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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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Table of Contents

COUNTER-STATEMENT OF THE 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 Respondent was named in her individual capacity instead of as Trustee and Beneficiary of the Trust in the original Complaint, Respondent argued at the summary judgment hearing citing multiple ways she had standing, and Respondent argued, in the alternative, the Circuit Court should grant leave to amend the Complaint to reflect the correct capacity.

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 the Appellant offered no proof that he would be prejudiced by an amendment, was on notice of the facts contained in the amendment for years, and the Circuit Court granted summary judgment with no analysis in the Order Granting Summary Judgment as to whether granting leave to amend was considered.

COUNTER-STATEMENT OF THE CASE

Respondent Elizabeth Lofton ("Lofton") commenced this action by filing a complaint against Berkeley Electric Cooperative, Inc., ("BEC") on July 1, 2015. R. pp.1-11. Lofton alleged that she was the owner of a piece, parcel or tract of land located in Charleston County, South Carolina and that BEC had fraudulently obtained a right-of-way easement over said property, proceeded to trespass on her property, convert her personal property, cut her timber, and engaged in unfair trade practices. *Id*. Lofton amended her complaint on January 19, 2016 to add John Lucas Tree Expert, Co., ("Lucas Tree") as a defendant. R. pp. 12-28. BEC answered Lofton's amended complaint on February 8, 2016, and Lucas Tree filed its answer on March 14, 2016. R. pp. 29-50. The Parties entered into a Consent Scheduling Order, which was filed on July 5, 2016. R. pp. 51-52. The Consent Scheduling Order required all discovery be completed by February 15, 2017, with a trial not before April 1, 2017. *Id*.

On July 7, 2016, Lofton was deposed and explained the property at issue was owned by the Irene N. Lofton Revocable Living Trust (the "Trust). R. pp. 127-128. On October 3, 2016, Lucas Tree moved for summary judgment arguing mainly that Lofton lacked standing in her

individual capacity to bring this claim. R. pp. 53-77. BEC also filed a Motion for Summary Judgment, adopting the arguments made by Lucas Tree. R. p. 78.

On October 28, 2016, a Consent Order was filed removing the case from the General Docket under Rule 40(j), SCRCP. R. pp. 79-83. On September 28, 2017, Lofton moved to restore the case to the active docket. R. pp. 85-87. The matter was restored on January 24, 2018. R. pp. 89-90.

On August 31, 2018, Lucas Tree moved for summary judgment a second time, arguing that Lofton had no standing to bring the suit in her individual capacity. R. pp. 91-92; R. Supp. pp. 1-20. BEC also moved for summary judgment a second time. R. pp. 107-120.

On November 26, 2018, Lofton filed a Motion to Amend her Complaint "to change the named Lofton in the lawsuit to the Trust…" R. pp. 121-122. Also filed on November 26, 2018 was the 14-page document, Plaintiff's Response to Defendant's Motions for Summary Judgment, in which Lofton raised the issue of a curative amendment in the alternative. Also on November 26, 2018, after filing the Motion to Amend her Complaint, but prior to receiving a notice of hearing or having a chance to serve opposing counsel with such, the parties' arguments regarding the Motion for Summary Judgment were heard by the Honorable Jennifer B. McCoy. At the hearing, Lofton's counsel argued that standing was proper. R. pp 157 - 158. Lofton's counsel also argued in the alternative, that if the Court found standing improper, the Court should grant leave to amend the Complaint rather than dismissing the action altogether in order to amend any perceived defect. R. pp. 164-166. Lofton's counsel acknowledged that the just-filed Motion to Amend was not properly before the Court at that time, but repeatedly requested leave of the court to amend the Complaint during the hearing to conform with the facts of the case. R. pp. 164-166. The Circuit Court refused to make a determination regarding leave to amend the Complaint

during the hearing and did not make any mention of considering amendment in the Order Granting Summary Judgment, filed February 22, 2019. R. pp. 165 ("I'm not prepared today to really move forward and make any kind of ruling on that."); R. Supp. pp. 21-24. Lofton moved to reconsider the Order pursuant to Rules 59 and 60, SCRCP. R. pp. 139-142. The Circuit Court denied Lofton's Motion to Reconsider in a Form 4 Order filed March 6, 2019, (R. p. 143) and Lofton timely appealed to the Court of Appeals.

The Court of Appeals did not address the substance of the standing issue but ruled in an unpublished opinion that the Circuit Court abused its discretion by failing to decide Lofton's Motion to Amend and remanded to the Circuit Court for it to consider her Motion to Amend. Petitioners each moved for Rehearing, which was denied on March 24, 2022.

ARGUMENT

I. The Court of Appeals did not err in remanding the case because the Circuit Court failed to rule on Respondent's Motion to Amend.

A writ of certiorari will only be granted where there are special and important reasons, such as: (1) Where there are novel questions of law. (2) Where there is a dissent in the decision of the Court of Appeals. (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. (4) Where substantial constitutional issues are directly involved. (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242 SC Rules of Appellate Practice. Petitioners argue that the reversal of the trial court was error because the Respondent lacked standing as a real party in interest through a technicality rather than merit. They further point to the fact that she failed to file any affidavits, but the record is clear that Respondent not only filed portions of deposition transcripts, but has maintained that she has both constitutional and

statutory standing throughout the proceedings. The Court of Appeals, with no dissent, rejected Petitioner's arguments that they were entitled to summary judgment and further concluded, that: "the circuit court abused its discretion in failing to rule upon the pending motion (to amend).". It is well-settled that the Rules of Civil Procedure, both the Federal and South Carolina versions, are rules intended to allow litigants to settle controversies on their merits rather than to grant dismissal due to procedural technicalities. *See Patton v. Miller*, 420 S.C. 471, 492 (2017) ("Today, however, we operate under the far more flexible notice pleading provisions of the rules of Civil Procedure… Disallowing the amendment draws us back to the technical pitfalls of code pleading we through we escaped in 1985 when we adopted the Rules"); *See also* 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed. 2015) ("The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."); *and Foman v. Davis*, 371 U.S. 178 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."). "The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (*quoting* FRCP 1) (Quoted phrase is identical to SCRCP 1).

Under Rule 15(a), SCRCP, "leave shall be freely given when justice so requires and does not prejudice any other party." Under *Foman*, "this mandate is to be heeded." 371 U.S. at 182. Leave to amend should be "freely given" in the absence of any apparent or declared reason. *Id*.

In *Patton v. Miller*, Plaintiff brought a claim for her daughter's medical expenses in her representative capacity as her daughter's next friend rather than in her own capacity. 420 S.C.

471 (2017). Defendant moved for dismissal in *Patton* due solely to the capacity issue. *Id*. "It is the same claim asserted by the same person in a new capacity." *Id*. at 497. The *Patton* Court ruled that dismissal was improper because the Rules of Civil Procedure heavily favored amendment. "The purpose of this provision is to avoid precisely what occurred here – the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits." *Patton*, 420 S.C. at 488. The same decision was reached in *Patton* regardless of whether the Court analyzed the issue under Rule 15 or Rule 17. *Patton*, 420 S.C. at 489. ("[W]e reach the same conclusion under Rule 15 that the circuit court should have reached under Rule 17.").

"Rule 15(a) has consistently been interpreted by the federal courts to strongly favor amendments 'where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed.'" *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 506 (1988) (quoting 3 J. Moore, *Moore's Federal Practice* Section 15.08 at 15-49 (2d ed. 1987)). Prior to the adoption of the South Carolina Rules of Civil Procedure, South Carolina courts have construed former Section 15-13-920 to require pretrial amendments to pleadings to be freely granted unless a circumstance exists to justify refusal. *See Smith v. Traxler*, 224 S.C. 290 (1953); *Braudie v. Richland County*, 217 S.C. 57 (1950).

In *Forrester v. Smith & Steele Builders, Inc.*, Forrester brought suit to enjoin Builders from completing and occupying a structure, among other allegations. 295 S.C. 504, 505 (1988). After the trial judge granted summary judgment, Builders appealed, and the Court of Appeals reversed. *Id*. After remand, Forrester moved to amend his complaint to add the tenants of the building as defendants and to seek monetary damages from the City. *Id.* at 506. Although the City argued it would be prejudiced because "the action has been pending for over two years and

the amendment would unduly delay a trial of the case," additional discovery would be required, and additional pleadings and motions would have to be filed. *Id*. at 508 The motions were denied. *Id.* at 506. Forrester again appealed, and the Court of Appeals again reversed the trial court's decision, emphasizing the prejudice element in interpreting Rule 15, SCRCP. *Id.* at 507. "Federal Rule 15 'evinces a bias in favor' of granting amendments and 'unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.'" *Id.* (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). "It is the responsibility of a party opposing an amendment to establish prejudice." *Shelton v. Southern Ry. Co.*, 86 S.C. 98, 67 S.E. 899 (1910).

Similarly, to *Forrester*, here, Petitioners oppose amendment to Respondent's Complaint after approximately a two-year period. However, although a significant period of time has passed since the filing of the Complaint, Petitioners have shown no way that they would be prejudiced if leave is granted for an amendment. In fact, Petitioners themselves have known about the facts contained in the amendment since prior to the filing of their Motions for Summary Judgment, when Lofton was deposed in July of 2016: the fact that the Trust owns the property in question and Lofton is the Trustee of the Trust. Petitioners have been on notice of these facts for a significant period of time. Additionally, even if the Petitioners believe additional discovery costs would be incurred or additional motions or pleadings would be required, as in *Forrester*, that is simply not enough to constitute prejudice enough to deny a motion to amend.

Finally, "Delay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice." *Forrester*, 295 S.C. at 508. Even in *Howey v. United States*, where a motion to amend was submitted five years after the action commenced and on the second day of trial, denial of the

motion to amend was improper because there was no evidence of prejudice to the non-moving party. 481 F.2d 1187 (9th Cir. 1973) (referenced in 295 S.C. 504 (1988)).

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182. The Petitioners have not and cannot show any prejudice would be incurred by virtue of allowance of the amendment, the only other reason the Circuit Court could have denied leave to amend would be due to "futility of amendment" where the amendment would make no difference in whether a genuine issue of material fact existed at that point in the litigation. Given the facts in this case, Lofton's proposed amendment clearly mattered and respondent should prevail on the merits. These Petitioners have made no demonstration that there are novel questions of law at play in this case nor have they identified where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. They have not shown where substantial constitutional issues are directly involved nor have they identified where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. All of the failures to comply to rule 242 listed above, along with the fact that this case has no dissent should strongly influence the court to deny certiorari.

II. The Court of Appeals did not err in reversing the Circuit Court's grant of summary judgment.

Summary judgment shall be granted under Rule 56(c), SCRCP, where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law." Facts and inferences must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490 (1994).

At the hearing for the motion for summary judgment, Lofton argued she had standing in her capacity as Trustee and as executor of her mother's estate and that the Complaint was proper. In the alternative, Lofton argued if the Court found she had no standing in her individual capacity, that leave to amend should be granted. In either situation, facts were presented that indicated a genuine issue of material fact was present at this point in the litigation.

Plaintiff's Response to Defendants' Motions for Summary Judgment addresses the genuine issues of material fact that existed at that point in the litigation, including whether or not the Plaintiff has produced evidence to support whether or not the Defendants had a valid easement and whether or not they violated said easement and/or caused damage to Plaintiff's property by way of negligence or any other theory. Specifically:

> Plaintiff can demonstrate the following: 1) That she did not give them express permission to the extent which they Defendants claim and that she never would have given them permission for the easement that was recorded (Plaintiff Dep. 5:4-16); 2) That Defendants in fact had no right at all to cut any trees (Plaintiff Dep 9:6-12 & 9:14-25); 3) That the Defendants in doing so actually went beyond the bounds even of the easement that was recorded (Plaintiff Dep 9:14-25); 4) That they cut the trees in such a way that large pines and oaks fell back into the property causing damage (Plaintiff Dep 9:14-25); 5) That the easement was obtained by Defendant BEC in an underhanded and deceitful manner which would constitute fraud and fraudulent inducement. (Plaintiff Dep. 20:3-25) and 6) That the Plaintiff instructed the Defendants to stop all work and they ignored her; Plaintiff Dep. 23:12-19)

Even at the hearing for the motion for summary judgment, Petitioners were never entitled to summary judgment and based on the argument presented above, if the Court found Lofton did not have standing in her individual capacity, summary judgment should not have been granted and leave to amend the complaint should have been given, if not at the motion for summary

judgement hearing, then certainly upon the motion for reconsideration, as the Court of Appeals held. However, if Lofton had standing in her individual capacity, then summary judgment was improper and an amendment was not required.

CONCLUSION

The Court of Appeals did not err in remanding the case on the grounds the Circuit Court failed to rule on Respondent's motion to amend, nor did it err in reversing the Circuit Court's grant of summary judgment where the Petitioners failed to demonstrate any special reason that they are entitled to a writ of certiorari and instead rely on arguments centered around Respondent's standing, which is undeniable. For these reasons, Respondent request that this Court deny Petitioner Lucas Tree and Petitioner BEC's Petitions for a writ of certiorari.

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