

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Case No.: 2005-CP-10-2434

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ASHLEY RIVER PROPERTIES II, LLC, as assignee of LUNAR SYSTEMS, LTD and  
ASHLEY RIVER PROPERTIES II, LLC,

Respondents,

v.

ASHLEY RIVER PROPERTIES I, LLC, successor in interest to Ripley Light Yacht Club, LLC  
and Ripley Light Development, LLC

Appellants.

ASHLEY RIVER PROPERTIES I, LLC, third-party Plaintiffs,

Appellant,

v.

LUNAR SYSTEMS, LTD and THOMAS J. LUSSIER, Third-party Defendants,

Respondents.

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INITIAL BRIEF OF RESPONDENT ASHLEY RIVER PROPERTIES II, LLC

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**RECEIVED**

MAR 14 2014

**SC Court of Appeals**

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## STATEMENT OF ISSUES ON APPEAL

Whether, given the Circuit Court's findings that the evidence failed to prove that Respondents had any ulterior motive other than their desire to be paid monies claimed to be due and, given the Respondents' principals' testimony that they filed and maintained a lis pendens upon Appellant's property for the purpose of being paid monies claimed to be due, there is sufficient evidence to support the Circuit Court's denial of Appellant's abuse of process claim?

## PRELIMINARY STATEMENT

Emerald Investments, LLC, which is owned by Stuart Longman, and Kriti Ripley, LLC formed Ashley River Properties II, LLC to develop water-front property in Charleston. Longman had previously been marketing the condominiums that would be built. At that time another entity owned by Longman, Ashley River Properties I, LLC, agreed to indemnify ARP II from any claims made by Longman's condo customers who had paid deposits. Lunar was one of Longman's customers. Lunar brought suit against ARP I and ARP II to recover its deposit.

ARP II settled with Lunar and took back an assignment of Lunar's claim against ARP I. ARP I counterclaimed alleging this was an abuse of process. The Court properly found that ARP II was simply trying to enforce the rights it thought it had under its indemnity agreement, that ARP II did not have any ulterior purpose and was not liable for abuse of process.

## STATEMENT OF THE FACTS

Kriti Ripley, LLC ("Kriti") and Emerald Investments, LLC ("Emerald") are the two members of Ashley River Properties II, LLC, referred to in this brief sometimes as ARP II or "the Company". In December 2003, Kriti and Emerald formed ARP II to continue the development of a marina on the Ashley River. The ARP II Operating Agreement has a broad arbitration provision requiring any dispute concerning the Company to be submitted to arbitration in New York.

In 2004, Emerald and its principal, Stuart Longman, diverted funds from the Company to personal accounts and committed various other defaults under the ARP II Operating Agreement. In 2005, Kriti commenced an arbitration that resulted in Emerald being stripped of its voting rights and leaving Kriti with the sole right to manage the Company and as the sole voting member of the Company. In addition monetary damages were awarded to Kriti.

Thereafter, in 2006, Kriti commenced a second arbitration to recover additional monetary damages due from Emerald because of its misconduct. Again, the arbitrators found in favor of Kriti. In February 2008, both awards were confirmed by the New York State Supreme Court and judgment was entered in favor of Kriti. The monetary portion of this judgment was \$1,184,581.72. This judgment was domesticated in South Carolina in 2009, and Kriti applied for and obtained a charging order against Emerald's interest in ARP II to secure payment of the judgment. This judgment remains unpaid to this day.

Before Kriti and Emerald formed ARP II in 2003, the project was owned and being managed by Mr. Longman. In addition to the property that was contributed to ARP II, Mr. Longman owned another parcel that was held by Ashley River Properties I, LLC, a company in which Kriti had no interest. In the course of Mr. Longman's development efforts prior to Kriti's entering the scene, Mr. Longman took deposits from several purchasers interested in acquiring the condominiums that Mr. Longman planned to build at the marina. One of those customers was Lunar Systems, LTD ("Lunar"). Lunar's deposit was equal to 50% of the purchase price of the completed condominium. Lunar's contract created an equitable lien upon the property owned by ARP I and ARP II to secure the refund of its deposit if the condominiums were not built. This contract, among others, was not disclosed to Kriti by Emerald or Longman, and constituted one of the many claims by Kriti against Emerald in their 2005 arbitration.

Because the condominium construction never materialized, in 2005, Lunar commenced the 2005-CP-10-2434 lawsuit seeking the recovery of its deposit. At the time of the formation of ARP II, ARP I agreed to indemnify Kriti and ARP II if either were called upon to pay for any undisclosed claims or liabilities.

ARP II paid Lunar \$325,000 and gave it a note in the amount of \$175,000 in exchange for an assignment of Lunar's claim against ARP I. Due to the fact that ARP II's operations have not been profitable, it has not paid the entirety of its note to Lunar.

ARP I claims that Lunar had conspired with ARP II when it assigned its claim against ARP I to ARP II. Lunar filed a cross-claim against ARP II seeking to be indemnified from ARP I's claims and seeking the balance due on its note from ARP II.

Although ARP II acknowledged at trial that Lunar was entitled to be paid the amount remaining due under the note after receiving appropriate credit for payments that had been made. ARP II submitted that it was entitled to be indemnified by ARP I pursuant to the terms of ARP I's Indemnity Agreement and pursuant to its rights as the subrogee of Lunar.

ARP I contended that the 2005 arbitration between ARP II and Emerald ruled that ARP II was responsible for resolving the Lunar claim and that ARP II was liable for abuse of process in allowing the lis pendens filed by Lunar to continue after ARP II paid for an assignment of Lunar's claims. While it was true that the 2005 Arbitration Award held that ARP II was responsible for resolving Lunar's claim, ARP I was not a party to the 2005 arbitration proceeding. ARP II has always maintained that ARP I was primarily liable for payment of Lunar's claim.

The Circuit Court held that the 2005 Arbitration Award held that ARP I was not liable for Lunar's claims, that ARP II was not entitled to indemnity from ARP I, but that ARP II was not liable to ARP I for abuse of process because, among other things, the evidence did not establish that ARP II was guilty of any ulterior purpose. ARP II has not appealed the Circuit Court's holdings that it is not entitled to indemnity from ARP I. ARP I has appealed the Circuit Court's holding that ARP II is not liable for abuse of process. Because there is ample evidence to support the Circuit Court's holding, its decision should be affirmed.

- I. The Standard of Review is Correctly stated by Appellant. If there is any evidence supporting the Circuit Court's order, the order must be affirmed.**
- II. There is ample evidence supporting the Circuit Court's ruling that ARP II did not have an ulterior purpose in maintaining the lis pendens on ARP I's property.**

The Appellant does not really argue that Lunar's initial filing of the lis pendens was in any way wrongful. Appellant argues that ARP II's continuing to maintain the lis pendens after it paid Lunar and took an assignment of its claim back against ARP II was an abuse of process. Appellant acknowledges that the Circuit Court properly and accurately stated the law with respect to the elements of a claim for abuse of process. One of those elements is that process be used for an ulterior purpose. Appellant wrongly argues that because the Circuit Court denied ARP II's claim for indemnity that means that ARP II knew its claim was without merit.

ARP II has been steadfast in its position that ARP I was primarily liable to Lunar and that ARP I should ultimately be held responsible for Lunar's claim. When ARP II took the assignment of Lunar's claim, it did so for the purpose of enforcing the claim and ultimately receiving its money through the forced sale of ARP I's property, if necessary. Tr.p. 12 L.22-p. 16 L.25.

Lunar's claim against ARP I was properly subrogated to ARP II. ARP II was within its rights to pursue those claims against ARP I. Subrogation can arise either by way of express contract or equitably. *Shumpert v. Time Insurance Company*, 329 S.C. 605, 496 S.E.2d 653 (Ct. App. 1998).

"Subrogation may be broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right." 73 Am.Jur.2d *Subrogation* § 1 (1974). The general rule is that when an insurer pays its insured for a loss resulting from the tortious conduct of a third party, the insurer is subrogated to the rights of its insured against the third party. *Frank B. Hall & Co. v. Bailey Lincoln-Mercury, Inc.*, 298 S.C. 282, 379 S.E.2d 892 (1989).

Subrogation enables the insurer to recover the amount paid to its insured out of any judgment or settlement proceeds received by the insured from the third party. Subrogation can arise by statute, by contract, or through equity. *Dailey v. Secura Ins. Co.*, 164 Wis.2d 624, 476 N.W.2d 299 (App.1991). Conventional subrogation arises by contract and is specifically bargained for by the parties. In contrast, equitable (or legal) subrogation is implied subrogation that arises under the common law.

329 S.C. at 611, 496 S.E.2d 656.

ARP II submits that by taking the assignment from Lunar, ARP II became contractually subrogated to Lunar's claims. ARP II also submits that it was entitled to be equitably subordinated to Lunar's claims.

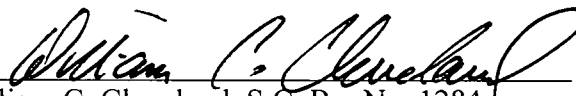
“Through the doctrine of equitable subrogation, a subsequent creditor can assume the rights and priority of a prior creditor. A party may be equitably subrogated to the rights of an earlier creditor if: (1) the party claiming subrogation has paid the debt owed to the earlier creditor; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity.”

*Dodge City of Spartanburg, Inc. v. Jones*, 317 S.C. 491, 454 S.E.2d 918 (Ct. App. 1995).

## CONCLUSION

Although, ARP II lost its claim for indemnity before the Circuit Court, it does not change the fact that throughout this lawsuit, ARP II has simply been trying to be paid the monies that it ultimately has paid and will have to pay Lunar. As the Circuit Court properly held, none of that amounts to an ulterior purpose and none of it is actionable as abuse of process.

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Attorneys for the Appellants

Charleston, South Carolina  
Dated: March 13, 2014

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Appellants.

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Appellant,

v.

LUNAR SYSTEMS, LTD and THOMAS J. LUSSIER, Third-party Defendants,

Respondents.

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CERTIFICATION

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The undersigned hereby certifies that the attached Designation of Matter to be included in the Record on Appeal does not contain any material irrelevant to this Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William C. Cleveland, III", written over a horizontal line.

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March 13, 2014

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SC Court of Appeals

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: Ashley River Properties, II, LLC, et. al v. Ashley River Properties I, LLC  
Case Tracking No. 2013-001984  
C/A No. 2005-CP-10-2434  
WCSR No.: 82826.0002.0

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondents' Initial Brief and the original and one copy of Respondents' Designation of Matter, along with the Certificate of Service for same. Please file the originals and return the file-stamped copies to me in the enclosed self-addressed stamped envelope.

Thank you in advance for your assistance with this matter.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

William C. Cleveland  
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WCC/cbc  
Enclosures

cc: Clayton B. McCullough, Esq. (w/encl.)  
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