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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)
Appeal No. 2022-000501

Elizabeth Lofton,.....Respondent,

v.

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

JOHN LUCAS TREE EXPERT, CO.'S REPLY TO PLAINTIFF'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioner John Lucas Tree Expert, Co. ("John Lucas Tree") submits this Reply to Respondent Elizabeth Lofton's Return to Petition for Writ of Certiorari. As an initial matter, it is unclear to which Petition Lofton is responding, as she alternates between the singular and the plural when referring to the Petition(s) filed by John Lucas Tree and Berkeley Electric Cooperative, Inc., and does not directly address any of the arguments raised in either Petition. Instead, Lofton's Return is little more than an attempt to reargue the summary judgment motion, asserting almost as an afterthought that the Petitions should not be granted. Indeed, Lofton completely fails to address in any way the novel and important question of law raised by John Lucas Tree, *i.e.*, whether a plaintiff, who has been on notice for over two years that she is not the real party in interest in this lawsuit can do absolutely nothing and, in a last-ditch effort to avoid summary judgment, file a motion to amend in an attempt to cure her standing problem. She also fails to address the fact that the Court of Appeals' Opinion No. 2022-UP-089 is in conflict with this Court's ruling in *Fisher v. Huckabee*, that "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." 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). In fact, Lofton does not address Rule 17, SCRCP, or *Fisher* at all.

I. Lofton misconstrues the facts and procedural history of this case.

Starting with her Counter-Statement of the Questions Presented for Review, Lofton mis-states and misconstrues the underlying facts and the procedural background of this case although, granted, at times it is difficult to discern exactly what she is arguing. With regard to her Counter-Statement, the Court of Appeals did *not* reverse the Circuit Court's grant of summary judgment

to Petitioners on any substantive grounds[1] as Lofton suggests but, instead, found that summary judgment was premature based on the Court of Appeals' (erroneous) determination that the Circuit Court had not, but should have addressed Lofton's request to amend her Amended Complaint.

Lofton maintains this misperception by arguing that the Court of Appeals "rejected Petitioners' arguments that they were entitled to summary judgment." (Return p. 5). Again, the Court of Appeals did not rule on the substance of whether Petitioners are entitled to summary judgment but, instead, reversed the grant of summary judgment, solely on the basis that, in the Court of Appeals' view, it was granted prematurely.

Next, Lofton attempts to characterize herself as a hapless victim of circumstances with respect to her failure to address her standing problem within a reasonable time, suggesting that "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." (Return p. 3). The dilemma in which Lofton currently finds herself is entirely of her own making: she purposefully filed a Complaint and then an Amended Complaint naming the wrong party in interest. She failed to correct this admitted error for over two years. Plaintiff's failure to move to name the real party in interest until the proverbial eleventh hour, and the lack of notice or alleged inability to properly consult with and serve opposing counsel all fall squarely on Lofton. *See Morrow v. Fundamental Long-Term Car Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (the plaintiff is the architect of her own complaint); *Fisher*, 422 S.C. at 241, 811 S.E.2d at 74 ("the burden of compliance with

[1] In this regard, Lofton's discussion of her opposition to the other grounds raised by Petitioners for summary judgment, (Return p. 9), is perplexing, as neither the Circuit Court nor the Court of Appeals addressed those issues, which remain pending.

Rule 17(a) and its real party in interest requirement falls to the plaintiff"). Moreover, as Berkeley County Electric noted in its Petition, Lofton failed to make any effort to have her Motion to Amend heard by a Judge, and failed to designate it as a "priority matter" under Rule 40(a)(2), SCRCP. Thus, the procedural dilemma in which Lofton found herself was entirely due to her own actions and failure to act within a reasonable time.

Lofton misconstrues Petitioners' arguments to this Court, suggesting that their argument is "that the reversal of the trial court was error because the Respondent lacked standing as a real party interest through a technicality rather than merit." (Return p. 4). While Lofton's statement is somewhat confusing, it is clear from a cursory reading of the Petitions that Petitioners' arguments are grounded in the Court of Appeals' error in remanding for the Circuit Court to decide Lofton's Motion to Amend. That motion was filed at the last minute and two years after objections had been raised. Lofton failed to take any step to have her Motion to Amend heard. Moreover, her request to amend was decided, at least implicitly, by the Circuit Court when it granted summary judgment to Petitioners. Indeed, Lofton confirms that she raised her request to amend her Complaint both in her opposition to summary judgment and in argument to the Circuit Court on November 26, 2018. (Return p. 3 (noting that she "repeatedly requested leave of the court to amend the Complaint"). Lofton specifically argued in her late-filed opposition to summary judgment that she "would show that a simple amendment of the named Plaintiff would remedy this defect. Plaintiff would request leave of the court to amend." (R. p. 123).

And, while Lofton's request to amend was denied implicitly, as is pointed out in *Dussouy v. Gulf Coast Inv. Corp.*, even with respect to Rule 15, "[t]he absence of an explanation of the denial need not always result in reversal," so long as the reasons are "readily apparent." 660 F.2d 594, 597 (5th Cir. 1981). Here, the over two-year unexplained delay between Petitioners'

initial objection and Lofton's first attempt to cure her standing issue is readily apparent, is patently unreasonable, as is explained below, and no further explanation by the Circuit Court was necessary. Thus, as the Circuit Court implicitly has denied Lofton's request to name the real party in interest, there is no point in remanding to the Circuit Court to have it rule again on this issue.

II. Lofton completely fails to address Rule 17, SCRCP, which controls the analysis of her motion to correct the real party in interest.

Understandably, Lofton focuses her argument solely on Rule 15, SCRCP, which she believes provides a standard she can meet. However, under well-established rules of statutory interpretation, which apply equally to the interpretation of court rules, *see*, *e.g.*, *South Carolina Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 519, 846 S.E.2d 861, 866 (2020) ("[i]n interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes"), where, as is the case here, "there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018); *see also Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015) ("[t]he general rule of statutory construction is that a specific statute prevails over a more general one"). Here, Rule 15 addresses motions to amend pleadings in general, whereas Rule 17 specifically addresses motions to amend the real party in interest, which is what Lofton was attempting to accomplish. (R. pp. 121, 123, 140-141, 157-158). As such, Rule 17, the more specific rule, prevails over Rule 15 and/or applies as an exception to or qualifier of Rule 15. Lofton's complete failure to even address Rule 17 serves as a concession of the validity of Petitioners position

regarding her failure to correct the party in interest within a reasonable time after objections were raised.

In any event, in order "[t]o 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 Elec. Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). The real party in interest "has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Anchor Points v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992).

Lofton has conceded she lacks standing to bring suit in her individual capacity.[2] (R. p. 157:6-9; *see also* R. p. 158:13-15 ("[s]he's really just improperly named in it as the plaintiff, and she should not be named as the plaintiff, the trust should"); R. p. 160:13-25 ("[s]o, in terms of the actual merits of summary judgment apart from the plaintiff's inability to bring the claim in a personal way …"); R. p. 164:10-12 (Plaintiff's counsel conceding defense counsel "is correct in terms of the fact that [Plaintiff] simply lacks standing …"); R. p. 166:18-20 ("[j]ust that, Your Honor, if—you know, whoever her attorney was originally that brought the case on behalf of her instead of the trust, that was in error …"); Plaintiff's Response to Motions for Summary Judgment, R. p. 123 ("Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity")).[3] Yet she did nothing for over two years after objection was raised and

[2] As was pointed out to the Court of Appeals, should Lofton prevail in her lawsuit as currently filed, any recovery would go to her directly and not to the Trust itself. *See* Brief of Respondent John Lucas Tree Expert, Co., p. 13, n.4. The Trust is intended to benefit not only Lofton but also her two brothers, in equal shares. (R. pp. 136, 147-149).

[3] Given Lofton's clear concession of this issue, her current attempts to characterize that position as merely an "alternative" argument, (Return pp. 9, 10), should be rejected. While she consistently has attempted to argue every possible position in the hope of untangling herself from this problem—which is entirely of her own making—she is bound by her prior assertions and the statements made by counsel. *See, e.g.*, *King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d

only on the afternoon of the summary judgment hearing, finally took steps to name the real party in interest as plaintiff.

There can be no legitimate dispute over whether Lofton failed to move within a reasonable time of being notified of the defect in her Complaint to correct the named plaintiff. For example, in *NCUA Bd. v. U.S. Bank Nat'l Ass'n*, the Second Circuit held that the plaintiff failed to move to correct the named plaintiff to reflect the real party in interest within a reasonable time where it waited for over a year after the defendants raised an objection. 898 F.3d 243, 258 (2nd Cir. 2018). In *Kuelbs v. Hill*, the Eighth Circuit upheld a dismissal based on the plaintiff's failure to correct his pleadings to reflect the real party in interest six months after an objection was raised. 615 F.3d 1037, 1043 (8th Cir. 2010). In *Weissman v. Weener*, the Seventh Circuit first held that the district court could move on its own to dismiss a complaint because the named plaintiff was not the real party in interest, and then affirmed the dismissal where, rather than addressing or correcting the real party in interest in an amended complaint filed three weeks after being advised of the problem, the plaintiff continued to assert himself as plaintiff. 12 F.3d 84, 87 (7th Cir. 1993); *see also Triple Tee Golf, Inc. v. Nike, Inc.*, 511 F. Supp. 2d 676, 702 (N.D. Tex. 2007) (finding the plaintiff failed to move to correct its pleadings to reflect the real party in interest within a reasonable time when more than three years passed between when defendants first raised an objection and the plaintiff "consciously chose not to do so notwithstanding repeated reminders over the years"); *Metal Forming Techs., Inc. v. Marsh &*

335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below); *Pope v. Heritage Comm., Inc.*, 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App 2011) (parties are bound by concessions made by their counsel); *Smith v. Pearson*, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound by its counsel's prior statement).

McLennan Co., 224 F.R.D. 431, 437-438 (S.D. Ind. 2004) (finding failure of plaintiffs to address the real party in interest problem within 14 months of defendant raising it in their answer and four months after defendant's summary judgement motion was filed was unreasonable). Notably, in *Metal Forming Techs.*, the court specifically rejected the plaintiff's argument that the defendant had to demonstrate prejudice in order for the complaint to be dismissed under Rule 17(a). 224 F.R.D. at 438. Lofton's failure to take action within a reasonable amount of time is sufficient in and of itself. Even under Rule 15 (and its statutory predecessor), "undue" or "inexcusable" delay is *one* of the factors that justify a refusal to amend. *See*, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962); *Braudie v. Richland* County, 217 S.C. 57, 59, 59 S.E.2d 548, 549 (19 50).[4]

Lofton failed to provide any explanation for her failure or for her unreasonable delay in addressing her standing problem. She could have, but did not file any affidavits explaining her failure to act in the two years after objection was raised that she was not the real party in interest.

Because Rule 17 prevails or controls the analysis of Lofton's failure to correct her standing issue, the cases on which she relies concerning application of Rule 15 are inapposite. With the exception of *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), all of the cases cited by Lofton in her Return deal exclusively with Rule 15,[5] which is subject to a different analysis than is Rule 17. The motions to amend in those cases were either to cure a deficiency in

[4] In addition, as is explained in John Lucas Tree's Petition, with the passage of years, memories fade and witnesses become unavailable. Lofton's initial Compliant was filed in July of 2015, complaining of events that occurred in July of 2013, nearly nine years ago at this point. (R. pp. 1-11).

[5] While *Patton* does discuss Rule 17, Lofton discusses that case only in the context of Rule 15. Moreover, as noted in John Lucas Tree's Petition for Rehearing, *Patton* supports Petitioners' position in that the plaintiff in *Patton* moved promptly to correct her standing issue after an objection was raised, (*see* Exh. A to John Lucas Tree's Petition for Rehearing, filed March 15, 2022), whereas, here, Lofton clearly did not.

the complaint or to add a cause of action but none of them dealt with a plaintiff who was not the real party in interest.

It is ironic that Lofton argues that Petitioners are not prejudiced by her failure to take any action to correct the real party in interest for over two years, because they have known about this issue "for a significant period of time." (Return p. 7). Just as Petitioners have known that she was improperly named as Plaintiff "for a significant period of time," Lofton herself has known all along of this defect in her pleading, (*see* Return, p. 2 ("Lofton was deposed and explained the property at issue was owned by the Irene N. Lofton Revocable Living Trust"); R. pp. 147-149 ("you're the trustee and the trust owns the farm property?" "Yes, sir") (R. pp. 53-79), but failed to take any action for over two years. Lofton, who bore the responsibility for correcting this mistake, *Fisher*, 422 S.C. at 241, 811 S.E.2d at 742 ("the burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff"), did nothing whatsoever to address this error for over two years, until the afternoon of the motions hearing as a last-ditch effort to avoid summary judgment. Thus, in pointing out the "significant period of time," that all parties knew Lofton lacked standing and that the Trust was the real party in interest, Lofton supports Petitioners' position that her lengthy delay is patently unreasonable, as well as their argument that this Court should hear this appeal and reverse the Court of Appeals' erroneous and pointless reversal and remand.

III. Lofton fails to address to arguments raised by Petitioner John Lucas Tree.

Lofton's complete failure to address the arguments raised by Petitioner should be treated as a concession of those arguments. In particular, other than her blanket, unspecific statements otherwise, John Lucas Tree's Petition raises a novel and important question of law, *i.e.*, whether a plaintiff who has been on notice for over two years, *i.e.*, a "significant period of time," that she

is not the real party in interest can do absolutely nothing and, in a last-ditch effort to avoid summary judgment, file a motion to amend in an attempt to cure her standing issue. Either parties are required to comply with the *South Carolina Rules of Civil Procedure*, including the provision that claims must be brought by the real party in interest and that corrections to the same must be made within "a reasonable time … after objection," Rule 17, SCRCP, or those *Rules* are merely a "suggestion" that parties can ignore with impunity.

Lofton fails to address Petitioners' argument that the Court of Appeals improperly relied on *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), to reverse the Circuit Court, as that case is inapplicable to the issues presented in this case. As explained in more detail in the Petition, *Skydive* addressed a motion to dismiss under Rule 12(b)(6), for failure to state a claim. Such motions necessarily are filed early in a case and, unlike the plaintiff in *Skydive*, here, Lofton had clear notice of the standing issue and had ample opportunity to attempt to cure it.

Lofton fails to address or even mention the fact that the Court of Appeals' Opinion No. 2022-UP-089 is in conflict with this Court's ruling in *Fisher* that "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." 422 S.C. at 241, 811 S.E.2d at 742.

CONCLUSION

John Lucas Tree hereby adopts and incorporates by reference the arguments in Petitioner Berkeley Electric's Reply to the extent they are not inconsistent with the arguments set forth herein. In light of the valid issues raised by Petitioners, as well as Lofton's failure to meaningfully address any of those arguments, this Court should grant their Petitions and agree to hear this case.

Respectfully submitted,

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