ORIGINAL

FINAL BRIEF OF APPELLANT*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

Mikell R. Scarborough, Judge

Case No. 2012-211963

William C Mitchell,

Appellant,

v.

James T. Helwig, Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

IV. DID THE MASTER-IN-EQUITY HAVE THE AUTHORITY TO OVER RULE THE PREVIOUS FINDINGS OF JUDGE JEFFERSON OF THE NINTH CIRCUIT COURT, FNDING THAT THE QUESTION ON THE STATUE OF LIMITATIOMS WAS A QUESTION FOR THE JURY.

V. DID THE MASTER-IN-EQUITY ERROR IN FINDING THAT THE SOUTH CAROLINA RULE OF CIVIL PROCEDUE, RULE 43(1) DID NOT APPL Y IN THIS CASE.

VI. WHETHER THE COURT OF APPEALS SHOULD FIND FOR THE RESPONDENT HELWIG, BASED ON THE ADDITIONAL GROUNDS OF PROBABLE CAUSE APPEARING IN THE RECORD.

1. DID THE MASTER-IN-EQUITY ABUSE IDS DECRETION BY SIGNING AN ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT HELWIG ON DECEMBER 29, 2011, WHEN THE COURT AT THE DECEMBER 12, 2011 HEARING, HAD INSTRUCTED BOTH THE APPELLANT MITCHELL AND RESPONDENT HELWIG, TO FILE ADDITIIONAL BRIEF'S BY DECEMBER 31,2011. APPELLANT MITCHELL'S ADDITIONAL BRIEF WAS FILED ON DECEMBER 30,2011, BEFORE APPELLANT MITCHELL'S TIME TO FILE ADDITIONAL BRIEF HAD EXPIRED.

2. WHETHER MASTER-IN-EQUITY ERRED IN OVER RULING THE PREVIOUS CIRCUIT COURT'S FINDINGS THAT THERE IS A GENUINE ISSUE OF A MATERIAL FACT IN DISPUTE, AND THE MASTER-IN-EQUITY FINDING THAT THERE IS NO GENUINE ISSUE OF A MATERIAL FACT IN DISPUTE, AS TO WHEN APPELLANT MITCHELL RECEIVED NOTICE OF THE DISMISSAL IN THE CRIMINAL CASE, THEREBY MAKING IT AN ISSUE FOR THE JURY, AND WHEN THE STATUE OF LIMITATION BEGAN TO RUN.

3. WHETHER MASTER-IN-EQUITY ERRED IN RULING THAT THE PREVIOUS CIRCUIT COURT RULING'S IS NOT THE LAW OF THE CASE.

4. WHETHER MASTER-IN-EQUITY HAS THE AUTHORITY TO OVER RULE THE PREVIOUS FINDINGS OF JUDGE JEFFERSON, NINTH JUDICIAL

CIRCUIT COURT'S FINDINGS THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, AS TO THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS AND THAT THE QUESTION ON THE STATUE OF LIMITATION IS A QUESTION FOR THE JURY.

5. WHETHER MASTER-IN-EQUITY ERRED IN RULING THE SOUTH CAROLINA RULE OF CIVIL PROCEDURE, RULE 43 (I) **DID** NOT APPLY TO TIDSCASE.

6. WHETHER THE SOUTH CROLINA COURT OF APPEAL SHOULD FIND FOR RSPONDENT HELWIG, BASED ON THE ADDITIONAL GROUNDS OF PROBABLE CAUSE APPEARING IN THEE RECORD.

TABLE OF AUTHORITIES

CASES

STAUTES

STATEMENT OF THE CASE

Appellant Mitchell filed a civil action against Respondent Helwig on July 9,2010, asserting five separate causes of action against Respondent Helwig: civil conspiracy; tortuous interference with a contract; intentional interference with business expectancy; malicious prosecution; and abuse of process. (Comp. 48-54; R pp 44-46).

On August 5, 2010, Respondent Helwig filed a Motion to Dismiss and/or in the alternate to convert to Summary Judgment, with the court. The matter was heard on February 22,2011, by the Honorable Deada L. Jefferson, Ninth Judicial Circuit, and an Order was filed on April 8, 2011, dismissing all causes of action asserted, based on the statute of limitation, except for the malicious prosecution and abuse of process claims. Based on the evidence before the court, the court ruled, that there was a genuine issue of a material fact in dispute as to when Appellant Mitchell received notice of the dismissal in the criminal case, and there-fore it was a question for the jury as to when the statute oflimitation began to run. (Comp. R P.75.76.77,78) (Rp.14; Order-notes 3) (R pp. 15; 2-3)

On June 23,2011 Respondent Helwig, filed a separate Motion for Summary Judgment on the remaining claims of malicious prosecution and abuse of process, bases on the same set of facts and circumstances that was previously heard by Judge Jefferson at the hearing on February 22,2011. A hearing was held on December 12,2011, by the Master-in Equity and the same set of facts and circumstances that were heard by Judge Jefferson were argued by the Respondent Helwig's. No new facts, circumstances or evidence were presented by the Respondent Helwig.

Master-In Equity ruled that there was no genuine issue of a material fact in dispute and dismissed the remaining malicious prosecution and abuse of process claims based on the statute of limitation. The Order was signed December 29, 2011 (R. p. 28)and was filed with the clerk of court on January 6, 2012. Appellant received notice of same on January 14,2012.

Appellant file a Motion for Reconsideration pursuant to Rule 59(e), on January 18,2012. This Motion was denied and an order was filed with clerk of court on May 1, 2012. Appellant received notice of this order on May 3,2012.

Appellant served Respondent with Notice of Appeal on May 10,2012 and filed Notice of Appeal on May 14,2012.

STATEMENT OF THE FACTS

As alleged in the Appellant's Complaint, in April 2001, Respondent Helwig contacted Appellant about constructing a dock at a property located at 3088 Pignattle Cresent, Mt. Pleasant, S. C., property Respondent Helwig had recently purchased. On April 23, 2001, Respondent Helwig signed a contract agreeing to pay Forty Thousand Five Hundred Dollars to the Appellant for the construction of a dock, to be build after respondent, (who was living in New Jersey at the time) moved to Mt Pleasant, South Carolina. Along with the signing of the contract, the Respondent sent a check to the Appellant for Thirteen Thousand Five Hundred Dollars as a payment under the terms of the contract. Sometime (around the first of June, 2001),after the forming of the contract, the Appellant had material delivered to Respondent Helwig's property in Mt. Pleasant. Respondent Helwig subsequently sent another check per the terms of the contract, to the Appellant in the amount of Thirteen Thousand Five Hundred dollars. At this point in time the Appellant also had ongoing contracts with defendants Michael and Elizabeth Masiowski to construct docks at two separate locations for an alleged total price of Fifty Eight Thousand Five Hundred Dollars. The Complaint further alleges that while working for the Masiowski's, the Appellant and Defendant Masiowski had discussions related to the Masiowski' s, buying into the Appellant's dock construction business. Between mid-July and August 5, 2001, the Appellant alleges he discovered that while the Appellant was out of town that Defendant Masiowski"s had hired his entire work crew and formed their own new dock construction company. According to the Complaint, the Respondent Helwig and the Masiowski's conspired with one another to

breach their respective contracts with the Appellant to construct docks at the Defendants properties. According to the Complaint the Respondent Helwig and Defendant Masiowski both, together at the same time and same location, the Defendant's presented the Plaintiff with a letter on August 6, 2001, terminating their respective contracts with the Appellant and demanding a return of all monies paid on of the contact.

According to the Complaint, on December 12, 2001, the Appellant was arrested on a warrant for Obtaining Money By False Pretenses. The warrant was signed by Respondent Helwig. According to the Appellant's allegation, he believed the Defendants pressured the criminal action against him because he refused to give in to their threats, intimidations and did not comply with the demands of the Defendant's to refund all monies paid on the contracts with The Appellant.

According to the Complaint and the deposition and affidavit in evidence as furnished by Appellant's defense Attorney Phillip Middleton, the Appellant was first notified by his defense attorney in early 2008 that the above mentioned criminal matter had been dismissed. (R. p. 75,76,77,78).

The circumstances at the time made it very difficult, impractical and almost impossible, for Appellant Mitchell to have made and inquiry at the clerk of court's office.

The Appellant Mitchell further alleges that at that point in time (in early 2008), and at the instructions of his defense attorney Middleton, that he then first obtained a copy of the dismissal from the Charleston County Clerk of Court.

The Appellant filed suit against the defendant's on July 9,2010, asserting five separate causes of action against the Defendants: Civil Conspiracy; Tortuous Interference With a Contract; Intentional Interference With a Business Expectancy; Malicious Prosecution; and Abuse of Process.

The Defendants each filed Motions to Dismiss with prejudice pursuant to Rule 12(b)(6) and alternative request to convert to Summary Judgment, based on the grounds that the applicable statute of limitations bars each and every cause of action asserted by the Appellant's Complaint against the Defendants. S.C. Code Ann. 15-3-510, 15-3-530

On February 22,2011, a hearing was held by the Circuit Court Judge, the Honorable Deadra L. Jefferson, on the Respondent Helwiag's Motion to Dismiss under Rule 12(b)(6) or to convert to Summary Judgment.

Judge Jefferson ruled in favor of Respondent Helwig on the civil conspiracy, tortuous interference with a contract, intentional interference with a business expectancy based on the statute of limitations.

Judge Jefferson denied the Respondent Helwig's Motions to Dismiss or to convert to Summary Judgment on the allegations of Malicious Prosecution and Abuse of Process based on the statute of limitation. (R. p.16)

Further, Judge Jefferson ruled that the allegation in the complaint give rise to competing inference as to notice to Appellant Mitchell of the nolle prosequi and the filing ofthe change of status form with the clerk of court. (R. pp. 13; 17-19,14; 1-3).

From the outset of the criminal proceedings, because Appellant was represented by counsel, the Solicitors office had informed and instructed Appellant, from the first that they would not talk to Appellant about the case. Therefore, Appellant must and did rely upon his criminal defense Attorney Phillip Middleton, from the beginning of the prosecution in 2001, to advise him and keep him apprised of the status of the case.

The Charleston County Solicitor's office, tells all defendant when they appear at the first roll call, if you have an attorney, don't call us, we're not going to talk to you, we're not going to tell you anything. Keep in touch with your defense attorney, he will advise you of the status of your case.

Assistant Solicitor Ed Knisely testified at his deposition that the Charleston County solicitor's office has probably 10,000 cases per month. There is no way for these 10,000 defendant's to contact the solicitor's office or the clerk of court's office each month to check on their case. If these 10,000 defendants were to contact or go to the clerks of courts office to check on their case it would over-whelm the clerk's office, plus all kinds of documents may disappear from the files. It would be chaos. It's not even practical to even suggest that. Further, until recently the Charleston County clerk of courts office was on a private computer system. Even an attorney had to go to the clerk's office ifhe wanted to view a clients file. The only way a defendant and the Appellant had to know what the status of his case was through his defense attorney.

True v. Monteith, 327 S.c. 116, 489 S.E. 2d 615 (1997) A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel. The client should be able to rely on attorney's advice and should be able to follow this advice without

fear the attorney is not acting in the client's best interest.

Appellant argues there is no evidence from which a jury could have reasonably concluded he knew or had reason to know.

Reasonable minds could differ on this issue. Byerly v. Connor, 307 S.C. 441,445,415 S.E.2d 796, 799 (1992) (stating summary judgment is appropriate when "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ").

The determination of when the Appellant knew or should have known of any potential claims was consequently a jury issue. **Santee Portland Cement Co. v. Daniel Int'l Corp, 299 S.C. 269, 274, 384 S.E. 2d 693,696 (1989);** overruled on other grounds by **Atlas Food Sys. & Servs., Inc. v. Crane Nat'l vendors Div. ofUnidynamics Corp.,** 319 S.C. 556,462 S.E. 2d 858 (1995) (finding that when all of the evidence goes to the reasonableness of a party's actions, the statute of limitation issue becomes one for the jury to decide). As such the Master improperly granter the Respondent Helwig's motion for summary judgment on the allegations of malicious prosecution and abuse of process, based on the expiration of the statute of limitation.

Moreover, the court was advised and so stated in its order dated April 8, 2011, that it is the policy and procedure of the Charleston County Solicitor's Office to notify defense counsel of the dismissal or nolle prosequi of a criminal case. (R. pp 15; 16-23)

The Appellent's file is void of evidence that the solicitor's office notified the Appellant's defense attorney. The Court ruled that there is an inference raised by the pleadings as to when the Appellant received notice that his charges were dismissed. (R.pp 15; 20-21)

The Court ruled that only the claims for civil conspiracy; tortious interference with a

contract ; tortious interference with a business expectancy must be dismissed as barred by the applicable statute of limitation and that the action on malicious prosecution and abuse of process continue.

Sometime later Respondent then filed a Motion for Summary Judgment before the Master In Equity based on the same set of facts and circumstances as already heard and ruled on by the Circuit Court, the Honorable Dedra L. Jefferson, on April 8, 2011.

A hearing was held by the Master on December 12, 2011. Respondent presented no new facts and no new evidence at this hearing, only the same as previously heard and ruled on by Judge Jefferson, on April 8, 2011.

On December 12,2011, at a hearing before the Master, the Appellant filed and argued lhat the previous ruling on April 8, 2011, by Judge Jefferson was the law of the case, and that Rule 43(I) further prevented the Master from overruling Judge Jefferson prior ruling.

At the December 12,2011, hearing the Master ordered that the Appellant and the Respondent file an additional brief by December 31, **2011**, stating why the court should find in their favor and why the nolle prosequi was terminated in favor of the plaintiff. (R pp. 144,24-25, p. 145;1-2, p.146; 9-13,21-24)

The Appellant, on December 30, 2011, did file the brief as instructed by the Master. (R. pp.160; 22-25, 161; 1) However, on December 29,2011, the Master did sign an order granting summary judgment to the Respondent Helwig, without following its own instruction, without even reviewing, are given any consideration to the brief filed by the Appellant on December 30,2011, as instructed by the Court. (R. pp. 146; 1- 13)

This Order was then filed on January 6,2012 and notice ofthe filing ofthe order of summary judgment was received by the Appellant on January 14,2012.

On January 19,2012, Appellant filed a Motion for Reconsideration. A hearing was held on the Appellant's motion for reconsideration on April 23, 2012.

The Master-In Equity at the April 23, 2012, affirmed his previous order of Summary Judgment for Respondent Helwig, that was signed December 29,2011, that the actions for malicious prosecution and abuse of process were barred by statute of limitation.

Appellant received written notice of the order May 3, 2012.

Appellant served Respondent with Notice of Appeal on May 10,2012 and filed Notice of Appeal on May 14,2012

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519,511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP. See also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998)(trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter oflaw). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be

reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. **Strother v. Lexington County Recreation Comm 'n, 332 S.e. 54, 504 S.E.2d 117 (1998); ~ v. Aycock, 325 S.e. 426, 480 S.E.2d 455 (Ct. App. 1997).** If triable issues exist, those issues must go to the jury. **Rothrock v. Copeland, 305 S.e. 402, 409 S.E.2d 366 (1991); Young, supra.**

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. **Tupper v. Dorchester County, 326 S.e. 318, 487 S.E.2d 187 (1997); Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150,511 S.E.2d 699 (Ct. App.1999).** All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. **Young, supra; Truck South, Inc. v. Patel, 332 S.C. 222, 503 S.E.2d 774 (Ct. App. 1998).** Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. **Young, supra; Moriarty, supra.** However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. **Young, supra; ~, supra.**

ARGUMENT

1. **WHETHER MASTER-IN-EQUITY ABUSED IDS DISCRETION BY SIGNING AN ORDER GRANTING THE RESPONDENT HELWIG, SUMMARY JUDGMENT ON DECEMBER 29,2011, WHEN THE COURT HAD INSTRUCED BOTH APPELLANT MITCHELL, AND RESPONDENT HELWIG TO FILE**

ADDITIONAL BRIEFS ON OR BEFORE DECEMBER 31, 2011. APPELLANT MITCHELL, DID FILE AN ADDITIONAL BRIEF ON DECEMBER 30, 2011, AS INSTRUCTED BY THE COURT. THE MASTER-IN-EQIDTY'S SIGNED ORDER OF DECEMBER 29, 2011, GRANTING SUMMARY JUDGMENT TO RESPONDENT HELWIG, WAS THEN FILED ON JANUARY 6, 2012.

At the hearing before the Master on December 12,2011,(Rp 144-145; Transcript P.64, line 24, 25, P. 65 line 1 to 9), the and Appellant and Respondent were instructed by the court to file an additional briefbefore December 31,2011, (Rp 146;Transcript P. 66 line 1 to 13), as to why the court should rule in their favor and why the nolle prosequi was terminated in favor of the Appellant, are why the Respondent believed the nolle process was not terminated in favor of the Appellant.

The Appellant on December 30, 2011, did file the additional brief as instructed by the court to do.

However, on December 29, 2011, the master had already signed an order granting summary judgment to the Respondent Helwig. (R p. 160,21-25; p. 161, 1)

Therefore, the Master clearly abused his discretion, did not follow the court own instruction, did not give the Appellant's review, credence, or consideration in his decision to grant the Respondent summary judgment.

2. **WHETHER MASTER-IN-EQIDTY ERRED IN OVER RULING THE PREVIOUS CIRCIDT COURT'S FINDINGS THAT THERE IS A GENUINE ISSUE OF A MATERIAL FACT IN DISPUTE, AND THE MASTER-IN-EQUITY FINDING THAT THERE IS NO GENUINE ISSUE OF A MATERIAL FACT IN DISPUTE, AS TO WHEN APPELLANT MITCHELL RECEIVED NOTICE OF THE DISMISSAL IN THE CRIMINAL CASE, THEREBY MAKING IT AN ISSUE FOR THE JURY, AND WHEN THE STATUE OF LIMITATION BEGAN TO RUN.**

BECAUSE THE PRIOR CIRCUIT COURT'S RULING DETERMINED THERE ARE FACTUAL MATTERS IN DISPUTE. THEREFORE, RENDERING SUMMARY JUDGMENT INAPPROPRIATE?

'Here we are talking about notice in a criminal case, not a civil case. Here a person's life and liberty are at stake. The rules and procedures are different in a criminal case vs. a civil case.

The rules of notice is also different a criminal case. The Charleston County Solicitors office policy and procedure (R.p 15;Jefferson order P.lO,line 16-23) to give actual notice to the criminal defendant and/or defendant's criminal defense attorney. A factual finding on the issue of whether (Appellant) the defendant in the criminal case or his defense attorney received notice of the dismissal and nolle prosequi, was made by Judge Jefferson. (R p.9; Judge Jefferson order P. 4, notes 1), states that the statutes of limitation issue sufficiently creates a question of fact on the cause of action for malicious prosecution and abuse of process.

Further,(R. p 13; Judge Jefferson ruled P. 8, line 19-24), that there is a competing inference on a question of material fact, and(R p.15 Judge Jefferson ruled P. 10, line 22-24), that there is an

inference raised by the pleadings as to when the Appellant received notice that his criminal charges were dismissed.

Therefore, the case against Respondent Helwig, for malicious prosecution and abuse of process was allowed to proceed.

In this case the solicitor's office failed to give any notice and the Appellant's file is void of any such notice. (R p. Judge Jefferson order P.10, line 20). In all criminal cases, the solicitor is required to give actual notice to the defendant and the defendant's defense attorney of all motions, filing, etc. **State v Johnson,** 347 S.C.67, 552 S.E.2d 339 (Ct App. 2002) **James v State,** 372 S.C. 287, 641 S.E.2d 899 (2007).

Further, in the matter of the nolle prose of the criminal charges in this case, the mere filing of a "change of statues from with the clerk of court is not actual notice to the defendant or defendant's attorney in a criminal case.

The Respondent has offered no case on point in a criminal matter that the mere filing of a statues change form with the clerk of court in a criminal case being NOTICE to defendant or defendant council. (R. pp 87; 23-24)

The facts are that a criminal defendant, and the Appellant in this case, in Charleston County would have no common knowledge of the dismissal or nolle prosequi procedures of the Charleston County Solicitator's Office and no circumstances exist that would give a criminal defendant pr the Appellant, cause to inquire about the filing of a change of statues form with the Clerk of Court without actual notice to the defendant are the defendants attorney.(R. pp. 121; 1-25, 122; 1-4)

In Lambert v. People of the State of California, 355 U.S. 225 (1956), the United States Supreme Court applied a similar analysis to notice of criminal prohibitions, though without using the terminology of actual and constructive notice. In effect, the Court found in that case that the registration requirement was not a matter of common knowledge and no circumstances existed that would have given the defendant cause to inquire about the existence of such a requirement. Those circumstances are markedly different from the circumstances of a convicted sex offender who has actual knowledge of registry-related requirements, including those of reregistering at certain intervals and maintaining his current address on file with the sheriffs office. United States v. Gould, 568 F.3d 459, 468-69 (4th Cir. 2009) (distinguishing Lambert from federal sex-offender registration requirement applying to "a much more narrowly targeted class of "persous in a context where sex-offender registration has been the law for years").

There are no circumstances sufficient from which the jury could fmd that Appellant Mitchell, or Defense Attorney Middleton, in the criminal case had notice to inquire or actual notice of the nolle prosequi. The Appellants defense attorney testified by affidavit that he learned in the early months of 2008, after studying the clerk of court's wed site, the case was dismissed, and it was at this time that he informed the Appellant Mitchell that the case had been dismissed.(R. p 308-309)

Moreover, the court was advised that it is the policy and procedure of the Charleston County Solicitor's Office to notify the Defense Counsel of any status change or filing with the clerk of court. The circuit court found that there is an inference raised by the pleadings as to when the Appellant Mitchell received notice that his charges were dismissed. (R. p.15; Order, April 8, 2011,15-23)

Constructive, or inquiry, notice is the legal imputation of notice to a person based upon circumstances sufficient to substitute for actual notice. City of Greenville v. Washington Am. League Baseball Club, 205 S.c. 495, 509,32 S.E.2d 777, 782 (1945) ("[I]fthere are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose." Strother v. Lexington County Recreation Comm'n, 332 s.C. 54,64-65,504 S.E.2d 117, 123 (1998) (explaining that knowledge of facts or circumstances putting a party on notice to inquire constitutes constructive, not implied actual notice).

Given the significant deprivation of liberty for one who is convicted of failing to re-register due to a change in the law, we by a negative inference arising from unreturned first class mail. To hold otherwise would effectively minimize a person's significant liberty interest as we have recognized the need for strict compliance to notice requirements even in cases where a property interest was at stake. cr. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E. 2d 202, 207 (2003) (recognizing that section 12-51-40 of the South Carolina Code, which controls the procedure for notifying delinquent taxpayers that property will be sold to collect delinquent taxes, required that "levy notices on personal property must be sent via certified mail, return receipt requested in order to accomplish 'levy by distress".

Thus, the Respondent Helwig, presented no proof that the Appellant or Appellant's defense attorney had received notice ... an office practice and procedure followed in the regular course of business by the Charleston County Solicitor's Office, which did not show that the notice had been duly sent to

the defendants attorney.

There is no evidence in this case from which the jury could find that Appellant Mitchell, or his Defense Attorney, in the criminal case had actual notice.

The case cited by Defendant Helwig, Berry v. Mcleod, 328 S.c. 435,445, 492 S.E.2d 794,800 (Ct.App.1997) is inapplicable in this case.

A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel. The client should be able to rely on attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest. True v. Monteith, 327 S.C. 116,489 S.E. 2d 615 (1997)

Further, the burden of establishing the bar of the statute of limitations rests upon the one "interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide. Brown v. Finger, 240 S.c. 102, 113, 124 S.E.2d 781, 786 (1962).

3. WHETHER MASTER-IN-EQUITY ERRED IN RULING THAT THE PREVIOUS CIRCUIT COURT RULING'S IS NOT THE LAW OF THE CASE.

The Appellant argues that, "because the issue of notice had been previously litigated and decided in Judge Jefferson's Order, Judge Scarborough erred in re-addressing this issue .. " In support of this position, the Appellant contend (1) the findings in Judge Jefferson's prior order are the law of the case; (2) Judge Scarborough did not have the power to review, modify, affirm, or reverse Judge Jefferson's fmdings; and (3) Respondent Helwig was judicially estopped from adopting a position that was contrary to the position it took on that

issue in the prior hearing before Judge Jefferson.

See ML-Lee Acquisition Fund, LP v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997)

This unappealed ruling is the law of the case, In re: Morrison, S.C. _' 468 S.E.2d 651 (1996), and should not have been reconsidered by the Master.

See Bakala v. Bakala, 352 S.c. 612, 576 S.E.2d 156 (2003); Charleston Lumber Co. v. Miller Housing Corp., 338 S.c. 171,525 S.E.2d 869 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Sandy Springs Water Co. v. Department of Health and Envtl. Control, 324 S.C. 177, 478 S.E.2d 60 (1996); Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 427 S.E.2d 646 (1993); Larimore v. Carolina Power & Light, 340 S.c. 438,531 S.E.2d 535 (Ct. App. 2000); see also Brading v. County of Georgetown, 327 S.C. 107,490 S.E.2d 4 (1997) (clarifying that where decision is based on more than one ground, appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law ofthe case); In re Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996) (recognizing court's ruling is the law of the case where it is not contested on appeal); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 166, 177 S.E.2d 544, 544 (1970) (stating an unchallenged ruling, "right or wrong, is the law of the case and requires affirmance"); Priester v. Brabham, 230 S.C. 201, 95 S.E.2d 167 (1956) (holding that, because there was no exception to the ruling of the court below, that ruling, right or wrong, was the law of the case); Unisun Ins. v. Hawkins, 342 S.C. 537,

537 S.E.2d 559 (Ct. App. 2000) (noting an unappealed ruling is the law ofthe case which the appellate court must assume was correct); Hall v. Clarendon Outdoor Adver., Inc., 311 S.C. 185,428 S.E.2d 1 (Ct. App. 1993) (emphasizing that failure to argue against basis for trial court's ruling renders it the law of the case). Concomitantly, the ruling by the circuit judge is the law of the case.

Because the Circuit Court's finding was not appealed, it is the law of the case and not subject to review by the Master-In-Equity.

Thus, the issue as presented before the Master, by Respondent Helwig at the December 12, 2011, hearing is the functional equivalent of an appeal of the refusal to grant summary judgment, an issue that is not appealable. Ballenger v. Bowen, 313 S.c. 476,443 S.E.2d 379 (1994); Olson v. Faculty House of Carolina, 354 S.c. 161,580 S.E.2d 440 (2003). *Johnson v. South Carolina Dep't of Probation, Parole, and Pardon Services,* _ S.C. _,641 S.E.2d 895, 897 (2007) (providing that this Court will not entertain the merits of an issue on appeal where the record on appeal is inadequate for review); *Woodard v. Westvaco Corp.,* 319 S.C. 240, 242-43, 460 S.E.2d 392, 393-94 (1995) (providing that the denial of a Rule 12(b)(1) motion to dismiss is an interlocutory order which is not immediately appealable); *Ballenger v. Bowen,* 313 S.c. 476, 477-78, 443 S.E.2d 379, 380 (1994) (providing that an order denying a motion for summary judgment is not appealable); *Moyd v. Johnson,* 289 S.c. 482, 482, 347 S.E.2d 97, 98 (1986) (holding that the denial of a Rule 12(b)(6) motion to dismiss is an interlocutory order which, ordinarily, is not immediately appealable)

4. WHETHER MASTER-IN-EQUITY HAS THE AUTHORITY TO OVER RULE THE PREVIOUS FINDINGS OF JUDGE JEFFERSON, NINTH JUDICIAL CIRCUIT COURT'S FINDINGS THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, AS TO THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS AND THAT THE QUESTION ON THE STATUE OF LIMITATION IS A QUESTION FOR THE JURY.

The Appellant argues that the Master- In-Equity, the Honorable Judge Scarborough ruling in granting the Respondent Helwig summary judgment on the malicious prosecution and abuse of -process, based on the same set of facts and same circumstances already hear and ruled on by Judge Jefferson, based on the statute of limitation should be reversed.

Enoree Baptist Church v. Fletcher, 287 S.e. 602,604,340 S.E.2d 546, 547 (1986)" One Circuit Court Judge does not have the authority to set aside the order of another"

The Master should not have granted the Defendant Helwig summary judgment based on the statute of limitation, because Circuit Court Judge Jefferson had already ruled on the statute of limitation on the Appellant's allegations of malicious prosecution and abuse of process and allowed the case to proceed.

By granting the Respondent Helwig summary Judgment based on the statute of limitation, the Master-In Equity improperly overruled another judge of an equivalent or higher court.

Charleston County DSS v. Father, 317 S.C. 283, 454 S.E. 2d 307 (S.C.1995)

5. **DID THE MASTER-IN-EQUITY ERROR IN FINDING THAT THE SOUTH CAROLINA RULE OF CIVIL PROCEDUE, RULE 43(1) DID NOT APPLY IN TIDS CASE.**

S.c.R. CIV.P; **RULE 43(1)**

(I) Subsequent Applications for Order After Refusal. If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action. (R.p 160; 13-19)

The Respondent Helwig, argued the same set of facts and circumstances that was argued before Jhe Circuit Courf at the February 22,2011, hearing and Ruled on by Judge Jefferson's Order of April 8, 2011.

6. WHETHER THE SOUTH CROLINA COURT OF APPEAL SHOULD FIND FOR RSPONDENT HELWIG, BASED ON THE ADDITIONAL GROUNDS OF PROBABLE CAUSE APPEARING IN THE RECORD.

On or about 10-.22-01 Officer Hoose, having questions regarding probable cause, contacted the Charleston Count Solicitor's office and spoke to Assistant Solicitor Shawn Kent. (Officer Hoose is the officer for the Mt. Pleasant Police Department, that investigated this case".

After Det. Hoose, had explained the facts and evidence of the case to assistance solicitor Shawn Kent, Det. Hoose was advised, by assistant solicitor Kent, that this was a civil

case, not a criminal case. Det. Hoose's official Police Report, (R. pp.441; 5)

Det. Hoose then informed Defendants attorney Dennis O'Niell of assistant solicitor Kent's decision.

Defendants Attorney O'Neill, then immediately contacted the Charleston county solicitor's office and salt out an assistant solicitor that would be more acceptable to prosecuting the case.

Respondent's, attorney O'Neill then talked to assistant solicitor Ed Knisley and arranged a meeting with assistant solicitor Knisley. (R. pp 337; Helwig deposition page 30 line 18)

This meeting took place on *10/25/01.* Present at this meeting on October 25,2001, were Respondent Helwig, Respondent's attorney Dennis O'Neill, Det. Hoose and Appellant's attorney Walter Bilbro and assistant solicitor Knisley.

At this meeting Respondent Helwig and his Attorney O'Neill were persistence that Appellant be arrested and prosecuted.

At this point in time Assistant Solicitor Knisley, had been out of law school one year, and had worked as an assistant solicitor, at the Solicitors office for 3 to 4 months.

Assistant Solicitor Knisley, being very inexperienced, and under pressure from the much more experienced defendants attorney O'Neil, and Defendant Helwig. Both defendant

Helwig and defendant attorney O'Neill were insistent that Plaintiff be arrest and prosecuted.

Assistant Solicitor Knisley, in a rush to judgment, arbitrarily and capriciously, made the decision that there was probable cause to arrest and prosecute the Appellant.

The record afforded does not substand a basis for such a decision.

Assistant solicitor Knisley had in his procession, a copy of the contract, and all other relevant documents and was well aware of the terms and conditions of the contract.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." SchuJmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Thus, "[i]f the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."

Assistant solicitor Knisley knew or should have known that he is not at liberty to change the contract.

Further, assistant solicitor Knisley knew or should have known that, under contract law, if a party to a contract cancels a contract then the injured party is entitled to the overhead, expenses and profit involved in that contract as damages.

The Appellant and the Respondent, entered into a contract on or about April 1 8, 2001 for the Appellant to build a dock for Respondent Helwig, at some point in time in the future ..

At the point in time the contract was entered, the Respondent Helwig was living out of state and had not yet moved to South Carolina.

Respondent Helwig admits he read and understood the terms and conditions of the contract and further testified he signed the contract and agreed to the terms and conditions of the contract. (R. pp. Helwig de po. 343; lines 12 to 25, 343; page 18, lines 1 to 4, 344; lines21 to 25, 345; lines 1 to 25, 345; page58, lines 1 to 4)

The facts and evidence in this case prove that the Appellant was to build this dock for the Respondent Helwig, at some point in time in the future.

The terms and conditions of the contract signed by the Respondent Helwig state;

"It is further understood and agreed that any and all monies paid under this contract are a single payment on the contract and any such monies and/or payment paid hereunder, are not a payment in trust, and not required to be held in any particular manner, Or for any specific purpose and no accounting is required for the use of same. No monies herein are implied or expressed to be a payment in trust".

"ACCEPTANCE OF PROPOSAL: The above prices and specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above. A 1 ½ % interest per month on any unpaid balance past due, plus attorneys fees and cost of collection". (R. P 478)

Assistant solicitor Knisley, knew or should have known the law, and the elements of the crime of, Obtaining Money By False Pretense, and the Obtaining Money or Goods by False Pretense, is larceny.

All monies paid under the terms and conditions of this contract to the Appellant, simply belonged to the Appellant.
Once the payment was made to Appellant, it belonged to Appellant. Therefore, if the money in question belonged to Appellant, how could Appellant steal from himself?

Assistant solicitor Knisley, conclusory decision, that there was Probable Cause, was not based on standards, or on rules of law, but was based on preference, bias, prejudice, rather than on reason or fact, and was an unreasonable act of individual will without regard for the facts or applicable law.

Further, the facts and evidence in this case prove that the Appellant was to build this dock for the Respondent at some point in time in the future. R.pp.344, Helwig depo, page 55 line 9-10).

A promise to do an act in the future is not a representation of a present or past fact.

In the case, State v. Jamie McCutcheon, No. 0404, Court of Appeals, Heard Jan. 23, 1985. Decided March 4, 1985. The Court ruled that a promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretense. State v. Winter, 98 S.C.294, 82 S.E.2d 419 (1914)

Assistant Solicitor Knisley, had no facts or evidence of a past or present fact upon which this prosecution could be based.

Further, any alleged conversation between Appellant and Respondent does not constitute a basis for a criminal prosecution for Obtaining Money By False Pretense. The elements of the crime of Obtaining Money By False Pretenses, simply did not exist in this case.

Further, the facts and evidence show that assistant solicitor Knisley, did handled this case for three years, and had sole discretion to call this case for trial, at will, yet refused to call this case for trial.

As to the Breach of Trust charge; this was a direct indictment.

The assistant solicitor that handed this case, knew that the elements of a crime of Breach of Trust, did not exist in this case. Therefore the charge of Breach of Trust was dismissed and nolle prosequi.

In a Breach of trust case, the state must prove the exact trust which has been breached.

The question in this case, is whether the Appellant received the property" In this case the money" in trust, which Appellant violated.

The contract entered into between Appellant and Respondent Helwig states the following; " It is further understood and agreed that any and all monies paid under this contract are a single payment on the contract and any such monies and/or payment paid hereunder, are not a payment in trust, and not required to be held in any particular manner, Or for any

specific purpose and no accounting is required for the use of same. No monies herein are implied or expressed to be a payment in trust". (R. P 478)

"ACCEPTANCE OF PROPOSAL: The above prices and specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above. A 1 ½ % interest per month on any unpaid balance past due, plus attorneys fees and cost of collection. (R.p. 478)

Respondent Helwig, testified that he understood and accepted these term and conditions and that he signed the contract, clearly stating the above.

Therefore, no trust is attached to the money in question.

State v Shirer, 205 S.c. 392,408 (1883), State v Green 5 S.c. 65 (1873), State v Cody, 180 S.C. 417, 186 S E 165(1936), State v White, 244 S. C. 349, 137 S.E 2d 97 (1964), State v Jordan, 255 S. c. 86, 177 S E 2d 464 (1970) State v LeMaster, 231 S.C.321, 58 S E 2d 756(1957)

In this case both the Obtaining Money By False Pretense charge and Breach of Trust charge, just because the complaining witness alleged some elusive fraudulent intent, and rather than go to the expense of a civil trial, brought criminal charges against the Appellant, assistant solicitor Knisley, knew or should have known there was no probable cause, based on applicable law.

That is why four different assistant solicitor's assigned to these cases, from 2001 until 2006, would not call these cases for trial and this is why the last assistant solicitor Kim Steel, nolle prosequi the cases.

This is a clear implication of, does imply, and is consistent with the innocence of the Appellant in these cases.

Further, the respondent had demanded a full and complete refund of all monies paid any credit for monies defendant received for the material Plaintiff had furnished for the construction of his dock, and also refused to give Appellant any credit for overhead, expenses or profit regarding this contract, which Appellant is entitled to.

Respondent with malice intended to punish the Appellant by having the Appellant arrested and prosecuted, all without just or probable cause.

In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse." Eaves v. Broad River Elec. Coop., Inc., 277 S.C. 475, 479,289 S.E.2d 414, 416 (1982) (internal quotation omitted). It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Law, 368 S.C. at 437,629 S.E.2d at 649.

Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a *disregard of the consequences of an injurious act, without reference to*

any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.

Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution.

Further, the court does not have the authority to decide credibility issues or to resolve conflicts in the evidence. **Parrish, 376 S.C. at 319,656 S.E.2d at 388.**

Thisis a question for a jury.

The Respondent Helwig, did institute the prosecution, did persist and fully participate in the prosecution, without probable cause and cause injury and damage to the Plaintiff Defendant Helwig did sign the affidavit and arrest warrant, and Plaintiff was arrested and the indictment charges, obtaining money by false pretense. (R. p 353-354)

At some point in time in 2006, someone at the Solicitor's office obtained different indictment for Breach of Trust. (R. p.355)

The Appellant was never served a copy of this 2006, Breach of Trust indictment and Appellant was never arrested on this indictment or charge.

The first the Appellant knew of the indictment of Breach of Trust was when Appellant went to the Clerk of Court in 2008 to get a copy of the file on the charge of Obtaining Money by False Pretense, as he as requested to do by Appellant's defense counsel

Middleton and at that time was also given a copy of the Breach of Trust indictment and its dismissal form, which stated "see notes". (R. P 351, 352)

There were "no notes" attached to or in the files at the Clerk of Courts office.

There were a total of four different assistance solicitors handling this case over a five year period oftime, from 2001 until 2006.

In a final attempt to pressure and force the Appellant to enter a plea in the case, assistant solicitor Steel sent notice that the case was to be called for trial. The Appellant and appellant witness, appellant counsel showed up ready for trial." Appellant believes this was sometime between September and November 2006." After waiting around outside the court room most ofthe day, Assistant Solicitor Steel finally informed the Appellant's defense council Phillip Middleton that the case was not going to be called at that time, and would notify defense counsel when the case was to be called.

Assistant solicitor Kim Steel, and three other assistant solicitor's previously assigned to the case, were well aware that the Appellant stood ready all time's to defend himself at a trial and refused to give in to the unreasonable demand of the Respondent Helwig and refused to enter any plea or plea agreement, except not guilty.

All four of the assistant solicitor's assigned to these cases had the authority, to call these cases, at will, yet not one of the four assistant solicitors' assigned to the cases, would call the cases for trial.

The last assistance solicitor assigned to these cases was Kim Steel. In 2006, Ms. Steel filed a change of statues form with the Clerk of Court, on or about December 27, 2006, and Nolle Prosequi, both the Obtaining Money By False Pretense and Breach of Trust cases. (R. P 351,352) This is further evidence that the nolle prosequi was a complete nolle prosequi, and was terminated if favor of the Appellant and that there was no probable cause.

The elements of malicious prosecution are (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiffs favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.

Further, Respondent Helwig, in August 2001, did contact and file with the South Carolina Dept. of Labor, License and Regulation, South Carolina Contractors Licensing Board, two complaint's.

Complaint number one. That Appellant in 2001 had entered into a contract with Respondent Helwig, without the proper license from Dept. of Labor, Licensing and Regulation, and the South Carolina Licensing Contractors Board.

Complaint number 2. That after being licensed in 2001, that Appellant in 2001 had entered into a contract with the Respondent Helwig, which exceeded his license.

The So. Car. Dept. of Labor, License and Regulation Dept, So.Car. Contractors Licensing Board, conducted an investigation into both these complaints.

Upon completion of there investigation,S.C.Dept. L.L.R and S.C. Contractors Licensing Board, ruled that there was no violation of either, of the two complaints, made by Respondent Helweg, against the appellant, and closed these matters. (R.p. 360, 361,362,363,364)

Both' Appellant and Respondent Helwig, were informed and notified in writing of these rulings, by The S.C.Dept. ofL.L.R and the S. C. ContractorsLicensing Board.

The Board ruled there were no violation by the Appellant, regarding the Respondent Helwig's contract, and the matter was closed.

The Respondent Helwig's conduct caused the criminal action to be instituted against the Appellant, did cause it to be maintained, did voluntarily aide or assisted in its prosecution all with-out probable cause. " Black v Lexington Sch. Dist. No.2, 327 S.c. 55, 61 488S.E. 2d 327, 330 (1997)"

In Melton v Williams, 281 S.C. 182,262 S.E.2d 612 (Ct.App. 1984), court concluded that, even though an arrest warrant was issued, that it was for a jury to say whether or not

there was probable cause in an action for malicious prosecution, **Kinton v Mobile Home Indus., inc., 274 S.C. 179, 182,262 S.E.2d 727,728 (1980),** it is only pima facie evidence and not conclusive, and the existence of an arrest warrant dose not conclusively establish probable cause for prosecution.

If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action. The question is one for the jury. **Moriarty v. Garden Sanctuary Church of God, 341 S C 320, 338-39, 354 S.E. 2d 672,681-82 (2000)**

A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel. The client should be able to rely on attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.

True v. Monteith, 327 S.c. 116,489 S.E. 2d 615 (1997)

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. **Englert, Inc. v.** Leaf Guard **USA, Inc., 377 S.c. 129, 134,659 S.E.2d 496, 498 (2008).**

Respondent's subsequent misuse of process (even if) properly obtained that constitutes the tort of abuse of process. **Mullins v. Sanders, 54 S.E.2d 116,122 (Va. 1949)** " as a means of extortion", the existence of an ulterior purpose, **Donohoe Const. Co. v.** Mt. Vernon Assoc., 369 S.E. 2d at 857, 862.

CONCLUSION

For the reasons stated, this Court should reverse the Order for Summary Judgment for Respondent Helwig, issued by the Master-in-Equity.

May 31,2013

Respectfully submitted,

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PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master- In Equity

Mikell R. Scarborough, Judge

Case No. 2010-CP-1O-5532

William C. Mitchell

Appellant,

v.

James T. -Helwig, Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appeal, on James T. Helwig, by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2013, addressed to his attorney of record, James T. Sullivan, Esq., at 215 East Bay Street, suite 303, Charleston, S C 29401 and T. Alexander Beard, Esq., at 1002 Anna Knapp Blvd., suite 202, Mt Pleasant, S C 29464.

May 31, 2013

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THE STATE OF SOUTH CAROLINA
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RULE 211(B), SCACR, CERTIFICATION

I , the undersigned, William C. Mitchell, Pro Se, hereby certify that the Final Brief of Appellant complies with Rule 211 (b), SCACR.

May 31, 2013

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