have no interest in the "undisclosed easement." (Trustee Resp. In. Br. at 17.) This is an obtusely simplistic view of the posture and facts in this case. The Trustees maintain and assert rights in the *replacement* easement, which Plaintiff will argue that she never would have agreed to without the leverage of the prior purported easement. (*See* R. at 0020, ¶ 31 (stating that the Trustees "have agreed to reduce the size and scope of the easement").) It is clear that Plaintiff intends to maintain that the "new" easement is merely the same easement,

reduced, and therefore still causing damage that relates back to the old purported easement. The Trustees advance a contrary position—that they have no interest at all in the old purported easement. This opposing position must be litigated to conclusion, not resolved on a Rule 21 motion. Therefore, the Trustees are still necessary to the proper adjudication of this case.

If the Trustees would stipulate that the purported easement was never enforceable against Jones, that the purported easement was not used as a bargaining chip to reach the new agreement, and that they will not bring any future claims related to the purported easement, Appellants would happily consent to their dismissal from this case. The Trustees continue to maintain that they have nothing to do with this suit, but they have refused to stipulate to their relinquishment of their rights as dominant estate holder, even though that opportunity has been offered. (R. at 0187.) The Trustees even refused to submit to a deposition unless Appellants dismissed them from the suit. (*See* footnote 11, *supra*.) That being so, the Trustees must be a party to this case, wherein the most key and fundamental issue is whether there is or was a valid and enforceable easement. In order to prove any case against Appellants, Plaintiff must establish "damage proximately resulting from the breach of duty." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). Without a determination of the enforceability of the easement there can be no establishment of damages—either from the enforceability of the purported easement or from the new easement, which Plaintiff will undoubtedly contend was only entered into because of the leverage created by the purported easement.[9] (*See* R. at 0020, ¶ 31.) This of course assumes that the law of this state does not allow Plaintiff and her neighbor to simply stipulate damages against

[9] The Trustees note in their brief that Plaintiff's counsel argued before Judge Buckner that his client intended to pursue the case whether or not the easement is valid or enforceable. (Trustee Resp. In. Br. p. 6.) However, shortly after this statement, Judge Buckner asked counsel for Plaintiff to concede that there can be no duty of disclosure if there is no easement. Mr. Maring agreed. (R. at 0502, ll. 8–12.)

a third party as Plaintiff has suggested.[10] As Judge Buckner wisely pointed out, the law firm does have the right to assert that "there is no easement . . . ." (R. at 0501, ll.17–18.)

There is after all, a duty to mitigate damages. In their brief, the Trustees assert that "Appellants should be grateful" for the mitigation allegedly accomplished by the new easement. (Trustee Resp. In. Br. at p. 43.) While it is Plaintiff's burden to put forward a *prima facie* case establishing the easement, Appellants do also get to contest the easement as part of their defenses as well. Appellants do not just accept that Plaintiff has mitigated their damages, but will show at trial that Plaintiff has failed to make reasonable efforts to minimize her alleged damages. After all, "[i]t is the undoubted general rule that it is the duty of the owner of property, which is injured by the negligence of another, to use reasonable means to minimize the damages . . . ." *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). If Plaintiff fails to make a *prima facie* case that the easement existed and caused her harm, or if Appellants can prove that the harm could have been completely mitigated, then the lower court will necessarily have to decide that the Trustees do not have the rights they have asserted as dominant estate holders. In order to bind the Trustees to such a ruling, they must be parties to the case. This is precisely the purpose of Rule 19, SCRCP.

d. Neither Judge Jefferson, nor Judge Buckner have accepted Respondents' position that Appellants do not have standing to challenge the validity of the easement, although Judge Jefferson declined to rule on that precise issue.

The Trustees assert in their brief that Appellants never asserted before Judge Jefferson that they have standing to challenge the validity or enforceability of the Trustees' purported easement.

[10] In addition to his comments before Judge Bucker in August 2018, counsel for Plaintiff argued to Judge Jefferson that his clients "are the only people who can actually . . . make the claim that the easement is invalid." (R. at 0534, ll.8–10.) Even though the easement is the whole basis for Plaintiff's claim, counsel for Plaintiff stated that "The law firm can't make the claim that the easement is invalid." (*Id.*) All Respondents are asserting that Appellants must simply accept their mutual agreement that the purported easement was valid and enforceable. This is nothing if not a stipulation of damages between parties otherwise opposed as dominant versus servient estate holders for the purpose of attacking a third party.

(Trustee Resp. In. Br. at p. 18.) This ignores the fact that *Plaintiff* raised the argument that Appellants did not having standing to challenge the easement in both hearings. Judge Buckner rejected that argument and granted joinder. (R. at 0501, ll. 17–19 ("[t]he law firm does have a right to raise the defense, . . . there is no easement").) While Appellants disagree with Judge Jefferson's later ruling releasing the Trustees from the case, she did appear to reject the idea that Appellants could not raise the issue of validity as a defense. (R. at 0004 ("the issue of the validity of any easements is viable to [sic] Defendant RT&T's defenses").)

However, Judge Jefferson did reject the idea that Appellants could challenge the easement in such a way that it would be binding on the dominant estate holder. That is, even though Plaintiff has brought the issue of the easement before the court for determination by virtue of her complaint, Judge Jefferson determined that Appellants could not obtain a ruling that would be binding on the Trustees. (R. at 0004 ("the issue of the validity of any easements . . . is not viable [sic] or dispositive of the Trustee Plaintiffs [sic] interest in the property").) In so ruling, the lower court erred. Recognizing the error, Appellants addressed the standing issue in their motion for reconsideration. (R. at 0262–63, ¶ 1.) However, the lower court declined to address the issue in its resulting order. (R. at 0009–11).

"'Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018) (quoting *Michael P. v. Greenville Cty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009)). Appellants have a right to have the damages and causation alleged against them determined by the court. *See Motsinger v. Nationwide Mut. Ins. Co.*, 920 F. Supp. 2d 637, 643 (D.S.C. 2013) (finding that insurer had standing to seek determination on underlying facts so as to avoid paying unvalidated claims). To accomplish this determination in such a way that it is binding on those whose interests are alleged, the Trustees must be joined to the suit. Thus,

Appellants have standing to bring the issue of the validity of the easement before the lower court and to have that decision binding on the necessary parties. Judge Jefferson's ruling, while *stating* that no impingement on Appellants' rights would be caused, in reality completely hamstrings Appellants' rights. Because without the chance to bind the Trustees *and* Jones to a determination, the ruling of the court on the validity of the easement would be unenforceable—a hypothetical determination.

VII. THE TRUSTEES ARE THE ONLY NECESSARY DOMINANT ESTATE HOLDERS.

Respondents indicate it is suspicious that Appellants have only sought to join the Trustees and not the owners of the other lots referenced in the purported easement. The explanation for that is simple. Plaintiff has not alleged that the other dominant estate holders assert any interest in the purported easement or have caused her any damages. She identifies only the owners of Lot 6A as having and contriving to have an easement across her property, which causes her damage. Therefore, the other lot owners are not necessary parties. *See Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 85, 313 S.E.2d 636, 639 (Ct. App. 1984) (citations omitted) ("A party is not a necessary party unless it has rights which must be ascertained and settled before the rights of the parties to the action can be determined.").

Appellants were forced to join the Trustees because Plaintiff alleges their continued assertion of rights in the servient estate created the damage upon which Plaintiff is basing her case.[11] (R. at 0020, ¶ 31 ("That the owners of lot 6-A (TMS#263-00-03-068) will not terminate

[11] The Trustees have also asserted that Appellants are "fixated" on keeping them in this case to cause them unnecessary expense. This is ridiculous and offensive. The Trustees would not have incurred more than minimal costs following their joinder except for the fact that they moved for "nonjoinder" and forced Appellants to seek declaratory judgment and undertake this appeal. Appellants seek no monetary relief from the Trustees. If in fact the Trustees have no interest whatsoever in the outcome of this suit, as they claim, they did not have to do anything other than sit on the sidelines of the case and wait for a determination of their rights in the easement. They

their rights to the easement . . . [and] as a result, the owners of Lot 6-A will continue to have an easement on the Plaintiffs [sic] property, depriving them of exclusive ownership of their property.").) Those allegations have not changed. Therefore, the Trustees rights must be determined before the remainder of the case may be resolved. If Plaintiff had asserted damages based on the attempted enforcement of the purported easement by the other dominant estate holders, Appellants would have moved to join them as well. As Appellants have repeatedly pointed out, Plaintiff's case fails if she cannot prove damages. Lack of damages is not a defense—damages is an element for which the burden of proof falls on the plaintiff. Plaintiff asserted damages based solely on the Trustees continued assertion of rights based on the purported easement; therefore, only the Trustees need be joined as dominant estate holders with a purported legal interest in the case.

Notably, in their brief, the Trustees state that they "have not filed any action against Plaintiffs to enforce [the easement's] terms . . . ." (Trustee Resp. In. Br. at p. 2.) This is precisely why the Trustees are necessary to this case. If they do not seek enforcement of the easement, then how can Jones be damaged by the alleged failure to disclose this easement as she claims? Appellants have a right to the determination of whether the easement was ever enforceable against Plaintiff and, moreover, that determination is required by law. Without a valid easement, Plaintiff could never have been harmed. Yet, counsel for Jones insists that the courts of this state have no

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were joined as a plaintiff, not a defendant. If they truly do not care about the outcome, then they did not even have to appear. (*See* Trustee Resp. Br. at p. 23.) Granted, the Trustees would have had to participate in depositions about the easement and minimal discovery, but that would have to happen either way—under party discovery rules or via subpoena. Those depositions would already have been long finished and this case well on its way to completion had counsel for the Trustees not tried to use the previously scheduled depositions as leverage for getting his clients removed from the case caption where they belong. (*See* Exhibits at R. 0170, 0172, 0186, 0187, 0188, 0189, 0198, and 0199.)

power to determine the validity of the purported easement. This belies the rule of law and the fundamental requirements of due process.

CONCLUSION

Respondents assert that certain allegations were admitted in Appellants' answer to the complaint. Appellants do not contest that certain documents have been recorded that purport to create easement(s) on the lot that now belongs to Jones. However, Appellants do contend that these easements may not be valid at all.[12] That is, Appellants require that the purported easement be adjudged valid or invalid by the court.[13] In order for this determination to be enforceable, the alleged dominant estate holders need be a party to the decision along with Plaintiff. Because the operative and only complaint for the Plaintiff in this case directly alleges that the Trustees have and will continue to have an easement across Plaintiff's property, the Trustees remain material to the outcome of this case. In dismissing the Trustees from this case, the circuit court has choked off the ability of the defendant lawyers to bind Plaintiff and the Trustees to a determination of the Trustees' interest, thereby rebutting Plaintiff's claims and presenting a proper defense. Without the Trustees, the final order in this case cannot fully resolve the issues raised by Plaintiff, but such resolution is the right of any defendant when their professional work has been challenged.

[12] Appellants also contest that any alleged breach of the standard of care resulted in foreseeable damages. Given that the Trustees and Jones have confused which easement is even the subject of this case on multiple occasions, it cannot reasonably be asserted that there was anything predictable about the duplicative and misleading filings that surround the purported easement. Plaintiff sued about a purported easement recorded in 2006. (R. at 0017, ¶ 16.) Plaintiff and Trustees entered into a new agreement ending a purported easement recorded in 2005. (R. at 0066–78.) The Trustees then further attached to their motion to dismiss in this appeal yet another easement recorded in record in 2007. (Mot. to Dismiss Appeal, Ex. 2.)

[13] Notably an easement can be created and enforced between two original parties but still not be valid as to successors in title. *See Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362 (Ct. App. 2012) (citing *Windham*, 370 S.C. at 418, 635 S.E.2d at 559).

Appellants therefore request that this Honorable Court reverse the order of the lower grant and remand this case back for proceedings consistent therewith.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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