

The South Carolina Court of Appeals

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SC Court of Appeals

Ashley River Properties II, LLC, as assignee of Lunar Systems, LTD and Ashley River Properties II, LLC, in its own right, are the Respondents

v.

Ashley River Properties One, LLC, successor in interest to Ripley Light Yacht Club, LLC and Ripley Light Development, LLC

173112

Of Whom, Ashley River Properties One, LLC, is the Appellant.

Ashley River Properties One, LLC, Third-Party Plaintiffs, Appellant

v.

Lunar Systems, LTD and Thomas J. Lussier, Third-Party Defendants, Respondents.

Appellate Case No. 2013-001984

**The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2005CP1002434**

APPELLANT’S MOTION TO ALLOW LATE FILING OF INITIAL REPLY BRIEF TO RESPONDENTS LUNAR SYSTEMS, LTD AND THOMAS J. LUSSIER

Appellant Ashely River Properties One, LLC (“ARP-II”) respectfully requests and moves this Honorable Court for an Order authorizing the late filing of ARP-II’s Initial Reply Brief to Respondents Lunar Systems, LTD and Thomas J. Lussier. Counsel for each Respondent has graciously consented to this request. **See E-mails attached**

hereto as Exhibit A. As grounds for this Motion, ARP-I would respectfully show that:

1. On August 1, 2014, the undersigned Counsel for APR-I received a phone call from the Court of Appeals staff stating that there was no copy of Appellant's Initial Reply Brief to Respondent Lunar Systems, Ltd. and Thomas J. Lussier on file with the Court (the "Initial Reply Brief"). The Final Reply Brief to Respondent Lunar Systems, Ltd. and Thomas J. Lussier (the "Final Reply Brief") was, however, filed on May 12, 2014.

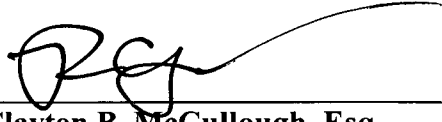
2. By letter to the Court of Appeals dated March 21, 2014, Counsel for ARP-I enclosed the original and one (1) copy of the Initial Reply Brief, and also served copies of same on Counsel for Respondents. **See Letter attached hereto as Exhibit B and Copy of Appellant's Initial Reply Brief attached hereto as Exhibit C.**

3. The Initial Reply Brief contains a Proof of Service dated March 21, 2014, and such service and transmittal to the Court of Appeals for filing was timely under the South Carolina Appellate Court Rules ("SCACR").

4. For some unknown reason, the Initial Reply Brief was never filed by the Court of Appeals, and the Final Brief was subsequently and timely filed.

WHEREFORE, in order to comply with Rules 208, 211, and all other necessary provisions of the SCACR and *with the consent of all Respondents*, Counsel for ARP-I respectfully requests that this Honorable Court grant its request to allow the Initial Reply Brief to be filed at this time, albeit outside the time permitted by the SCACR, in order to preserve the Final Reply Brief for review by this Court. A copy of the fresh, original Initial Reply Brief for late filing is attached hereto as **Exhibit D.**

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'CBM', is written over a horizontal line.

Clayton B. McCullough, Esq.

Ross A. Appel, Esq.

McCULLOUGH KHAN, LLC

359 King St., Suite 200

Charleston, SC 29401

(843) 937-0400

ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

Ashley River Properties II, LLC, as assignee of Lunar Systems, LTD and Ashley River Properties II, LLC, in its own right, are the Respondents

v.

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PROOF OF SERVICE

I, the undersigned Paralegal of the law firm of McCullough Khan, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the **APPELLANT'S MOTION TO ALLOW LATE FILING OF INITIAL REPLY BRIEF TO RESPONDENTS LUNAR SYSTEMS, LTD AND THOMAS J. LUSSIER** by mailing a copy of same by United States Mail, postage prepaid, to the following addresses:

William C. Cleveland, Esq.
P.O. Box 999
Charleston, SC 29402

Frank M. Cisa, Esq.
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464



Alicia M. Benton, Paralegal

August 4, 2014

Ross A Appel

From: Cleveland, William <WCleveland@wcsr.com>
Sent: Friday, August 01, 2014 1:24 PM
To: Ross A Appel; 'frank@cisadodds.com'
Cc: Clay McCullough; Alicia Benton
Subject: RE: Ashley River Properties, II, LLC v. Ashley River Properties I, LLC and Lunar Systems, LTD (Appeal No. 2013-001984)

Ross,
We consent. Thank you.
Will

William C. Cleveland
Womble Carlyle Sandridge & Rice, LLP
Five Exchange St.
P.O. Box 999
Charleston, S.C. 29401

843-720-4606

From: Ross A Appel [<mailto:Ross@mklawsc.com>]
Sent: Friday, August 01, 2014 10:40 AM
To: Cleveland, William; frank@cisadodds.com
Cc: Clay McCullough; Alicia Benton
Subject: Ashley River Properties, II, LLC v. Ashley River Properties I, LLC and Lunar Systems, LTD (Appeal No. 2013-001984)

Dear Will and Frank,

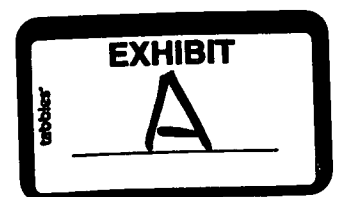
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As you can see per the attached letter to the court from my office, copy of the Initial Reply Brief to Lunar and Lussier, and proof of service (dated March 21, 2014), these documents left our office on March 21, 2014. We received a clocked copy of our Initial Reply Brief to ARP-II (see attached), filed stamped March 24, 2014, we just never got one for the Lunar/Lussier Initial Reply Brief. The Court does have filed copies of both Final Reply Briefs.

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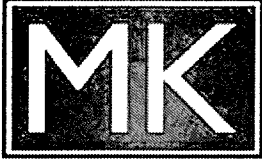
I really appreciate all of your cooperation to date and hope both of y'all have a great weekend. If there are any questions about this procedural snafu, please do not hesitate to call me at 843-937-9798.

Regards,



*****Please note our new address below.*****

Ross A. Appel, Esq.



McCullough Khan, LLC

359 King Street, Suite 200

Charleston, SC 29401

Phone: 843.937.0400

Direct: 843.937.9798

Fax: 843.937.0706

ross@mklawsc.com

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CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney-client privilege, that may attach to this communication. Thank you for your cooperation.

Ross A Appel

From: Frank Cisa <Frank@cisadodds.com>
Sent: Friday, August 01, 2014 1:59 PM
To: Ross A Appel; wcleland@wcsr.com
Cc: Clay McCullough; Alicia Benton
Subject: RE: Ashley River Properties, II, LLC v. Ashley River Properties I, LLC and Lunar Systems, LTD (Appeal No. 2013-001984)

Ross, I consent . Frank

Frank M. Cisa
Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC
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fax(843) 881-5433
frank@cisadodds.com

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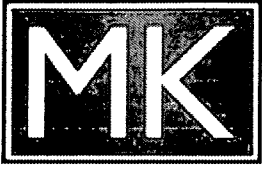
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Clayton B. McCullough
Phone: (843) 937-0040
Fax: (843) 937-0706
clay@mklawsc.com

March 21, 2014

VIA U.S. MAIL

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Calhoun Building
1015 Sumter Street
Columbia, SC 29201

Re: *Ashley River Properties II, LLC et al. v. Ashley River Properties I, LLC et al. v. Lunar Systems, LTD et al.*
Appellate Case No.: 2013-001984
C/A No.: 2005-CP-10-2434

Dear Ms. Kitchings:

I hope this finds you well. Attached for filing, please find an original and one (1) copy each of the Appellant's Reply Brief to Respondent Ashley River Properties II, LLC and the Appellant's Reply Brief to Respondents Lunar Systems, Ltd. and Thomas J. Lussier in the above-referenced matter. Please forward to the appropriate person for filing, and return a file-stamped copy of each document to our office in the enclosed envelope.

Please feel free to contact me should you have any questions or concerns. Thank you in advance for your assistance in this matter.

Sincerely,

McCULLOUGH KHAN, LLC

Alicia M. Benton

Paralegal to Clayton B. McCullough

Enclosures (as stated)

cc: William Cleveland, Esq.
Frank Cisa, Esq.



THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-CP-10-2434

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Systems, LTD and Ashley River Properties II, LLC.....Respondents

v.

Ashley River Properties One, LLC, successor in the
interest to Ripley Light Yacht Club, LLC and Ripley
Light Development, LLC.....Appellant

Ashley River Properties One, LLC, Third-Party
Plaintiffs.....Appellant

v.

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Party Defendants.....Respondents

APPELLANT'S REPLY BRIEF TO RESPONDENTS LUNAR SYSTEMS, LTD.
AND THOMAS J. LUSSIER

Clayton B. McCullough, Esq.
Ross A. Appel, Esq.
McCULLOUGH KHAN, LLC
68 ½ Queen Street
Charleston, SC 29401
(843) 937-0400

ATTORNEYS FOR APPELLANT

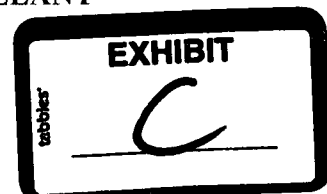


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Lunar and Lussier state in their Brief that once "Lunar assigned its rights to the claims asserted in the Plaintiff's Complaint on December 20, 2007, Lunar had no further control of the claims or *Amended Lis Pendens* that was filed with the suit." This is legally incorrect. S.C. Code Ann. § 15-11-40 ("The *lis pendens* notice, however, may be cancelled without a court order by **the person who filed the notice** any time after the action has been **settled**, discontinued, abated, or dismissed by a court of law by the submission of a written notice of cancellation to the clerk of court of each county in which a notice was filed or recorded.") (Emphasis added) The proper course of conduct for Lunar and Lussier after their claims had been settled would have been for them to cancel the *Lis Pendens* and *Amended Lis Pendens* filed on ARP-I's property.

Lunar's and Lussier's failure to release the *Lis Pendens* and *Amended Lis Pendens*, coupled with the ample evidence in the record demonstrating Lunar's and Lussier's cooperation with ARP-II vis-à-vis the *Amended Lis Pendens*, strongly evidences both an ulterior purpose and a wilful act in the use of the process, thus supporting ARP-I's abuse of process claim. *E.g., Hainer v. Am. Med. Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). Given the foregoing, there is no evidence to

reasonably support the circuit court's denial of ARP-I's abuse of process claim against Lunar and Lussier.

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Lunar and Lussier have identified in their Brief one example of a foregone business opportunity deemed speculative by the circuit court in support of their claim that all of the damages asserted by ARP-I at trial were speculative. Putting aside for a moment the issue of whether this and other lost profit arguments were speculative, which ARP-I strongly denies, Lunar and Lussier and also the circuit court ignored evidence of other damages suffered by ARP-I.

Aside from lost profits, ARP-I introduced evidence on damages including loss of equity, site design and engineering fees, legal fees, and certain carrying costs on the property (taxes and interest payments). (Tr. 106:13-108:5) Each of these damages items are non-speculative and capable of precise measure, and supported by the testimony of Mr. Longman. Moreover, as set forth in greater detail in Appellant's Brief, all of these damages are recoverable in an abuse of process action where the tortfeasors' wrongful conduct prevented property from being sold and proximately caused the asset to ultimately be lost. *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). Given the foregoing, there is no evidence to reasonably support the circuit court's finding that all of ARP-I's damages were speculative or conjectural.

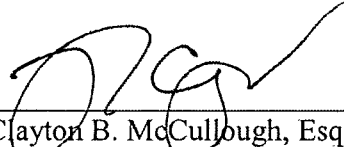
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Given the foregoing, ARP-I respectfully requests that this Court reverse the circuit court's denial of ARP-I's abuse of process claims against Lunar, and Lussier and

order these causes of action remanded for a new trial consistent with this Court's guidance on the law of abuse of process.

March 21, 2014

Respectfully submitted,



Clayton B. McCullough, Esq.
Ross A. Appel, Esq.
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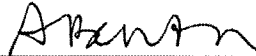
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William C. Cleveland, Esq.
P.O. Box 999
Charleston, SC 29402

Frank M. Cisa, Esq.
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464



Alicia M. Benton
Paralegal

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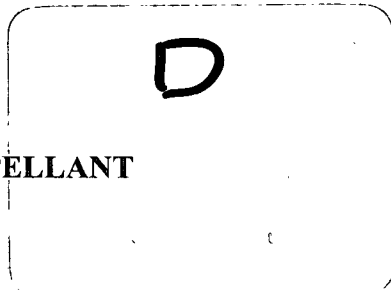


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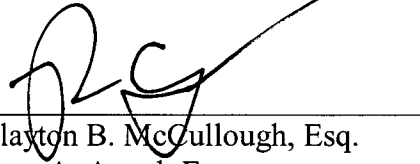
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August 4, 2014

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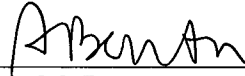
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Party Defendants.....Respondents**

PROOF OF SERVICE

I, the undersigned Paralegal of the law firm of McCullough Khan, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the **Appellant's Reply Brief To Respondents Lunar Systems, Ltd. and Thomas J. Lussier** by mailing a copy of same by United States Mail, postage prepaid, to the following addresses:

William C. Cleveland, Esq.
P.O. Box 999
Charleston, SC 29402

Frank M. Cisa, Esq.
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464



Alicia M. Benton
Paralegal

August 4, 2014



RECEIVED

AUG 05 2014

SC Court of Appeals

Alicia M. Benton
Phone: (843) 937-0040
Fax: (843) 937-0706
alicia@mklawsc.com

August 4, 2014

VIA U.S. MAIL

South Carolina Court of Appeals
Attn: Diane Greene
Calhoun Building
1015 Sumter Street
Columbia, SC 29201

Re: *Ashley River Properties II, LLC et al. v. Ashley River Properties I, LLC et al. v. Lunar Systems, LTD et al.*
Appellate Case No.: 2013-001984
C/A No.: 2005-CP-10-2434
Our File No.: 1051.001

Dear Ms. Greene:

I hope this finds you well. Attached for filing per your instructions, please find the original and six (6) copies of the Appellant's Motion to Allow Late Filing of Initial Reply Brief to Respondents Lunar Systems, Ltd. and Thomas J. Lussier (the "Initial Reply Brief") in the above-referenced matter. Also enclosed is a check in the amount of \$25.00, which serves as the appropriate filing fee.

Please forward to the appropriate person for filing, and return a file-stamped copy to our office in the enclosed envelope.

Further, should this motion be granted, please also forward the Initial Reply Brief to the appropriate person for filing, and return a file-stamped copy to our office in the enclosed envelope. I have included the original Initial Reply Brief as Exhibit D to the above-referenced motion, as well as one copy of the same.

Please feel free to contact me should you have any questions or concerns. Thank you in advance for your assistance in this matter.

Sincerely,

McCULLOUGH KHAN, LLC

Alicia M. Benton

Paralegal to Clayton B. McCullough

Enclosures (as stated)

cc: William Cleveland, Esq.
Frank Cisa, Esq.