THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-12-0323

Mell Woods ..... Appellant,

v.

John D. Hinson; Christine Jones; John C. Hinson; Kathy Huffstickle; Charles J. Hinson; William L. Hinson; Lois Hinson; Robert Breakfield, as Personal Representative of the Estate of Reba P. Hinson; Elaine H. Hensley; Robert H. Hinson; George Stanford, as Personal Representative of the Estate of Linda H. Stanford; William C. Hinson, Jr.; Darrell W. Hinson; Mary Roe and John Doe, fictitious names used to designate all other parties, whose names are unknown, and any and all other persons claiming any right,title, estate interest or lien upon the real estate described in the complaint; ..... Respondents.

RESPONDENTS' INITIAL BRIEF

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I. **The trial court used the proper summary judgment standard and properly granted summary judgment in favor of Respondents because as a matter of law the Last Will of Levie Hinson devised only a life estate to Reba Hinson.** (Appellant's Issues on Appeal nos. 1 and 3.)

II. **By granting summary judgment in favor of Respondents, the trial court did not deny the Appellant his rights under S.C. Code Ann. §15-67-100.** (Appellant's Issue on Appeal no. 2).

III. **The trial court properly granted summary judgment in favor of Respondents because as a matter of law the four corners of the Last Will of Levie Hinson devised only a life estate to Reba Hinson.** (Appellant's Issue on Appeal no. 3).

IV. **The trial court correctly ruled that as a matter of law a life tenant cannot claim adverse possession against remaindermen.** (Appellant's Issue on Appeal no. 4.)

STATEMENT OF THE CASE

Appellant filed this action against members of the Hinson family, including the two personal representative defendants, on June 22, 2011. (Complaint dated June 22, 2011.) In his Complaint Appellant describes the action as trespass to try title (Complaint, ¶ 3), and he alleges that he is the owner of fee simple title to the land in question because he contracted to by the land from Reba Hinson who then owned the fee simple title (Complaint ¶12); alternatively that he is a good faith purchaser without notice that Reba Hinson owned only

a life estate (Complaint ¶11); and, alternatively, that he and Reba Hinson, now deceased, together adversely possessed the property at issue for over 20 years (Complaint ¶ 15).

The Respondents served their joint Answer and Counterclaim on August 25, 2011. In the Counterclaim, Respondents sought a declaratory judgment that the Defendants-remaindermen are the owners of the property at issue and an order requiring Appellant to vacate the property. (Answer and Counterclaim.)

Notwithstanding the Appellant's characterization of his action, Respondents assert that in actuality this is a will construction case because the content of the Levie Hinson Last Will governs the outcome of the case. As will be made more clear below, the central question presented to and decided by the trial court was whether the Levie Hinson last will devised a life estate or fee simple title to Reba Hinson. It is well settled that "(t)he character of an action is determined by the main purpose of the complaint ...." Pate v. Thomas, 262 S.C. 365, 204 S.E.2d 571 (1974); Alford v. Martin, 176 S.C. 207, 180 S.E. 13 (1935).

Simultaneously with the service of the Answer and Counterclaim, Respondents filed and served a Motion for Summary Judgment (Motion) and supporting Affidavit of Defendant Breakfield, in his capacity as Personal Representative of the Estate of Reba Hinson. (Breakfield, PR Affidavit, including Exhibits.)

Appellant filed and served a verified Response to Defendants' Motion for Summary Judgment dated September 28, 2011. (Response to Defendants' Motion for Summary Judgment, dated September 28, 2011 - 7 pages.)

The Respondents' Motion for Summary Judgment was heard on November 9, 2011, Judge Goldsmith presiding. By Order dated December 29, 2011 the Respondents' Motion for Summary Judgment was granted. (Order dated December 29, 2011.)

Appellant served a Rule 59(e) Motion for Reconsideration on January 14, 2012. (Motion for Reconsideration.) Respondents served their Amended Return to the Motion for Reconsideration on March 13, 2012. (Amended Return dated March 13, 2012.) Judge Goldsmith elected to decide the Motion for Reconsideration without further oral argument. (Brackett letter to Appellant dated March 5, 2012.) By Order dated April 23, 2012, Appellant's Rule 59(e) Motion for Reconsideration was denied. (Order dated April 23, 2012.)

Appellant served his Notice of Appeal on June 21, 2012.

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Bass v. Gopal, Inc., 395 S. C. 129, 716 S.E.2d 910 (2011).

Summary Judgment Law. Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Bass v. Gopal, Inc., supra. Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a scintilla

of evidence to withstand a motion for summary judgment. Id. However, a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth specific facts showing a genuine issue for trial. Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (2003).

To survive a summary judgment motion by the defendant in a lawsuit, the plaintiff must offer some evidence that a genuine issue of material fact exists for each element of the claim at issue except for those elements that are either uncontested or agreed to by stipulation. Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011). Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

A fact is material if it is "outcome determinative" under the applicable law, that is, if its existence in a case will have some impact in deciding the facts of the case. Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160 (7th Cir. 1984); PPG Indus. V. Orangeburg Paint & Decorating Center, 297 S.C. 176, 375 S.E.2d 331, 332 (Ct. App. 1988). When the facts, and all reasonable inferences to be drawn from the underlying facts, are viewed in a light most favorable to the non-moving party, and the record nevertheless reveals that the opposing party would not prevail under any discernable circumstances, summary judgment is appropriate. Kreuzer v. American Academy of Periodontology,735 F.2d 1479 (D.C. Cir.

1984). However, a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth **specific facts** showing a genuine issue for trial. Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (2003).

Of particular relevance in this case, "When there is present on a motion for summary judgment a question as to the construction of a written agreement [last will] that can be determined by a consideration of the plain and unambiguous language of the contract [last will], the question as one of law may be resolved by the court." Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct. App. 1987). "The general rules for construction of wills are not unlike those for the construction of other writings, such as deeds and contracts." Coleman Karesh, Wills 38 (1977).

STATEMENT OF FACTS

The Appellant has commenced four actions in either the Chester County Probate Court or Circuit Court, all having to do with Appellant's dispute with the Hinson family over the administration of the Estate of Reba Hinson and Appellant's claim that he is entitled to a deed for a lot or parcel of land he originally leased from the decedent Reba Hinson. All four cases have thus far resulted in trial court Orders favorable to the above-captioned Respondents, their agent, and to the Personal Representative of the Reba Hinson Estate.

Case 1. 2010-CP-12-0168 (appellate case no. 2011-191876). Reba Hinson died in January 2007. Plaintiff filed three claims against the Estate of Reba Hinson. Those claims were dismissed in case no. 2010-CP-12-0168. The specific claim for nuisance damages was dismissed by summary judgment in the circuit court, and Appellant's appeal of the summary judgment order to the

Court of Appeals is pending under the above tracking number. Final briefs have been filed.

Case 2. 2010-CP-12-0201 (appellate case no. 2011-201066). Appellant tried to insert himself into the administration of the Reba Hinson estate by seeking to have the personal representative removed and advocating that the probate court was probating the wrong last will of Reba Hinson. The probate court denied Appellant's petitions and motions[1], and the circuit court, sitting as an appellate court, affirmed the probate court's Order. Appellant has appealed the case to this court, and final briefs have been filed.

Case 3. 2010-CP-12-0595 (appellate case no. 2012-206469). Appellant filed a tort action against the members of the Hinson family alleging that the Hinson family, as descendants of Levie and Reba Hinson and as owners of the neighborhood on Fishing Creek Lake where the property at issue is located, are responsible for the conduct of one Richard Van Griffin, a drunk and unruly tenant alleged to have then been occupying another residence in the neighborhood. Respondents generally denied Appellant's allegations and alleged counterclaims. The trial court granted summary judgment in favor of the Hinson family, and Appellant appealed to this court. Initial briefs have been filed and served.

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[1] One of the grounds for the probate court's ruling was that the Plaintiff was not a devisee in any version of Reba Hinson's last will and therefore is a stranger to the Reba Hinson estate and has no standing to insert himself into matters of estate administration.

Case 4. 2011-CP-12-0323 (appellate case no. 2012-212330). This is the above-captioned case now being briefed.

There is also a fifth appeal now pending in this court, not commenced by the Appellant, involving the Appellant and the Hinson family: 2011-CP-12-0291 is an appeal from Magistrates Court (appellate case no. 2012-212318). The Hinson family commenced an eviction proceeding in the Chester County Magistrate Court to evict Appellant from the property that is at issue in the above-captioned appeal. The Magistrate Court issued a pre-trial Order that the Appellant appealed to the Circuit Court. The Circuit Court affirmed the Magistrates Court Order. Appellant then appealed to this court. The briefing process is unfinished at present.

The above-recited facts and Orders are supported by records already on file with this Court.

With respect to this particular appeal, the facts are best understood by reviewing the Respondent Breakfield's, as Personal Representative, Affidavit in Support of the Respondents' Motion for Summary Judgment. The affidavit is dated August 24, 2011. The content of said Affidavit is set out below, 32 numbered paragraphs (with no. 3 having been accidently omitted.) The incorporated exhibits to the Affidavit are also designated for inclusion in the Record on Appeal. The Affidavit reads:

> Personally appeared before me Robert H. Breakfield, Esquire, who being duly sworn deposes and says that:
>
> 1. I am the duly appointed and acting Personal Representative of the Estate of Reba Hinson, and in that capacity I have been named as a

defendant in this case, and it is in that capacity that I make this affidavit.

2. I make this affidavit on personal knowledge, on the content of court files and records, and on facts that have been developed in the related cases identified herein. Based on the information set forth below, the Reba Hinson Estate makes no claim to the premises at issue in this case, that being the lot of land known as 1537 Hinton Road.

4. [there was no paragraph number 3] Levie Hinson and Reba Hinson were husband and wife.

5. Levie Hinson owned approximately 100 acres adjacent to Fishing Creek Lake, north of Great Falls, SC, when he died on August 1, 1986.

6. Levie Hinson left a Last Will and Testament dated April 21, 1977 that was probated in the Chester County Probate Court as case no. 1986-ES-12-188. It provided, in relevant part in Item II: "I will devise and bequest [sic] unto my beloved wife Reba P. Hinson all my real estate, in fee simple, as long as she lives then to our bodily heirs forever." A true copy of said Last Will is attached hereto and incorporated herein as **Exhibit A**. [Last Will and Testament of Levie Hinson dated April 21, 1977]

7. There appears to have been no deed of distribution or similar instrument issued from the Levie Hinson estate evidencing the

transfer or distribution of the real estate on Fishing Creek Lake to Reba Hinson.

8. Without officially subdividing the acreage on the public record, Reba Hinson appears to have divided the acreage in closest proximity to the lake into lots on which tenants placed mobile homes, campers, or small cabins. Leases do not appear to have been placed on the public record.

9. In or about May 2002, the Plaintiff, as tenant, leased the lot of land known as 1537 Hinton Rd. from Reba Hinson, as landlord. There is a writing signed by Reba Hinson and Plaintiff that confirms the lease agreement and the relationship of landlord and tenant. A true copy of this writing/lease is attached hereto and incorporated herein as **Exhibit B**. [Lease Agreement between Appellant and Reba Hinson dated May 6, 2002] At the time of the lease, a mobile home was on the property, having been placed there by the prior tenant Mr. Gardner. Plaintiff purchased the mobile home from Gardner in a separate transaction. So the dirt and the improvement did not share common ownership. This information is from the Plaintiff's deposition testimony.

10. The basis for Plaintiff's claim to title is his allegation that in 2003 the lease agreement with Reba Hinson was terminated and replaced with an agreement allowing for the Plaintiff's purchase of the lot known as 1537 Hinton Road. According to Plaintiff, the new agreement provided that Plaintiff could

continue to occupy the premises for 10 years, from May 2002. The lease payments were converted to purchase payments in the same amount ($951 per year) and at the end of the 10 year term, Plaintiff could pay double the amount of the annual payments, lump sum, and in return, Reba Hinson would give Plaintiff a deed to the lot. By this description, the lease converted to a contract of sale.

11. Plaintiff has testified under oath about his alleged agreement with Reba Hinson as follows:

> Q. . . . tell me about that then. What sort of agreement came later that altered your ten year lease?
> . . .
> A. All right. In went back and talked to her and told her that - that that building appeared to be attached to the ground and was probably part of the real estate and it would be really hard to move. And this is the deal we had. She said if I wanted to keep paying that amount that I could pay it. And then at the end of the ten years that she would sell it to me. But I had to pay double in everything I'd paid in. So in other words, if I paid that much, she would put ten times that much and then double it. And she said she would sell me what the small amount of land where that building was.
> Q . . . . Now, when was that agreement reached with Ms. Hinson . . .
> A. About a year after that.
> Q. So, . . . roughly the mid-2003?
> A. Somewhere along in there. (Plaintiff's deposition transcript in 2010-CP-12-0595, p. 56, l. 23 to p. 60, l. 4.)

12. When asked at deposition in case no. 2010-CP-12-0595 if he had a writing signed by Mrs. Hinson in which she obligated herself to sell 1537 Hinton Road to the Plaintiff, the Plaintiff testified: "not today" (Plaintiff's deposition transcript in 2010-CP-12-0595, p. 55, l. 21-24); and "not with me. . . I don't know where it is" (Plaintiff's deposition transcript in 2010-CP-12-0595, p. 58, l. 16-24). Plaintiff has not heretofore produced a writing signed by Reba

Hinson to support Plaintiff's allegations of an agreement for the purchase and sale of 1537 Hinton Road.

13. I am unaware of a writing signed by Reba Hinson that promised or obligated her to sell 1537 Hinton Road to the Plaintiff. There is no deed known to me whereby Reba Hinson conveyed any interest in the property at 1537 Hinton Road to the Plaintiff.

14. Reba Hinson died January 3, 2007.

15. I was appointed personal representative of the Reba Hinson Estate by Order of the Chester County Probate Court dated February 18, 2009.

16. Plaintiff filed claims against the Reba Hinson Estate alleging nuisance proximately caused by the alleged absence of a septic tank resulting in alleged illegal discharge of sewage into the lake from property owned by the decedent Reba Hinson, (2) conversion resulting from the Personal Representative's probating of the "wrong will," and (3) unspecified damages suffered by Claimant because of actions of attorney Ned Gregory and the Personal Representative.

17. All of Plaintiff's claims have been dismissed by procedural motions or summary judgment motion. (See 2010-CP-12-0168, including an Order from the Court of Appeals dismissing Plaintiff's appeal to that Court).

18. Plaintiff commenced proceedings in the Probate Court to insert himself into matters of estate administration. The Probate Court ruled against the Plaintiff

on all substantive matters, and the Circuit Court, sitting as an appellate court, affirmed the Probate Court's Order. (See 2010-CP-12-0201).

19. Plaintiff filed a tort action against some, but not all, of the Hinson heirs, alleging that a drunk and unruly tenant in the Fishing Creek Lake neighborhood was brought in for the purpose of harassing the Plaintiff. That case is pending. (2010-CP-12-00595).

20. The Hinson heirs/remaindermen commenced an eviction action in the Chester County Magistrates Court to evict the Plaintiff from the premises known as 1537 Hinton Road. Plaintiff appealed a pretrial Order in that proceeding to the Circuit Court where it is now pending. (2011-CP-12-0291). It was after the commencement of the eviction proceedings that the Plaintiff commenced the above-captioned action to claim superior title.

21. Although Plaintiff filed claims against the Reba Hinson estate, Plaintiff did not file a claim against the estate to enforce his *alleged* rights stemming from his *alleged* contract of sale with the decedent Reba Hinson. (see 2010-CP-12-168). The claims period expired in November 2009.

22. Plaintiff has continued to occupy the premises at 1537 Hinton Road since Reba Hinson's death (now over 4 years) without making a payment until approximately two months ago when the magistrate court ordered the payment of rental in connection with the pending eviction proceedings.

23. Reba P. Hinson was the surviving spouse of Levie Hoyt Hinson.

24. Following Reba Hinson's death, an action was brought in the Chester County Probate Court to determine the intention of Levie Hoyt Hinson in using the language "bodily heirs" in his Last Will. Plaintiff was not a party to that action. A true copy of the Probate Court's Order dated October 15, 2007 is attached hereto and incorporated herein as **Exhibit C**. [Order of the Chester County Probate Court dated October 15, 2007 in the Estate of Levie Hinson] Said Order provides that the bodily heirs referred to in Levie Hoyt Hinson's Last Will were John C. Hinson, Lois H. Griffin, Kathy Huffstickle, and the heirs of William C. Hinson who were declared to be William L. Hinson, John D. Hinson, Charles J. Hinson, Robert H. Hinson, William Calvin Hinson, Etta Elaine Hinson, Linda Kay Hinson and Darrell W. Hinson.

25. Said Order also held that the real estate that passed from the Levie Hoyt Hinson estate to Reba Hinson was, after Reba Hinson's death, owned by the bodily heirs of Levie Hoyt Hinson as tenants in common, which could only result if Reba Hinson's interest was a life estate

26. The remaindermen to Reba Hinson's life estate were identified and described by Levie Hoyt Hinson in his Last Will (**Exhibit A**) [Last Will and Testament of Levie Hinson dated April 21, 1977] as "our bodily heirs forever." ("our" refers to Levie and Reba Hinson). Plaintiff has disputed throughout his various legal actions that Reba Hinson owned only a life estate, claiming

instead that she owned the fee simple title to the premises at 1537 Hinton Road.

27. From my investigation into the facts, and based on all information available to me, and assuming that Reba Hinson owned a life estate, the ownership of the tract, and of the particular lot at issue herein, is now owned by the following persons in the percentages shown:

Lois Hinson a/k/a Lois Griffin	25% - subsequently conveyed to defendant Christine Jones;
John C. Hinson	25%
Kathy Huffstickle	25%
William C. Hinson's heirs	25% (shared as shown below)
William L. Hinson	3.125%
William C. Hinson, Jr.	3.125%
John D. Hinson	3.125%
Elaine Hensley f/k/a Elaine Hinson	3.125%
Robert Hinson	3.125%
Darrell Wayne Hinson	3.125%
Jerry Hinson	3.125%
Linda Stanford f/k/a Linda K. Hinson	3.125%

(Linda Stanford is now deceased and her share is held by George Stanford, as Personal Representative of the Estate Linda H. Stanford).

28. Chester County has taxed the Hinson land to Reba Hinson as owner of a life estate. True copies of Chester County tax records are attached hereto and incorporated herein as **Exhibit D**. [Chester County tax records (six pages)]

29. Plaintiff was not related by blood or marriage to Levie Hinson and/or Reba Hinson.

30. Plaintiff was not a devisee or interested party in the Estate of Levie Hoyt Hinson.

31. Plaintiff was not named as a devisee in any Last Will that might have been admitted to probate in the Estate of Reba Hinson.

32. I do not waive the protection of the Dead Man's Statute.

(Breakfield Affidavit dated August 24, 2011 including incorporated Exhibits A to D.)

In addition to the Breakfield Affidavit and its incorporated exhibits, the other evidence submitted to the trial court for consideration with respect to the summary judgment motion was: Appellant's deposition transcript in case no. 2010-CP-12-0595, content of Appellant's verified Complaint, and Appellant's seven-page verified Response to Motion for Summary Judgment dated September 6, 2011.

Appellant described his case to the trial court as trespass to try title that "is founded on prescription." Appellant asserts that Reba Hinson received fee simple title from her husband's last will and alternatively that she obtained title by adverse [possession for over 20 years. (Hearing transcript p. 34, l. 15 to 24.)

The trial court's Order granting summary judgment in favor of the Respondents was grounded in the following conclusions/rulings: that Levie Hinson's Last Will devised to his surviving spouse, Reba Hinson, a life estate and not the fee simple title; that Appellant had at least constructive notice from the public record that Reba Hinson held only a life estate and therefore Appellant could not be a purchaser without notice; that Reba Hinson could not have conveyed an interest in the land (fee simple) that was greater than she held (life estate); and that Appellant cannot gain title to the subject real property by a claim of adverse possession or presumption of grant because Appellant cannot tack his possession to the preceding possession of Reba Hinson to reach the 20-year requirement because Reba Hinson held only a life estate which cannot run as adverse possession against the remaindermen. (Order dated December 29, 2011.)

ARGUMENT

Appellant has raised four issues for appeal:

1. that summary judgment should not have been granted because Appellant demonstrated the existence of issues of fact;
2. that Appellant is absolutely entitled to a jury trial pursuant to S.C. Code Ann. §15-67-100 without regard to the operation of Rule 56, SCRCP;
3. that Reba Hinson owned the fee simple title to the land in question pursuant to the case of Moore v. Sanders, 15 S.C. 440 (1881); and
4. that it was error for the trial court to conclude that Reba Hinson, as a life tenant, could not claim adverse possession against the remaindermen to the life estate.

I. The trial court used the proper summary judgment standard and properly granted summary judgment in favor or Respondents because as a matter of law the Last Will of Levie Hinson devised only a life estate to Reba Hinson.

(Appellant's Issues on Appeal nos. 1 and 3.)

Appellant's Issue on appeal No. 1, "Did the trial court err in granting summary judgment where issues of fact remain?" is a broad general statement that does not satisfy the requirement of Rule 208(b)(1)(B), SCACR, that statements of issues on appeal must be concise and direct.

As best as Appellant's argument as to issue one can be discerned, the argument is really twofold: (1) Procedural - the trial court used the federal summary judgment standard for an action requiring a heightened burden of proof, rather than the state law standard, a scintilla of evidence, and (2) substantive- that the trial court record "is full of sworn, and admissible testimony in quantities enough to send the case to a jury."

(1) Procedural objection. Appellant argues that the trial court used the federal law summary judgment standard and that he satisfied the state law scintilla standard by the content of his on file evidence. [2] This is a misstatement of the law. State law also provides for a different summary judgment standard when the cause of action at issue requires a heightened burden of proof. Where the burden of proof in a case is the preponderance of the

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[2] Pursuant to Rule 56(c), SCRCP, "summary judgment motions and, inferentially, supporting materials [are required] to be **on file** when they are to be relied upon at a summary judgment motion hearing." Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991). (emphasis aded). The "on file" requirement is satisfied when (1) the document is filed with the clerk of court prior to the hearing; or (2) the document is delivered to and received by the trial judge at the time of the hearing. Id.

evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009). However, "where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." Id. Rather than the issue being the use of a federal law standard vs the use of the state law standard, Appellant asserts that the trial court used the heightened standard when the regular scintilla of evidence standard was called for.

Although the trial court's summary judgment Order does not expressly state such, the clear implication of the Order is that the Court employed the South Carolina scintilla of evidence standard and treated the matters presented as questions of law. (Order.) Most importantly, the trial court concentrated on the issue of the title or estate devised to Reba Hinson by the last will of her spouse Levie Hinson. (Order, p. 3, l. 1-17.)

Without citing the specific legal authority, the trial court applied the law found in Coleman Karesh, Wills 38 (1977) ("The general rules for construction of wills are not unlike those for the construction of other writings, such as deeds and contracts," and Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct.App. 1987) ("When there is present on a motion for summary judgment a question as to the construction of a written agreement [last will] that can be determined by a consideration of the plain and unambiguous language of the contract [last will], the question as one of law may be resolved by the court.")

(2) Substantive objection regarding on file summary judgment evidence presented to the trial court. Appellant argues that he presented a scintilla of evidence to the trial court,

sufficient to overcome summary judgment on the issue of the nature of the title devised to Reba Hinson. A review of the record shows otherwise.

Argument on the summary judgment motion in this case starts on p. 24 of the joint transcript of the November 9, 2011 hearings. (Transcript p. 24, l. 16 to p. 42, l. 8). In addition to the motion now being considered, another summary judgment motion involving the Appellant and the Hinson family, in case no. 2010-CP-12-595, was argued immediately prior to the motion now being reviewed herein. The court reporter prepared a joint transcript of the two summary judgment motions. (Joint Transcript of November 9, 2011 hearings). The submissions and arguments for the two motions had some amount of cross-over. In general, pages 3 to 24 in the transcript relate to the hearing in 2010-595, and pages 24 to 42 relate to the hearing in 2011-323 (the above-captioned case.) The record confirms that Respondents submitted (1) Appellant's deposition transcript in case no. 2010-595 to be used in case no 2010-595 "and in the other case;" (Transcript p. 4, l. 3 to p. 5, l. 10.) (2) a "memorandum of law that addresses all of the various cases and motions that are on the roster today." (Transcript p. 3, l. 11-19); and (3) the affidavit of Robert Breakfield dated August 24, 2011, including its four incorporated exhibits. Appellant's on file evidence was his verified complaint (transcript p. 34, l. 19 to p. 36, l. 16, and Complaint) and his seven-page Response to the summary judgment motion. (Appellant's Response to Defendants' Motion for Summary Judgment, dated September 28, 2011 (7 pages). As shown below, the content of Appellant's on file evidence was deficient.

Complaint. Although Plaintiff's complaint was verified, it contains nothing more than conclusory allegations.[3] Attached to the Complaint as Exhibit A is a plat referred to in ¶ 16 of the Complaint. (Complaint ¶ 16 and Ex. A.) The plat says nothing about the nature of Reba Hinson's title. It says only that the plat was done for Reba P. Hinson and that it shows "a portion of the Reba Hinson lands. . ." It makes no representation about whether Reba Hinson owned the land in fee or only as a life estate. Land held by life estate can be surveyed and platted. Without additional explanation and **authentication**, the plat does not show the location of the lot at issue herein with respect to the portions of the Reba Hinson lands being surveyed, and it does not represent to anyone the nature of Reba Hinson's title.

Materials used to support or oppose a summary judgment motion, such as affidavits, deposition testimony and documents, must set forth facts that would be admissible in evidence at trial. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); Moss v. Porter Bros., Inc., 292 S.C. 444, 357 S.E.2d 25 (Ct.App. 1987). The party responding to a summary judgment motion must set forth **specific facts** showing a genuine issue for trial. Burry & Son Homebuilders, Inc., v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain

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[3] Examples: "Defendants are not now, and never were truly remaindermen. . ." ¶ 5; Defendants do not own and have no right to possess the land. . ." ¶ 7; "Plaintiff purchased the described land in good faith from Reba P. Hinson. . . plaintiff is a bona fide purchaser for value without notice . . .." ¶ 11; "defendants were taught to start calling themselves remaindermen" ¶ 12; Mrs. Reba Hinson never recognized any persons to have a remainder interest in her land" ¶ 14; Mrs. Reba Hinson held her lands adversely against everyone . . ." ¶ 15. These are examples of unsupported conclusory allegations that fail to satisfy the "specific fact" requirement for summary judgment motions. No admissible evidence was submitted in support of these, and many other, allegations. Plaintiff's Complaint is grossly inadequate to demonstrate genuine issues of material fact.

specific probative facts and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading.")

Documents submitted to the court for consideration in ruling on a motion for summary judgment motion require a proper foundation to be laid to authenticate them, and without the foundation and authentication, such documents cannot support or defend against a motion for summary judgment. 73 AmJur2d Summary Judgment §52 (2012).

Verified Response to Summary Judgment Motion. On September 28, 2011 Appellant filed and served his verified Response to Defendant's motion for summary judgment. (Response dated September 28, 2011.) Appellant also filed a second Response dated October 12, 2011, but it was not verified. The first response included as an attachment an alleged land sales contract between Reba Hinson and Appellant. (Response, Ex. A). Appellant's Response also included a hand-drawn map to show the location of an alleged easement.

The Response does not authenticate or otherwise lay the foundation for admissibility of the its Exhibit A. It merely states that "Exhibit A attached to this response shows at least a color of title." (Response, ¶2.) The document would not be admissible at trial with a

foundation limited only to "the document shows at least a color of title." Consequently, the lack of authentication and foundation excludes it from the trial court's consideration in ruling of a summary judgment motion. 73 AmJur2d Summary Judgment §52 (2012).

Hearing Transcript. Finally, a review of the hearing transcript shows that Appellant did not submit anything else to the court. He referred to the plat that is identified hereinabove as Exhibit A to his Complaint, but there were no other submissions. Pursuant to Rule 56(c), SCRCP, "summary judgment motions and, inferentially, supporting materials [are required] to be on file when they are to be relied upon at a summary judgment motion hearing." Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991). The "on file" requirement is satisfied when (1) the document is filed with the clerk of court prior to the hearing; or (2) the document is delivered to and received by the trial judge at the time of the hearing. Id.

If the trial court's grant of summary judgment on issue on appeal no. 4, that the Levie Hinson Last Will devised only a life estate to Reba Hinson, Exhibit A to the Complaint and Exhibit A to the Appellant's Response are rendered moot as to the outcome of the case.

II. By granting summary judgment in favor of Respondents, the trial court did not deny the Appellant his rights under S.C. Code Ann. §15-67-100. (Appellant's Issue on Appeal no. 2).

This question or issue was not preserved for appellate review. The particular statute identified by the Appellant was not included or alleged in the Complaint. (Complaint) It was not identified or cited in anything filed with the trial court with respect to the summary judgment proceedings until Appellant's Motion for Reconsideration dated January 14, 2012.

(Motion for Reconsideration). New matter cannot be presented or raised for the first time in a motion for reconsideration. Englert, Inc. v. Netherlands Ins. Co., 315 S.C.300, 433 S.E.2d 871 (Ct.App. 1993). It is true that Appellant's verified Response to the summary judgment motion included in his "Wherefore" clause "the fact that plaintiff has a statutory right to a jury trial in a title clearing case," but the particular statute was not identified. (Verified Response to summary judgment motion dated September 28, 2011). The statute was not mentioned or addressed by Appellant in his oral argument to the trial court on November 9, 2011 when the summary judgment motion was heard.

Reserving the argument in the preceding paragraph, Appellant appears to argue that summary judgment is unavailable to a defendant in a "title clearing case" because S.C. Code Ann. §15-67-100 preserves, or more accurately guarantees without exception, the right to jury trials in such cases. There is no law holding that the right to a jury trial in law cases is synonymous with a guarantee of a jury trial that cannot be lost via an adverse summary judgment. Summary judgment is frequently granted in law cases (cases in which litigants have the right to jury trials). Summary judgment is governed by the nature and sufficiency of the pre-trial evidence presented and the existence, or not, of genuine issues of fact, not by the title of the cause of action or by the existence of a right to jury trial.

III. The trial court properly granted summary judgment in favor of Respondents because as a matter of law the four corners of the Last Will of Levie Hinson devised only a life estate to Reba Hinson. (Appellant's Issue on appeal no. 3).

Appellant argues that the content of his verified complaint is all that he needed to create a genuine issue of fact to defeat summary judgment on the question of the estate

devised to Reba Hinson in and by the last will of Levie Hinson. (Levie Hinson Last will). His brief identifies four specific allegations from his Complaint that he contends were sufficient to create genuine issues of fact. They are:

a. Appellant is the owner of the land in question. That is a conclusion. It is actually the ultimate issue to be decided. Conclusions do not constitute specific probative facts in summary judgment procedure. The party responding to a summary judgment motion must set forth **specific facts** showing a genuine issue for trial. Burry & Son Homebuilders, Inc., v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain specific probative facts and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading.")

b. Plaintiff purchased the land in good faith for value and without notice of the claim of remaindermen. The Respondents submitted public chain of title records that contained notice that Reba Hinson owned a life estate: Levie Hinson probate estate records, including his last will, and Chester County tax records. The trial court noted that these records provided constructive notice to the Appellant of the nature of Reba Hinson's title and

that the bona fide purchaser without notice claim must fail. (December 29, 2011 Order, p.4, 18-21.) The trial court was correct.

Appellant alleges that he is a purchaser without notice that Reba Hinson's ownership could be a life estate or that third parties could claim remaindermen status. (Complaint, ¶ 11). He alleges that he never saw Levie Hinson's last will until after the land sale agreement was in place. (Complaint, ¶ 12).

A purchaser of real property has the duty to make a complete search of the public records for information that the public records may contain with respect to the validity of the title of the real property he intends to purchase. South Carolina Tax Comm. v. Belk, 225 S.E.2d 177 (S. C. 1976).

From Spence v. Spence, 628 S.E.2d 869 (S.C. 2006):

> [c]onstructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. Epps, 139 S.C. at 499, 138 S.E. at 303 ("recording amounts to notice, whether known or unknown, because the means of information are at hand"); Franklin Bank, N.A. v. Bowling, 74 P.3d 308, 313 (Colo. 2003) (en banc) (constructive notice in real estate transaction essentially is record notice).

And, where there is any evidence in the chain of title sufficient to put a party on inquiry notice of an interest in property, a purchaser is chargeable as a matter of law with actual notice of facts that could have been discovered by proper inquiry. Kirton v. Howard, 134 S.E. 859 (S.C. 1926). The chain of title to real estate includes public records from several sources:

> The recorder's office is not the only public office required to maintain records affecting the title to real estate. As such, a complete title search is not confined to the records of the county recorder. Although actual practice may vary somewhat from county to county, an abstractor or title insurance agent will routinely examine records affecting title to real estate in the offices of the recorder, auditor, assessor, treasurer, sheriff and clerk of the courts in the county where the real estate is located.

WorldCom Network Servs. v. Thompson, 698 N.E.2d 1233 (Ind.Ct.App. 1998).

The public records affecting Reba Hinson's title included the probate court file for the Estate of Levie Hinson and the Chester County tax records for the property at issue. Consequently, Appellant had at least constructive notice of the content of those records and facts that could have been discovered by proper inquiry triggered by the content of those records. Appellant's response was not anything factual, but only the argument that tax records are hearsay and are subject to mistakes. (Hearing Transcript, p. 27, l. 9-19.) There is no issue of fact in the record contesting the existence of constructive notice to the Appellant in the public record. .

c. Appellant claims title through Reba Hinson and Levie Hinson, the common grantor. Exactly how this impacts Appellant's claim or demonstrates error on the part of the trial court is not explained by Appellant in his brief. Failure to offer meaningful argument in the appellate brief is an abandonment of the issue. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 214 (2d ed.2002).

d. There are no remaindermen. This is a blatant conclusion. It is contrary to the terms of the Levie Hinson last will and to the county tax records, and to the content of the Probate Court's Order dated October 15, 2007. The party responding to a summary judgment motion must set forth **specific facts** showing a genuine issue for trial. Burry & Son

Homebuilders, Inc., v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain specific probative facts and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading.")

Content of Levie Hinson Last Will. Levie Hinson left a Last Will and Testament dated April 21, 1977 that was probated in the Chester County Probate Court as case no. 1986-ES-12-188. (Levie Hinson Last Will). It provided, in relevant part in Item II: **"I will devise and bequest [sic] unto my beloved wife Reba P. Hinson all my real estate, in fee simple, as long as she lives then to our bodily heirs forever."** (Emphasis added.) Appellant argues that this provision devised fee simple title to Reba Hinson; Respondents argue that the provision devised a life estate to Reba Hinson. The trial court found this language sufficiently clear to determine the testator's intent with respect to the nature of the estate to be devised to his wife Reba Hinson.

If the Levie Hinson Last Will devised a life estate to Reba Hinson, Appellant's' claim to title through Reba Hinson must fail because a life tenant cannot convey any greater interest than she has in the land. Cayce Land Co. v. Southern Railway Co., 111 S.C. 115, 96

S.E. 725 (1918). See also F. C. Enterprises, Inc. v. Dibble, 335 S.C. 260, 516 S.E.2d 459 (Ct. App. 1999); Cummins v. Varn, 307 S.C. 37, 413 S.E.2d 829 (1992)(no deed [contract] can convey an interest which the grantor does not have in the land described therein.) Reba Hinson could only convey to Appellant's a life estate measured by her (Reba Hinson's) life[4] or a lease that would terminate on her (Reba Hinson's) death.[5] In either case, the remaindermens' interest would be unaffected.

Any language which is free of ambiguity and clearly shows an intent to create a life estate will suffice to create a life-estate. Gasaway v. Reiter, 736 P.2d 749 (Wyo. 1987); Bernat v. Kivior, 494 N.E.2d 425 (Mass. App. 1986); 31 C.J.S Estates §30. One given the use and occupation of property for life is given a life estate. Pierce v. Lowe, 256 S.W.2d 43 (Ark. 1953).

Appellant's argues that Item II of Levie Hinson's Last Will first devised to Reba Hinson the fee simple interest in the land and that the subsequent language **in the same sentence** describing the devise as a life estate is ineffective. The starting point is a principle of law that is usually over-simplified in its recitation, as it is in this case by Appellant: an estate first devised in fee simple cannot be cut down by subsequent language in the will inconsistent with the fee simple devise. Wates v. Fairfield Forest Products Co., 210 S.C.

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[4] A conveyance by the life tenant passes only the life estate and ordinarily is without effect on the estate in remainder. 3 Thompson on Real Property, Second Thomas Edition (David A. Thomas, ed., 2001) §23.04.

[5] A life tenant may make a valid lease of property that is subject to her life estate, but the term of the lease may not extend beyond the life tenant's term. 31 C.J.S. Estates §64 (2008).

319, 42 S.E.2d 529 (1947). However the actual fully-stated principle of law more accurately reads:

> There is no doubt of the soundness or wisdom of the rule that when a gift is made in one clause of a will in clear and unequivocal terms, the quality or quantity of the estate given should not be cut down or qualified **by words of doubtful import found in a subsequent clause**. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given. (emphasis added).

Id.

Item II of Levie Hinson's Last Will is but one sentence. It uses the term "fee simple," but immediately thereafter (not in a subsequent clause) describes the devise as being for "as long as she lives then to our bodily heirs forever." (Emphasis added). The subsequent words are not of doubtful import; they are equally as clear as the term "fee simple." The Court has the authority under this circumstance to hold ineffective either the first or second expression of the devise. "If the intention of the testator is to be given effect, as it must be, courts must be permitted, considering each case separately, to hold ineffective words of restriction and to enforce an absolute estate, where such an estate was intended, or conversely, to disregard words of absolute gift and to declare the estate created to be a limited estate where a clear intention to that effect appears." Shevlin v. Colony Lutheran Church, 227 S.C. 598, 88 S.E.2d 674 (1955).

In the case of Bryant v. Britt, 216 S.C. 299, 57 S.E.2d 535 (1950), the Court wrote:

> "* * * It is well established that where an estate or interest is once given by words of clear and ascertained legal significance, it will neither be enlarged nor cut down by superadded words in the same or subsequent clauses, **unless they raise an irresistible inference that such was the intention of the testator.** Shevlin v. Colony Lutheran Church, 227 S.C. 598, 88 S.E.2d 674 (1955). (Emphasis added).

And, another expression of the law:

> "If there is anything well settled it is that a Court will not cut down an estate once granted absolutely in fee by limitations contained in subsequent parts of a will, **unless the intent to limit the devise is manifested clearly and unmistakably**. If the expression relied upon to limit a fee once devised be doubtful, the doubt should be resolved in favor of the absolute estate." (Emphasis added).

Schroder v. Antipas, 215 S.C. 552, 56 S.E.2d 354 (1949).

There are South Carolina cases in which language in last wills indicating a fee interest was restricted or reduced to a life estate based on subsequent language in the will that the court found to clearly and unmistakably manifest the intent to limit the devise. Shevlin v. Colony Lutheran Church, 227 S.C. 598, 88 S.E.2d 674 (1955); Wates v. Fairfield Forest Products Co., 210 S.C. 319, 42 S.E.2d 549 (1947); Simpson v. Antley, 137 S.C. 380, 135 S.E. 469 (1926).

A close examination of the language used by Levie Hinson reveals his intent with respect to the estate being passed to Reba Hinson in the real property. Item I devised the testator's personal property; it reads: "I will, device [sic] and bequeath unto my beloved wife, Reba P. Hinson all of my personal property of every kind and description including cash money. **At her death the remainder if any to our beloved children.**"(emphasis added). This provision uses two separate sentences. The first states an absolute, unqualified gift of all personalty. The second would reduce the absolute gift of personalty to a life estate, with the right to consume or dispose of the personalty. This right to consume or dispose is clear because the testator expressly provided at the death of Reba Hinson, the "remainder if any" of the personalty was to pass to the children.

Contrast Item I with Item II in which the testator devised his real property. Item II reads: I will devise and bequest [sic] unto my beloved wife Reba P. Hinson all my real estate, in fee simple, as long as she lives then to our bodily heirs forever." Item II uses the term "fee simple" but immediately thereafter (not in a subsequent sentence or clause) describes the devise as being for "as long as she lives then to our bodily heirs forever." (Emphasis added). Although the second part of the sentence uses classic life estate terminology, absolutely nothing is said that could be considered a grant of a life estate with the power to consume or dispose of the real property. This is a key consideration because the testator knew how to provide for a life estate with the right to consume or dispose, because he did just that in Item I. By not using similar language in Item II, the life estate left to Reba Hinson in the real property did not include the right to consume or dispose.

Therefore, from the four corners of the Levie Hinson last will, Reba Hinson was devised a life estate in the real property.

IV. The trial court correctly ruled that as a matter of law a life tenant cannot claim adverse possession against remaindermen. (Appellant's Issue on Appeal no. 4.)

Appellant presented as an alternate claim that in the event Reba Hinson did not receive fee simple title via Levie Hinson's last will, that Reba Hinson and Appellant together have satisfied the requirements for adverse possession. In its Order Granting Summary Judgment, the trial court wrote: "Plaintiff claims ownership by virtue of a 20-year presumption of a grant through Reba Hinson. This claim must fail, as a life tenant (RebaHinson) cannot claim adverse possession against remaindermen."[6] (Order, p. 4, l. 1-

[6] The adverse possession period is ten years pursuant to S.C. Code Ann. §15-67-210. The common law presumption of grant period is 20 years. Getsinger v. Midlands

3). Appellant argues that the trial court erred in its ruling because of the case of Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992).

Title by adverse possession requires proof of actual, open, notorious, hostile, continuous, and exclusive possession by the claimant, or by one or more persons through whom he claimed, for the full statutory period. Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473 (1956). It is well established that adverse possession does not run against a remainderman until the death of the life tenant. Phipps v. Hardwick, 273 S.C. 17, 253 S.E.2d 506 (1979). This same rule applies to the 40 year statute.[7] Stamper v. Avant, 233 S.C. 359, 104 S.E.2d 565 (1958); see Phipps v. Hardwick, supra. Similarly, presumption of grant will not be acquired against a remainderman who is unable to assert his rights because of an intervening life estate until the life estate is extinguished and the remainderman is entitled to possession. See 10 S.C.L.Q. 292, 302 (1958) (citing Bolt v. Sullivan, 173 S.C. 24, 174 S.E. 491 (1934); Phipps v. Hardwick, supra).

By his own admission, Appellant's first involvement with the real estate he now claims was in 2002 when he bought the residence from Mr. Gardner and when he signed a lease with Reba Hinson for the lot on which the Gardner residence was located. (Appellant deposition transcript in 2010-595, p. 6, lines 10-23; p. 82, line 3 to p. 83, line 17). The lease was dated May 6, 2002 (Exhibit 8, Appellant's deposition transcript; and Exhibit B to Breakfield Affidavit); and the alleged land sale agreement bears the date of May 7,

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Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct.App. 1997), rehearing denied, certiorari denied.

[7] The 40-year statute is found in the Limitations of Civil Actions Chapter of the Code, specifically S.C. Code Ann. §15-3-380.

2005.(Exhibit to Appellant's Response to summary judgment motion.). He never lived in South Carolina prior to moving to the Hinton Road property in 2002. (Appellant's deposition transcript, p. 6, lines 10-23.) In order to establish a claim of adverse possession, the claimant must prove by clear and convincing evidence his possession of the subject property was continuous, hostile, actual, open, notorious, and exclusive for the statutory period. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 595 S.E.2d 253 (S. C. App. 2004). The statutory period for adverse possession is ten years. Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct.App. 1997), rehearing denied, certiorari denied, citing S. C. Code Ann. §15-67-210, 15-67-220 and 15-3-340. There is also a common law 20-year period for a presumption of grant. Getsinger v. Midlands Orthopaedic Profit Sharing Plan, supra. The trial court Order mentioned only the 20-year presumption of grant, Order but Appellant's summary judgment showing fails under either claim.

Appellant's possession of the property from 2002 to 2005 was, by his own testimony, pursuant to a lease with Reba Hinson. (Exhibit 8 to Appellant's deposition transcript; and deposition transcript p. 54, line 18 to p. 57, line 24). Nothing hostile or adverse. Appellant now tries to convert his permissive use into a hostile and adverse use because of his claim to having purchased the fee from Reba Hinson in 2005, to have been conveyed at a later time. Prior to the commencement of this case, ten years had not elapsed since Appellant's first leasehold interest in the property in May 2002 and only six years had elapsed since the date of the alleged land sales agreement (May 2005).

Recognizing that he alone cannot satisfy either the adverse possession or presumption of grant periods, Appellant must tack his possession to the prior period of Reba Hinson's possession. This theory assumes that Reba Hinson did not get the fee title from her husband's estate in 1986 but that she, herself, had adversely possessed the property since that time. The Appellant's theory ignores the rights and ownership estate of the remaindermen to Reba Hinson's life estate. Having not been in South Carolina prior to 2002, Appellant has presented no admissible evidence of Reba Hinson's prior conduct with respect to the real property she was devised by her late husband's last will. Not having evidence showing his possession for ten years, and having no evidence of the nature of Reba Hinson's possession prior to 2002, Appellant's claim to title by adverse possession cannot stand and summary judgment was properly granted in favor of the Respondents.

With respect to Reba Hinson's possession after 1986, as noted above, it is well established that adverse possession does not run against a remainderman until the death of the life tenant. Phipps v. Hardwick, 273 S.C. 17, 253 S.E.2d 506 (1979). This same rule applies to the 40 year statute.[8] Stamper v. Avant, 233 S.C. 359, 104 S.E.2d 565 (1958); see Phipps v. Hardwick, supra., and to the 20-year presumption of grant because presumption of grant will not be acquired against a remainderman who is unable to assert his rights because of an intervening life estate until the life estate is extinguished and the remainderman is entitled to possession. See 10 S.C.L.Q. 292, 302 (1958) (citing Bolt v. Sullivan, 173 S.C. 24, 174 S.E. 491 (1934)); and Phipps v. Hardwick, supra. Adverse

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[8] The 40-year statute is found in the Limitations of Civil Actions Chapter of the Code, specifically S.C. Code Ann. §15-3-380.

possession against the remaindermen could not possibly have commenced until Reba Hinson's death in 2007.

Appellant's reliance on Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992) is misplaced. In Miller, the court addressed a situation where a statute of limitations for adverse possession had commenced and subsequently, a life estate was created. The argument was that the subsequent creation of the life estate would stay or "arrest" the running of the adverse possession period. The court in Miller disagreed. Here, Reba Hinson's life estate was not created after her alleged adverse possession limitations period started to run. Assuming that Reba Hinson had an adverse possession claim, its limitations period would have started to run at the exact same time as her life estate was created, namely at the death of Levie Hinson.

Unlike Miller there is nothing in this case that can give rise to a claim that the statute of limitations period was ever suspended. Miller is a limitations period case, whereas the case on appeal herein is a period of possession case.

CONCLUSION

For the reasons set out hereinabove, the Order of the Circuit Court granting summary judgment in favor of Respondents should be affirmed.

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February 25, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS

2011-CP-12-0323

Mell Woods,

Plaintiff,

v.

John D. Hinson; Christine Jones; John C. Hinson; Kathy Huffstickle; Charles J. Hinson; William L. Hinson; Lois Hinson; Robert Breakfield, as Personal Representative of the Estate of Reba P. Hinson; Elaline H. Hensley; Robert H. Hinson; George Stanford, as Personal Representative of the Estate Linda H. Stanford; William C. Hinson, Jr.; Darrell W. Hinson; Mary Roe and John Doe, fictitious names used to designate all other parties, whose names are unknown, and any and all other persons claiming any right, title, estate interest or lien upon the real estate described in the complaint;

Defendants.

CERTIFICATE OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Defendants in the above-captioned matter, do hereby certify that I have served Plaintiff, pro se with a copy of **Respondents' Initial Brief** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 25th day of February, 2013 at the following address:

Mell Woods
P. O. Box 2603
Lancaster, SC 29721
Plaintiff, pro se

Linda T. Abernethy