

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas  
Letitia H. Verdin, Circuit Court Judge

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Case No. 2014-CP-39-398  
Appellate Case No.: 2014-001771

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Charles Alan Grubb, Roberta Elizabeth Vogt,  
Eleanor Hare, Derek Hodgin, Katherine Lee  
Schwennsen, Linda Gahan, and Virginia Carner.....Respondents

v.

The City of Clemson and The Board of  
Architectural Review, Tom Winkopp, William E. Dukes  
and Monica Zeilinski, Defendants,

Of whom Tom Winkopp is the Appellant.....Appellant

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**REPLY BRIEF OF APPELLANT TOM WINKOPP**

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**STATEMENT OF ISSUE ON APPEAL**

**1. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' SOUTH CAROLINA RULE OF CIVIL PROCEDURE NO. 12(b)(6) MOTION TO DISMISS THE APPELLANT WINKOPP'S COUNTERCLAIM FOR FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE THE CAUSE OF ACTION FOR ABUSE OF PROCESS?**

## ARGUMENT

### **THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' *SCRCP* RULE 12(b)(6) MOTION TO DISMISS THE APPELLANT WINKOPP'S COUNTERCLAIM FOR FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE THE CAUSE OF ACTION FOR ABUSE OF PROCESS.**

This Reply Brief of Appellant Tom Winkopp does not need to be lengthy, but it does need to address several incorrect statements of facts and law made in the Respondents' Brief.

The Respondents' Brief states: "Since Winkopp does not and cannot allege Respondents of 'misuse' of the appeal, it proves that the Appellant's Counterclaim fails to state facts sufficient to constitute a cause of action, and Judge Verdin's Order must be affirmed." [Respondents' Brief, page 4].

This is incorrect because Winkopp specifically alleged the following, each of which independently makes the required allegation of abuse or misuse of the process and, in combination with each other, patently alleges intentional and willful misuse and abuse of the process of the appeal:

1. The appeal of the decision by the Board of Architectural Review (BAR) was "done for no purpose other than attempting to sabotage the Project and to prevent him from developing his Project in accordance with his plans." (Winkopp Answer and Counterclaim, paragraph 27).
2. "Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delaying or killing the Project, which they could not accomplish before Clemson City Council with the re-zoning or before the BAR." (Winkopp Answer and Counterclaim, paragraph 27).

3. “Further, Winkopp alleges that this constitutes a willful act in the use of process not proper in the conduct of these proceedings and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process.” (Winkopp Answer and Counterclaim, paragraph 27).

The Respondents also state: “Rather than alleging extortive or strong-arm tactics, threats or coercion, Appellant claims that by Respondents’ exercising their statutory right to appeal the BAR’s decision they abused the legal process,” and they proceed to argue that *effect* of the appeal is not the basis for a cause of action for abuse of process (Respondents’ Brief pages 6-7), but the Respondents and the Trial Court misunderstand the allegations of Winkopp’s Counterclaim: Winkopp does not pursue abuse of process against the Respondents’ simply because the effect of the appeal is to delay the project, but instead he has alleged that the *sole purpose* or *intent* of the appeal was to damage the project and thereby damage Winkopp. In essence, the Petitioners argue that Winkopp cannot complain of the *effects* of the appeal, but Winkopp has alleged their *sole intent* in the appeal was to use the process to harm him. That is why Winkopp alleged that the appeal was “done for no purpose other than attempting to sabotage the Project.” (Winkopp Answer and Counterclaim, paragraph 27).

It is the *intent* of the abuse of the process that is the key and not merely a complaint over the *effect* of the process.

This is the scenario that the South Carolina Supreme Court understood when it stated: “Our courts have noted that an abuse of process action may lie if a party prosecutes an *entire* lawsuit for collateral purposes.” *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012), reh’g denied (Aug. 9, 2012), aff’d in part as modified,

vacated in part, reh'g denied (Nov. 19, 2014) 410 S.C. 319, 764 S.E.2d 701 (2014)(emphasis added).

The position of Winkopp is supported by the case of *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002) where the South Carolina Court of Appeals quoted the Restatement (Second) of Torts §682 with approval and ultimately said: “It therefore follows that when a claim for abuse of process is predicated on an alleged act ‘aimed at an object not legitimate in the use of the process,’ the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim. *Id.* at 75, 567 S.E.2d at 256. That is exactly what Winkopp has alleged.

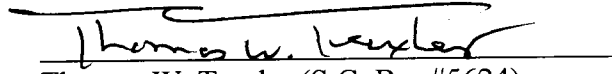
It is true that abuse of process will not lie “where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” *id.* at 74, 567 S.E.2d at 255, but liability will lie when a person “uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed.” *Id.* at 75, 567 S.E.2d at 255-56 (Ct. App. 2002) quoting Restatement (Second) of Torts §682.

The Petitioners say they can file an appeal even with bad intentions. Winkopp argues that abuse of process lies when those bad intentions are the *primary* purpose of the appeal. Winkopp has alleged even more than that and alleged that the *sole* purpose in the appeal was to kill the project by delay.

THAT is abuse of process, and it does not require a change in South Carolina law but instead requires only that existing law be applied.

CONCLUSION

The Trial Court's Orders filed on July 10, 2014 (dismissing the Counterclaim) and on August 5, 2014 (denying Motion To Reconsider) should be reversed.

  
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Dated: December 28, 2014  
Greenville, South Carolina

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Of whom Tom Winkopp is the Appellant.....Appellant

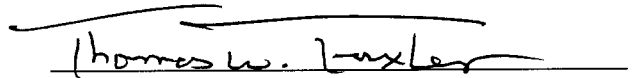
**PROOF OF SERVICE**

I certify that I have served the Reply Brief of Appellant Tom Winkopp on the attorneys of record for Respondents and all other attorneys of record as listed below, by depositing a copy of it in the United States Mail, postage prepaid, on December 29, 2014, addressed as indicated below:

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December 29, 2014

Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
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Re: *Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgins, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Respondents v. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski, Defendants of whom Tom Winkopp is the Appellant*  
C.A. No.: 2014-CP-39-00398  
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Dear Ms. Kitchings:

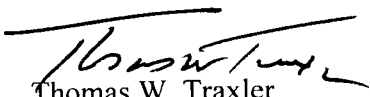
Enclosed for filing in the above-referenced matter is the original and one copy of the Reply Brief of Appellant Tom Winkopp and Proof of Service of the same. Please return a filed-stamped copy of these documents in the enclosed self-addressed stamped envelope.

By copy of this letter to Robert T. Lyles, Jr. and Marshall T. Austin, attorneys for the Respondents, we hereby serve Respondents with the Reply Brief of Appellant Tom Winkopp, and also to attorneys for The City of Clemson and The Board of Architectural Review.

Should you have any questions or need anything further from us in this matter, please do not hesitate to contact me.

Yours very truly,

CARTER, SMITH, MERRIAM,  
ROGERS & TRAXLER, P.A.

  
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TWT/ef

Enclosures

cc (w/encls.): Robert T. Lyles, Jr. and Marshall T. Austin, Attorneys for Respondents  
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Tom Winkopp  
William Dukes