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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
REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT

Pursuant to Rule 242, SCACR, Petitioner Berkeley Electric Cooperative, Inc., (“BEC”) submits this Reply to Respondent Elizabeth Lofton’s Return to Petition for Writ of Certiorari.

Lofton’s “Counter-Statement of the Questions Presented for Review” exemplifies her fundamental misunderstanding of the issues in this case. The first question, according to Lofton, that the Court should consider is

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.*

Respondent’s Return, p. 2 (italics added).

Lofton admitted that she did not have personal standing to bring her claims. R. pp. 123; 157:7-9, 21-24; 164:10-11; 165:3-5. In its unpublished opinion, the Court of Appeals ruled that Lofton failed to raise whether she had statutory standing or constitutional standing, and that she “repeatedly conceded that she lacked standing in her personal capacity during the summary judgment hearing and in her response to [Petitioners’] motions for summary judgment.” *Elizabeth Lofton v. Berkeley Electric Cooperative, Inc., and John Lucas Tree Expert Co.*, Unpublished Opinion No. 2022-UP-089 (S.C. Ct.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.) Lofton’s suggestion that the Court should now rehash whether she qualified as a real party in interest—despite her repeated concessions on the issue—is absolute nonsense.

Likewise, it is absurd for Lofton to contend that remand is proper simply because she “argued in the alternative” for leave to amend. Lofton conceded at the summary judgment hearing that her Rule 15 motion to amend was not properly before the court, and the Circuit Court made it

clear that it would not, indeed could not, properly consider her late-filed motion to amend. R. pp. 165:8-17; 167:8-10. Rule 17(a), SCRCPP, not Rule 15, governs Lofton's attempt to substitute the trust in her place as the real party in interest. *See* Rule 17(a), SCRCPP. As set forth below in Section I, Lofton failed to comply with the requirements of 17(a) and the Court of Appeals erred in reversing summary judgment.

The second question, in Lofton's view, that the Court should consider is

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.*

Respondent's Return, p. 2 (italics provided).

Presumably, Lofton means the *Petitioners* offered no proof that they would be prejudiced by an amendment. Lofton filed her one-page motion to amend shortly before the summary judgment hearing, without any supporting affidavits and then, in the weeks leading up to the Court's grant of summary judgment, failed to take any steps to supplement her motion or get the matter scheduled for a hearing. R. p. 121; Suppl. R. p. 21. *Petitioners* had no obligation to do anything in response to Lofton's motion unless and until a hearing was set. *See* Rule 6(d), SCRCPP.

In her motion for reconsideration, Lofton argued that her motion to amend was "properly before the court" and that she should be allowed to amend, "if the court deems necessary." R. p. 141. Lofton then asserts that she "would show that Amendment is not necessary." R. p. 141. But Lofton had conceded to the Circuit Court that her motion to amend to substitute the trust was not before the court. R. pp. 165:8-11. She failed to file any affidavits or materials in support of her motion to amend in compliance with Rule 17(a), SCRCPP. Neither Lofton's motion to amend

nor her Rule 59(e), SCRCP, motion for reconsideration identify any facts supporting her last-minute effort to substitute the trust under Rule 17(a), SCRCP.

It is immaterial whether Petitioners were “on notice” that Lofton was not a real party in interest—Lofton knew *from the very beginning* that she did not own the property at issue. Petitioners filed motions seeking summary judgment on Lofton’s standing in the fall of 2016. R. pp. 53-78. Lofton did nothing to remedy her defective standing for another two years, and then only took action months after Petitioners moved, again, for summary judgment in 2018. The Circuit Court’s order granting judgment did not analyze “whether granting leave to amend was considered” because Lofton failed to get her motion scheduled for a hearing prior to its grant of summary judgment and failed to submit anything substantive in support of her motion to amend for it to consider. “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 in interest requirement falls to the plaintiff.” *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018).

I. LOFTON IGNORES RULE 17(A), SCRCP.

Lofton’s reliance on Rule 15, SCRCP, and her citation to case law expounding on that rule is misplaced. *See* Return, pp. 5-8. It is axiomatic that to have standing, one must have a personal stake in the subject matter of the lawsuit; i.e., one must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm’n.*, 336 S.C. 174, 181, 519, S.E. 2d 567, 571 (1999) (citations omitted). The question of who may bring a civil action arises under Rule 17(a), SCRCP, which provides, “Every action shall be prosecuted in the name of the real party in interest.” *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 238, 811 S.E.2d 740. Lofton claimed in her original complaint filed in 2015 and in her amended complaint filed in 2016 that

she was the owner of the property at issue. R. p. 2, ¶ 5; p. 17, ¶ 6. Lofton has since conceded that she does not, in fact, own the property and that it is owned by a trust. R. pp. 157:21-24; 164:10-11; 165:3-5. Rule 17(a), not Rule 15, SCRPC, governs disputes over real party status and the procedural remedies available.

More specifically, Rule 17(a) provides:

... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 17(a), SCRPC. As stated in the Reporter's Note for the rule:

This Rule 17(a) is current Federal Rule 17(a). ...The last sentence of the rule [above] is intended to prevent forfeiture in those cases in which the determination of the proper party is difficult or there has been an honest mistake.

SCRPC Rule 17, Reporter's Note. *See also, Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377, at 380 (1994); *Fisher ex rel. Estate of Shaw-Baker v. Huckabee, supra*, 422 S.C. at 239, 811 S.E.2d at 741.

In the *Fisher ex rel. Estate of Shaw-Baker v. Huckabee* case, this Court affirmed a grant of summary judgment to defendants on the grounds that the plaintiff was not the real party in interest. *Id.*, 236-240. Plaintiff, as the purported "real representative" in an estate action, continued to maintain her legally flawed position action 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. In affirming the dismissal, the Court concluded 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.

In *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), the mother sued certain medical providers as “the next friend” of her daughter. Defendants moved for partial summary judgment arguing that the mother, suing as the daughter’s representative, could not recover her daughter’s medical expenses because the parents were legally responsible to pay those expenses until she turned 18. *Id.*, 420 S.C. at 477-479, 804 S.E.2d at 255-266. One month later, plaintiff not only opposed summary judgment but also filed a timely motion to amend her complaint. *Id.* This Court found that “while Patton did not specifically rely on Rule 17 in her motion, she did specifically ask to take advantage of each of the three provisions contained in Rule 17(a) to address the alleged failure to bring a claim by the correct party: “ratification, joinder, [and] substitution.”¹ *Id.*, 420 S.C. 471, 481, 804 S.E.2d 252, 269.

Other than *Fisher ex rel. Estate of Shaw-Baker v. Huckabee* and *Patton v. Miller, supra*, there appears to be no other South Carolina authority addressing the Rule 17(a) proscription against dismissal “until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of the real party in interest.” Rule 17(a), SCRCP. Because our Rule 17(a) is the same as the Federal rule, South Carolina courts look to Federal caselaw for guidance. *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), citing *Gardner v. Newsome Chevrolet–Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the Federal rules.”)

¹ Patton attempted ratification by assigning and waiving her right to recover tort-related pre-majority medical expenses in favor of her child in her motion for reconsideration; she attempted joinder/substitution by attaching a proposed amended pleading to her motion to amend that changed her capacity from “next friend” to her individual capacity. See *Patton v. Miller*, 420 S.C. at 488, 804 S.E.2d at 261. Lofton failed to take any such steps.

Federal courts have long held that when the determination of the proper party is not difficult and when there has been no understandable mistake, dismissal is warranted under Rule 17(a). *See, e.g., Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (District Court retains discretion to dismiss action where there was no reasonable basis for naming incorrect party); *Feist v. Consolidated Freightways Corp.*, 100 F.Supp.2d 273, 276 (E.D. Pa. 1999), *aff'd*, 216 F.3d 1075 (3d Cir. 2000) (“When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed.”); *Triple Tee Golf, Inc. v. Nike, Inc.*, 511 F.Supp.2d 676, 701 (N.D. Tex. 2007) (“To avoid dismissal, therefore, a plaintiff who is not the real party in interest must show, first, that he sued in his own name based on an understandable mistake and, second, that he did not have a reasonable time to correct the pleading deficiency.”); *see also, Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 563 (3d Cir. 2008); *U.S. for Use & Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070, 1075 (9th Cir. 1989); 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane *Federal Practice & Procedure: Civil* 3d § 1555 (3d ed. 2002).²

Moreover, Federal Courts have routinely ruled that the failure to remedy a defective real party in interest within a reasonable time after notice also warrants dismissal under Rule 17(a). *See, e.g., NCUA Bd. v. U.S. Bank Nat’l Ass’n*, 898 F.3d 243, 258 (2nd Cir. 2018) (Rule 17 dismissal not an abuse of discretion where plaintiff waited for over a year after the defendants’ objection to move to correct the named plaintiff to reflect the real party in interest); *Kuelbs v. Hill*, 615 F.3d 1037, 1043 (8th Cir. 2010) (Rule 17 dismissal affirmed based on the plaintiff’s failure to correct his pleadings to reflect the real party in interest six months after an objection was raised); *Triple*

² Decisions whether to dismiss pursuant to Rule 17(a) are reviewed under an abuse of discretion standard. *Commonwealth Pub. Sch. Employees’ Ret. Sys. v. Morgan Stanley & Co.*, 814 F.3d 641 (2nd Cir. 2016); *Esposito v. U.S.*, 368 F.3d 1271 (10th Cir. 2004)

Tee Golf, Inc. v. Nike, Inc., 511 F. Supp. 2d at 702 (N.D. Tex. 2007) (Rule 17 dismissal proper where plaintiff failed to move to correct its pleadings to reflect the real party in interest in a reasonable time after defendants first raised an objection and, further, the plaintiff “consciously chose not to do so notwithstanding repeated reminders”); *Metal Forming Techs., Inc. v. Marsh & McLennan Co.*, 224 F.R.D. 431, 437-438 (S.D. Ind. 2004) (Plaintiff’s failure to address the real party in interest issue 14 months after it was raised by defendant in its answer and four months after summary judgement motion was filed was unreasonable under Rule 17(a)).

In her Return, Lofton fails to point to anything in the record showing that she met her burden of complying with the requirements of Rule 17(a), SCRPC. Indeed, Lofton barely addresses Rule 17(a) at all—she mentions the rule once in her brief, and then only in passing. Return, p. 6. It was not difficult, by any measure, to determine that the trust owned the property at issue and was the proper real party in interest. *See* Reporter’s Note, Rule 17(a), SCRPC, and Federal authorities, *supra*. Lofton failed to submit anything that would establish her failure to name the trust was an honest and understandable mistake. *Id.* Lofton’s delay of over two years after notice of Petitioners’ objections, compounded by her continued insistence that she has standing, is manifestly unreasonable.³ *Id.*; *see also* R. pp. 140-141; Return, pp. 2, 4, 9, 10.

II. LOFTON’S COUNTER-STATEMENT OF THE CASE MISSTATES AND MISCONSTRUES THE RECORD.

Lofton implies that Petitioner’s motion for summary judgment was prematurely heard after she filed her motion to amend:

Also on November 26, 2018, after filing the Motion to Amend her Complaint, but prior to receiving 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.

³ Lofton seeks leave to amend her complaint to “change the named Plaintiff to the Trust”—but only if she loses on her claims of standing. *See* R. p. 121; p. 140-141; Return, p. 9-10.

Return, p. 3. Petitioners filed their (second) motion for summary judgment challenging Lofton’s capacity as a real party in interest in August and September of 2018. R. pp. 94, 110. Lofton did not file her motion to amend until an hour before the start of the hearing on Petitioners’ motions. R. pp. 121, 154. To the extent Lofton did not receive a notice of hearing on her Motion to Amend or have an opportunity to serve Petitioners with notice before the hearing on summary judgment, it was the direct result of her extended and unexplained delay in filing the motion.

Lofton next contends that, at the hearing on Petitioner’s motion for summary judgment, “[her] counsel argued that standing was proper. R. pp. 157-158.” Return, p. 3. As previously discussed, Lofton has repeatedly conceded that the trust was the real party in interest and that she lacked standing in her personal capacity. R. p. 123 (“Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity.”) R. p. 157:7-9 (“So, the plaintiff is indeed—the property itself is actually owned by a trust. And whoever had the case first did not file it in the trust’s name, and that was incorrect.”) R. p. 157:21-24 (“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 the trustee.”) R. p. 164:10-11 (“Otherwise, he is correct in terms of the fact that she simply lacks standing....”) R. (“At a certain point, the only real issue before my client in this Court that would actually legally prevent her from bringing the case is her standing issue.”) Lofton’s attempt to assert a position that is contrary to her concessions below should be rejected by the Court. *See Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986); *Daniel Int’l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982).

Lofton grudgingly acknowledges that her “just-filed Motion to Amend was not properly before the Court at that time” but then makes the claim that she “repeatedly requested leave of the court to amend the Complaint during the hearing to conform to the facts of the case.” Return, p.

3. Lofton cites to pages 164-166 of the Record but there is nothing there (or anywhere else in the transcript) that supports her claim. Further, Rule 15(b), SCRCF, covers two situations:

First, if an issue not raised by the pleadings is tried by consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings, the court may permit amendment of the pleadings subject to a right to grant a continuance, if necessary.

McMillan v. SC Dept. of Agriculture, 364 S.C. 60, 75, 611 S.E. 323, 331 (Ct. App. 2005). Neither situation applies in this case.

Lofton argues that “the Circuit Court refused to make a determination regarding leave to amend the Complaint during the hearing and did not mention considering amendment in the Order Granting Summary Judgment, filed February 22, 2019.” Return, p. 3-4. The Circuit Court did not *refuse* to make a determination on Lofton’s motion to amend. Lofton agreed that Petitioners that her last-minute motion was not properly before the court. R. p. 165:8-15. In the ensuing months, Lofton failed to take any steps to get her motion scheduled for a hearing and resolved before the Circuit Court finally granted summary judgment. Suppl. R. pp. 21-24. In granting summary judgment and then denying her motion for reconsideration, the Court effectively denied Lofton’s late and unsupported motion.⁴

Lofton asserts that “the Court of Appeals did not address the substance of the standing issue.” Return, P. 4. The Court of Appeals correctly ruled that Lofton had failed to preserve her claims of statutory standing and constitutional standing, and further observed that “Lofton repeatedly conceded that she located standing in her personal capacity during the summary judgment hearing and in her response to [Petitioners’] motions for summary judgment.” *Elizabeth*

⁴ The court can determine a motion for reconsideration without oral argument. Rule 59(f), SCRCF.

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.)

III. LOFTON FAILS TO ADDRESS THE ARGUMENTS RAISED BY
BEC IN ITS PETITION.

Lofton fails to address the arguments raised by BEC regarding the operation and effect of Rule 56, Rule 59(e), or Rule 17(a), SCRPC. Lofton fails to respond to BEC’s analysis that the Court of Appeals incorrectly relied on *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). Lofton fails to address BEC’s position that the Court of Appeals’ unpublished decision below conflicts with this Court’s ruling *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018). Lofton fails to show that she has complied with or is somehow excused from her obligation to satisfy the requirements of Rule 17(a), SCRPC. Lofton fails to point to anything in the record that would show that her years-long delay in seeking to “change the named plaintiff in the lawsuit to the trust” was reasonable under Rule 17(a).

Petitioners are not advocating a hyper-technical reading of some obscure rule to deprive Lofton of her claim. Lofton knew she did not own the property and stubbornly failed to remedy her defective standing. Lofton’s insistence that she be allowed to amend under Rule 15 while blithely ignoring the procedures and requirements of Rules 56, 59(e), and 17(a) is patently unreasonable and fundamentally unfair. Lofton first filed her complaint in 2015. Her failure to properly oppose Petitioners’ motions for summary judgment and her persistent refusal to comply with the requirements of Rule 17(a), SCRPC, has now wasted seven years. It is clear that Lofton was not a real party in interest. It is equally clear that Lofton failed to comply with the requirements of Rule 17(a) and make any showing that her delay in seeking to “change the named Plaintiff to the Trust” was reasonable. R. p. 121. See *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 therefore erred in reversing summary judgment and remanding this case for a hearing on her motion to amend.

Lastly, BEC hereby adopts and incorporates by reference the arguments in the Reply brief of Petitioner John Lucas Tree to the extent they are not inconsistent with the arguments 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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