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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 2022-UP-089 (S.C. Ct. App. filed March 2, 2022)

Elizabeth Lofton,..... Respondent,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,..... Petitioners.

**BERKELEY ELECTRIC COOPERATIVE, INC.'S
PETITION FOR WRIT OF CERTIORARI**

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CERTIFICATION BY COUNSEL

Counsel for Petitioner Berkeley Electric Cooperative, Inc., certifies that a Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the Circuit Court's grant of summary judgment that Respondent lacked standing as a real party in interest, where she had notice of objection to the defect for years, failed to file any affidavits in opposition to summary judgment or seek a continuance, and where she conceded at the hearing that she lacked standing.
2. Whether the Court of Appeals erred in remanding the case back to the Circuit Court for a hearing on her motion to amend where, despite notice, Respondent failed for years to remedy her defective standing and has never made any showing that her delay was reasonable.

Pursuant to Rule 242, SCACR, Petitioner Berkeley Electric Cooperative, Inc. ("BEC") hereby moves this Court to issue a writ of certiorari to review the Court of Appeals' Unpublished Opinion, No. 2022-UP-089, filed March 2, 2022. This petition raises a novel question of law, *i.e.*, whether and to what extent an unsupported and last-minute motion to amend trumps a party's duty to comply with the real party in interest requirements of Rule 17(a), SCRCRCP, the summary judgment procedures and requirements set forth in Rule 56, SCRCRCP, and the procedures and requirements for reconsideration under Rule 59(e), SCRCRCP. Further, the decision by the Court of Appeals conflicts with *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018), where this Court stated: "Ultimately, the circuit court is not responsible for doing the plaintiff's work, and the burden of compliance with Rule 17(a) and its real party and interest requirement falls to the plaintiff."

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's grant of summary judgment to Berkeley Electric Cooperative, Inc., ("BEC") and John Lucas Tree Expert, Co., ("Lucas Tree") on February 22,

2019.¹ R. p. 137. Respondent Elizabeth Lofton (“Lofton”) commenced this action against BEC on July 1, 2015, alleging that in July of 2013, BEC fraudulently obtained a right-of-way easement over her property and then proceeded to trespass on her property, convert her personal property, cut her timber and, in doing so, engaged in unfair trade practices. R. pp. 1-11. Lofton amended her complaint on January 19, 2016, to add Lucas Tree as a defendant. R. pp. 14-16. BEC answered Lofton’s amended complaint on February 8, 2016, and Lucas Tree filed its answer on March 14, 2016. R. p. 29; p. 33.

On October 3, 2016, Lucas Tree filed a motion for summary judgment arguing, in part, that Lofton lacked individual standing as a real party in interest because she did not own the real property as claimed in her complaint. R. pp. 53; 58-59. On October 11, 2016, BEC adopted Lucas Tree’s arguments and authorities and also moved for summary judgment. R. p. 78.

On October 28, 2016, Lofton was granted leave to dismiss her complaint pursuant to Rule 40(J), SCRCF. R. p. 80. Lofton subsequently moved to restore the case and, eighteen months later, on January 24, 2018, the case was refiled under a new action number, 2018-CP-10-00323. R. p. 89.

On August 13, 2018, Lucas Tree moved for summary judgment again arguing, in part, that Lofton lacked standing as a real party in interest because she did not personally hold title to the real property. R. p. 91; pp. 94-100. On September 19, 2018, BEC also moved for summary judgment again, based in part on the grounds that Lofton lacked standing as a real party in interest because she did not own the property as alleged in her complaint. R. p. 107; pp. 110-115.

¹ Lucas Tree has filed a separate Petition for Writ of Certiorari. BEC and Lucas Tree are jointly referred to herein as “Petitioners.”

The motions for summary judgment were heard by the Honorable Jennifer B. McCoy on November 26, 2018. An hour prior to the start of the hearing, Lofton filed a one-page motion to amend “to change the named plaintiff in the lawsuit to the Trust for which current Plaintiff is the trustee.” R. p. 121. Lofton also filed at that time a response to the motions for summary judgment attaching several pages from her deposition. R. pp. 123-136. Lofton did not file any affidavits in support of the motion to amend her response.

At the hearing on Petitioners’ motion, Lofton conceded that she did not own the real property at issue as alleged and therefore lacked standing as a real party in interest. 157:21-24; 164:10-11; 165:3-5. Instead, she argued that she should be allowed to amend her complaint to change the named plaintiff to the trust that owned the property. R. 157: 21-158:1. The Circuit Court informed Lofton that a motion to amend was not properly before this Court. R:165:9-11.

By order dated February 22, 2019, the Circuit Court granted summary judgment on the grounds that Lofton did not own the real property at issue and therefore lacked standing as a real party in interest. Suppl. R. pp. 21-24. On March 4, 2019, Lofton moved for reconsideration of the ruling, arguing that she did, in fact, have standing, that the Circuit Court incorrectly analyzed her standing as the personal representative of her mother’s estate, that her motion to amend was before the court and would remedy any defect, and that amendment was not necessary because she had statutory standing. R. pp. 140-142. The Circuit Court denied Lofton’s motion for reconsideration without hearing by order dated March 6, 2019. R. p. 143. Lofton filed her notice of this appeal on March 29, 2019. R. p. 144.

On appeal, Lofton argued that she had statutory standing as plaintiff under S.C. Code of Laws Anno. 62-7-816(24), that she had constitutional standing, and that the Circuit Court abused its discretion in not allowing her to amend her complaint. In an unpublished decision, the Court

of Appeals ruled that Lofton’s claim of statutory standing was not preserved for review because it was first raised in her motion for reconsideration and because it directly contradicted Lofton’s concessions at the hearing. *Elizabeth Lofton v. Berkeley Electric Cooperative, Inc., and John Lucas Tree Expert Co.*, Unpublished Opinion No. 2022-UP-089 (S.C. Ct. App., filed March 2, 2022.) The Court further ruled that Lofton’s argument of constitutional standing was not properly before the court because it was first raised in her reply brief.² *Id.* However, the Court of Appeals reversed the grant of summary judgment, ruling that the Circuit Court’s decision was premature because it first should have considered Lofton’s motion to amend. The case was remanded back to the Circuit Court for consideration of Lofton’s motion to amend her complaint. *Id.* On March 24, 2022, the Court of Appeals denied petitions for rehearing filed by BEC and Lucas Tree.

ARGUMENT

The Court of Appeals’ ruling that the Circuit Court abused its discretion by failing to rule on the pending motion to amend ignores the duties, obligations, and burdens laid out in Rules 17(a), 56, and 59(e), SCRCP. The Circuit Court did not fail to rule on Lofton’s pending motion to amend. Lofton literally had years of notice that BEC and Lucas Tree objected to her claim that she was a real party in interest, yet she inexplicably failed to take any steps to remedy that standing defect. After Petitioners moved for summary judgement on the issue for a second time, Lofton failed to timely and properly oppose those motions as required by Rule 56, SCRCP. Instead, she filed a last-minute motion to amend. When that didn’t fly, she did nothing for weeks, making no effort to get her motion heard prior to the Circuit Court’s grant of summary judgment.

² The Court of Appeals correctly determined that Lofton’s claims of statutory standing and constitutional standing were not preserved for review. BEC does not seek review of those rulings.

While it is true that a motion to amend should be “freely given when justice so requires and does not prejudice any other party,” it is not a “Get-Out-of-Jail-Free” card. Lofton’s motion to amend must be considered in light of Rule 17(a), SCRCF, which requires all cases to be prosecuted in the name of the real party in interest and authorizes the dismissal of actions brought by improper parties unless the defect is remedied within a reasonable time after objection. *See* Rule 17(a), SCRCF. Lofton’s unsupported motion to amend fails to offer any explanation why she delayed for years to remedy her defective standing or why she waited until just an hour before the hearing to file the motion. It is Lofton’s burden to comply with the requirements of Rule 17(a). *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, supra, 422 S.C. at 241, 811 S.E.2d at 742. The Court of Appeals’ decision to reverse summary judgment and remand the case for a hearing on Lofton’s tardy and unsupported motion to amend improperly shifts the burden of Rule 17(a) compliance back to the Circuit Court, penalizes Petitioners, and rewards Lofton’s lack of diligence and her failure to comply with the rules.

As further set forth below, the Circuit Court did not abuse its discretion in granting summary judgment and the Court of Appeals erred in reversing that decision and remanding the case for a hearing on the motion to amend. BEC therefore respectfully requests that the Court grant this Petition.

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT’S GRANT OF SUMMARY JUDGMENT THAT LOFTON LACKED STANDING AS A REAL PARTY IN INTEREST.

In her original complaint filed in 2015 and again in her first amended complaint filed in 2016, Lofton flatly asserts that she owned the real property at issue in this action. R. p. 2, ¶5; R. p. 17, ¶6. In October of 2016, Lucas Tree and BEC moved for summary judgment based, in part, on the grounds that Lofton did not, in fact, own the real property as claimed and that she therefore

lacked standing as a real party in interest. R. pp. 58-59, p. 78. Shortly after those motions were filed, the case was dismissed pursuant to Rule 40(j), SCRC. R. p. 80. The action was restored to the active docket in in January of 2019. BEC and Lucas Tree renewed their motions for summary judgement, again based in part on the grounds that Lofton lacked standing to pursue her claim because she did not own the real property at issue and was not a real party in interest. R. pp. 89; 94-106; 107-120.

The motions for summary judgment were heard by the Honorable Jennifer B. McCoy on November 26, 2018. An hour before the start of the hearing, Lofton filed a one-page motion to amend “to change the named plaintiff in the lawsuit to the Trust for which the current Plaintiff is the trustee.” R. p. 121. Lofton also filed at that time a “Response to Defendants’ Motions for Summary Judgment” conceding that “she lacks standing to bring her claim in a personal capacity,” but arguing “that a simple amendment of the named Plaintiff would remedy this defect.” R. p. 123.

A Circuit Court “shall grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Wright v. PRG Real Estate Mgmt., Inc.*, 413 S.C. 276, at 279-80, 775 S.E. 2d 399, at 401 (Ct. App. 2015), *reh’g denied*, (Aug. 20, 2015}. The nonmoving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Id.* It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Id.* A grant of summary judgment must be affirmed where the nonmoving party fails to establish the existence of an element essential to the party’s case. *Id.* “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. More specifically:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP. Lofton filed no affidavits in opposition to the motions for summary judgement. In fact, she frankly admitted that she did not own the property and that she lacked standing to bring her claim in a personal capacity. R. p. 123. The Circuit Court therefore properly granted summary judgment on the issue. Rule 56(c) and (e), SCRCP

Lofton’s belated and unsupported motion to amend does not change the analysis under Rule 56, SCRCP. The conclusory arguments in her motion or by her counsel at the hearing are not facts and are insufficient to defeat summary judgment. *See Cobb v. Benjamin*, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997) (Absent a stipulation, a representation of fact by counsel in written briefs, memoranda, or made during oral argument may not be considered by the court where it is unsupported by the record.) Lofton’s bareboned motion to amend fails to address—much less explain—her years-long delay in moving to remedy the defect. While amendments “are favored and liberally allowed, circumstances *such as inexcusable delay*, surprise to the adverse party, or the like, may justify refusal to amend.” *Crowley v. Spivey*, 285 S.C. 397, 414, 329 S.E.2d 774, 784 (1985)(emphasis added). Moreover, pursuant to Rule 17(a), SCRCP, an action can be dismissed on the ground that it is not prosecuted in the name of the real party in interest where “a reasonable time has been allowed, after objection, for ratification, joinder, or substitution of, the real party in interest.”

Whether Lofton's extended delay was reasonable under Rule 17(a) was addressed by counsel at the hearing:

MR. RIBACK: Elizabeth Lofton in an individual capacity has filed a lawsuit against Berkeley Coop and John Lucas Tree Company. She's testified in her deposition that she does not own the land. It's rather a trust owns the land and she is the trustee of the alleged trust. So, our first argument in asking for summary judgment is that plaintiff does not have standing to bring this claim. She has suffered no injury. In fact, whether – rather if there is any injury it's the trust that's suffered under *Sea Pines v. DNR*. So, we'd ask that that it be dismissed as she lacks standing. Rule 17 goes to whether you should dismiss an action. Rule 17 is pretty clear and it says that it doesn't need to be dismissed until a reasonable time has elapsed. And the original complaint was filed January of 2016, we filed a motion for summary judgment telling him the plaintiff should have standing on October of 2016 and yet nothing has been done in two years. So, our first argument is that plaintiff lacks standing to bring this claim.

THE COURT: All right. ...

R. p. 155:1-20.

MR. WHITSITT: Pretty much everything he said is correct. So, the plaintiff is indeed -- the property itself is actually owned by a trust. And whoever brought this case first did not file it in the trust's name, and that was an error. ...

R. p. 157: 6-9.

Lofton's' counsel tried to argue that unspecified health issues prevented Lofton from responding to Petitioners' motions for summary judgment:

MR. WHITSITT: So, the plaintiff is indeed – the property itself is actually owned by a trust. And whoever had this case first did not file it in the trust's name, and that was an error. I have as of this day filed a motion to amend only to change the plaintiff's name -- or the named plaintiff to be the trust. In terms of authority that my client has to bring the lawsuit, she is indeed the trustee of the trust. She's also the executor of her mother's estate, which is where the trust comes from. So, there has been some issues with my client's health. She's been near death a couple of times now. So, that's why we haven't been able – I haven't been able to meaningfully consult with her regarding what she wanted to do about the trust. I think they thought when they originally filed this case that the trust would be wrapped up before this case went anywhere, but that is not what happened. And so, it is true, the trust is indeed – or the property is indeed owned by the trust but my client does have the right to bring that lawsuit on behalf of the trust as trustee. And so I simply ask the Court to allow her leave to amend to that effect....

R. pp. 157:7-158:1.

MR. POPE: Your Honor, there is no affidavit before you that the plaintiff has been [in] ill health that has somehow affected her ability

to proceed in this matter. There is no affidavit that attaches the trust that shows she has the authority to bring lawsuits, nothing, nada. ...

R. pp. 162:23-163:2.

MR. POPE: He's brought you not the first affidavit to support his position. He's known about their motion for -- since it was filed. Mine was filed in September. The timing in this case is now. There are no genuine issues of material fact. We ask that you grant the motion.

THE COURT: Mr. Whitsitt, he brings up a good point.

MR. WHITSITT: Yes, Your Honor.

THE COURT: About the affidavit, why hasn't that been filed?

MR. WHITSITT: Well, firstly, my client has just gotten out of the hospital yesterday, is my understanding. I am happy to supplement the Court with my affidavits immediately showing that she has the authority as the trustee....

R. pp. 163:15-164:3.

Rule 56(f), SCRPC, allows a Circuit Court to defer or even deny entry of summary judgment based on an affidavit explaining why the party "cannot present by affidavit facts essential to justify [her] opposition" to the motion. However, "the rule does not apply in the situation presented where no affidavits were filed whatsoever." *Doe ex. Rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E. 2d 854, 857 (2001). Lofton failed to provide an affidavit explaining her extended delay in moving to amend or explaining why she could not present such an affidavit. Counsel's

late offer to “supplement the Court” with affidavits fails to comply with the requirements of Rule 56(f).³

As the hearing progressed, Judge McCoy made it clear that she would not rule on Lofton’s motion to amend:

MR. WHITSITT: At a certain point, the only real issue before my client in this Court that would actually prevent her legally from bringing this case is her standing issue. And really all we can do, Your Honor, is ask that it’s in your sound discretion that she be allowed to amend it.

THE COURT: Well, I really don’t think that a motion to amend is properly before this Court at this time. Certainly -- ---

MR. WHITSITT: It’s not at this time, no.

THE COURT: Certainly the other parties would need to receive notice and an opportunity to prepare for such a hearing.

MR. WHITSITT: Absolutely, and I will ---

THE COURT: So, I’m not prepared today to really move forward and make any kind of a ruling on that. ...

R. p. 165:3-17.

Lofton failed to properly oppose the motions for summary judgment and, pursuant to Rule 56, SCRCF, BEC and Lucas Tree were entitled to summary judgment. On February 22, 2019, the Circuit Court issued an order granting summary judgment against Lofton on the grounds that she lacked standing as a real party in interest. Suppl. R. pp. 21-24. During that thirteen-week period—

³ Lofton failed to provide any such affidavits.

from the hearing on the motions to the issuance of the order—Lofton made no effort to get her motion to amend before any judge for a hearing. Lofton failed to designate her motion to amend as a “priority matter” under Rule 40(a)(2), so the matter had no preference on the motion calendar and sat, along with dozens of other motions, waiting for a hearing slot on the Charleston County motions roster. The supplemental affidavits Lofton’s counsel promised to provide to the Court never materialized. Because Lofton failed to get her motion to amend scheduled for a hearing, BEC and Lucas Tree never had to file any affidavits in opposition to her motion. *See* Rule 6(d), SCRCP.

On March 4, 2019, Lofton filed a three-page motion for reconsideration of the Circuit Court’s grant of summary judgment.⁴ R. pp. 140-142. Lofton’s first argument was that she did have standing as the real party in interest. R. p. 140. That contention is nonsense, because Lofton conceded this issue in her “Response” and multiple times during the hearing. R. pp. 123; 157:21-24; 164:10-11; 165:3-5.⁵ Next, Lofton argued that the Circuit Court analyzed “whether she would have standing as personal representative of her mother’s estate and not as to whether she had standing as Successor Trustee.” R. p. 140. The order granting summary judgment does not mention, much less rely on, whether Lofton had standing based on her role as the personal

⁴ Lofton’s notice of motion and motion purports to seek relief from the order granting summary judgment “pursuant to SCRCP 59 and 60.” However, her notice further states: “Specifically, the Plaintiff will request reconsideration of the order.” Lofton’s motion makes no reference to any clerical mistakes under Rule 60(a) or mistakes based on excusable neglect, newly discovered evidence, fraud, etc., under Rule 60(b), SCRCP, and she filed no affidavits or other materials supporting such claims.

⁵ In its unpublished decision, the Court of Appeals agreed, citing *Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E. 2d 617, 619 (Ct. App. 1986); *King v. Daniel Int’l Corp.*, 278 S.C. 350, 354, 296 S.E. 2d 335, 337 (1982) The Court of Appeals also rejected this argument on the ground that it was raised for the first time in Lofton’s motion to reconsider and was not preserved for review, citing *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177 S.E.2d 567, 570 (2009).

representative of her mother's estate or as Successor Trustee. *See* Supplemental Record, pp. 21-24. Summary judgment was based on Lofton's allegation that she personally owned the real property at issue. R. p. 2, ¶5; p. 17, ¶ 6.

Lofton next argued that "simple amendment of the named Plaintiff would remedy any defect" and that her motion to amend "is properly before the court." R. p. 141. But Lofton then asserted that "amendment was not necessary" because she had statutory standing as the Successor Trustee under § 62-7-816(24) of the South Carolina Probate Code. R. p. 141. Lofton cannot have it both ways—that amendment is not necessary," but that it was prejudicial error for the Circuit Court's to deny her late-filed Motion to Amend. Lofton bears the burden of demonstrating that the Circuit Court's error was prejudicial, and "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). The Circuit Court's decision on the merits was that Lofton did not have standing as a real party in interest because she did not own the real property at issue. Suppl. R. pp. 22-24. Lofton conceded that she did not have standing as a real party in interest. R. pp. 123; 157:21-24; 164:10-11; 165:3-5. Lofton conceded that her motion to amend was not properly before the Circuit Court. R. p. 165:8-20. Lofton failed to provide any affidavits in support of her motion. In the ensuing weeks, Lofton failed make any effort to get her motion scheduled for a hearing. In granting summary judgment, the Circuit Court tacitly denied Lofton's tardy and unsupported motion to amend.

Lofton failed to raise any issues or point to any facts that the Circuit Court could properly consider, much less *re*-consider, in its determination that she lacked standing as a real party in

interest. A party cannot use a motion to reconsider, alter, or amend a judgment to present an issue—i.e., the reasons for Lofton’s extended delay in remedying her defective standing—that could have been raised prior to the judgment but was not so raised. *See, e.g., Kan Enterprises, Inc. v. S.C. Dept. of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017) *reh’g denied* (Sept. 22, 2017); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). Further, even if Lofton had been permitted to argue on reconsideration that her years-long delay in moving to amend was reasonable under Rule 17(a), SCRCP, she failed to file any affidavits to establish that fact with her motion. When a motion is to be supported by an affidavit, the affidavit shall be served with the motion. Rule 6(d), SCRCP.

The Circuit Court could not reconsider factual issues that were never presented at the initial hearing, or during the 13-week period from the hearing to the grant of summary judgment, or ten days later when she filed her motion for reconsideration. Rule 59(f), SCRCP, grants the Circuit Court’s discretion to decide Lofton’s motion for reconsideration without oral argument. *See, Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534, 536 (Ct. App. 1994). The Court of Appeals’ ruling that the Circuit Court failed to exercise its discretion is therefore incorrect. The Circuit Court properly granted summary judgment and properly denied Lofton’s motion for reconsideration, and in doing so properly denied Lofton’s late and unsupported motion to amend.

II. THE COURT OF APPEALS ERRED IN REMANDING THE CASE ON THE GROUNDS THE CIRCUIT COURT FAILED TO RULE ON RESPONDENT’S LAST-MINUTE MOTION TO AMEND.

In support of its decision to reverse and remand, the Court of Appeals relies on *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). *Skydive* involved a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim. Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the

underlying merits of the claim. *Id.*, 180. The motion was made early in the action and after a hearing, the circuit court asked for proposed orders from the parties. *Id.*, 179. Plaintiff Skydive submitted two proposed orders and “each time, Skydive requested in writing it be allowed leave to amend its complaint to cure any pleading defects....” *Id.* As stated by the majority in *Skydive*, “[w]hen the Circuit Court finds a complaint ‘fails to state a facts sufficient to constitute a cause of action under Rule 12(b)(6),’ the court should give plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.” *Id.*, 179-180. Based on this, the Court ruled that the circuit court erred by dismissing the action with prejudice and failing even to consider allowing Skydive to amend its complaint. *Id.*, 180.

The *Skydive Myrtle Beach* decision is inapposite. The subject action does not involve a Rule 12(b)(6) motion, and there is no right to amend as a matter of course prior to the grant of a motion for summary judgment. The motion to dismiss in *Skydive* was based on the technical requirements of the South Carolina Tort Claims Act, not on a lack of standing as a real party in interest and its corresponding requirement that any defect under the rule be cured within a reasonable time after notice. *See* 17(a), SCRCF; *Id.*, 184-185. Further, as indicated above, there the plaintiff requested leave to amend to the circuit court in the opening stages of the case, not at a hearing for summary judgment, years after defendants’ objection to the standing defect. *Id.*, 179.

The decision by the Court of Appeals ignores *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). There, the plaintiff continued to maintain her legally flawed position after her real party status was challenged by Defendants on summary judgment rather than promptly and specifically seeking to change status through ratification, joinder or substitution. *Id.*, 241-242. This Court upheld the circuit court’s grant of summary judgment, concluding that “ultimately, the circuit court is not responsible for doing the

plaintiff's work, and the burden of compliance with Rule 17(a) and its real party and interest requirement falls to the plaintiff." *Id.*, 241.

Here, Lofton continued to claim ownership of the real property for years after Petitioners first moved for summary judgment. After Respondents objected to her standing by filing motions for summary judgment in in 2016, Lofton failed to take proper steps within a reasonable time to rectify the defect. Lofton has never presented affidavits explaining her extended delay or explaining why she could not provide such affidavits. Lofton argued that she had statutory standing and, later, that amendment was not necessary. On appeal, Lofton expanded her arguments by claiming that she had Constitutional standing. It was Lofton's burden to ensure that she was in compliance with the requirements of Rule 17(a), SCRCP. *Id.* She failed to carry that burden and the Circuit Court therefore acted within its discretion in granting summary judgement.

Remanding the case solely to enable Lofton to pursue a belated motion to amend serves no legitimate purpose. The Court of Appeals' decision misplaces the burden of assuring Rule 17(a) compliance on the Circuit Court, unfairly penalizing Petitioners and unjustly rewarding Lofton for her lack of diligence. The ruling by the Court of Appeals should be reversed and the Circuit Court's grant of summary judgment should be affirmed.

Finally, BEC hereby adopts and incorporates by reference the arguments and authorities in Petitioner John Lucas Tree Expert, Co.'s Petition to the extent they are not inconsistent with the arguments and authorities set forth herein.

CONCLUSION

For the reasons stated above, BEC respectfully requests the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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