THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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

FINAL BRIEF OF APPELLANT TOM WINKOPP

Thomas W. Traxler (S.C. Bar #5624)
CARTER, SMITH, MERRIAM,
ROGERS & TRAXLER, P.A.
900 E. North Street (29601)
P.O. Box 10828 (29603)
Greenville, South Carolina
(864) 242-3566 / Fax: (864) 232-1558
Email: *tom.traxler@carterlawpa.com*
Attorney for Appellant

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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?

STATEMENT OF THE CASE

Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan and Virginia Carner ("Respondents") initiated the underlying action on April 2, 2014 (R. p. 9) against The City of Clemson and The Board of Architectural Review ("BAR"), Tom Winkopp, William E. Dukes and Monica Zeilinski, of whom Tom Winkopp is the Appellant in this matter and is hereafter referred to as "Winkopp." The Defendant William E. Dukes is referred to as "Dukes."

On April 25, 2014 a Stipulation of Dismissal as to Defendant Monica Zielinksi was filed in this matter.

The underlying action by the Respondents challenges the decision of the City of Clemson's BAR on March 4, 2014 to approve the architectural plans and specifications for a mixed-use real estate development project proposed by the Appellant Winkopp on property being acquired from Dukes. The appeal is based upon *S.C. Code Ann.* §6-29-900 (Supp. 2013).

The Appellant Winkopp served his Answer and Counterclaim in this matter on May 8, 2014 and filed on May 12, 2014. (R. p. 25) Dukes similarly served his Answer on May 8, 2014 with it being filed on May 12, 2014. (R. p. 31) The City of Clemson and its BAR served their Amended Answer on May 8, 2014. (R. p. 36) The Answers of all Defendants denied all allegations of the Complaint and asserted that the BAR had properly approved the architectural plans and specifications for the Winkopp project.

The Counterclaim of Winkopp asserts a cause of action against the Respondents for abuse of process, alleging that the appeal by the Respondents was done for an improper ulterior motive not proper in the conduct of the proceedings.

The Respondents served their Motion To Dismiss the Winkopp Counterclaim on June 5, 2014 (R. p. 44) pursuant to *South Carolina Rules of Civil Procedure* (*SCRCP*) Rule 12(b)(6) on the alleged grounds that the Winkopp Counterclaim did not allege facts sufficient to constitute a cause of action.

The Respondents' Memorandum Supporting its Motion to Dismiss dated June 19, 2014 was served on June 20, 2014 (R. p. 46). Winkopp and Dukes' Reply Memorandum in Opposition to Motion to Dismiss and Reply Memorandum to Motion to Bifurcate and for Protective Order was served on June 24, 2014 and filed on June 27, 2014 (R. p. 51), and the Respondents' Reply to Defendants Tom Winkopp and William E. Dukes' Memorandum in Opposition to Respondents' Motion to Dismiss was served on July 2, 2014 and filed on July 7, 2014 (R. p. 61).

A hearing on the Respondents' Rule 12(b)(6) Motion to Dismiss was heard in the Pickens County Courthouse on June 20, 2014 by the Honorable Letitia H. Verdin, Resident Circuit Court Judge. (R. p. 84).

An Order was issued by the Honorable Letitia H. Verdin on July 7, 2014 and filed on July 10, 2014 (R. p. 2) granting Respondents' Motion to Dismiss Counterclaim of Tom Winkopp and ruling on other Motions that are not pertinent to this appeal. That Order was received by counsel for Appellant Winkopp on July 14, 2014.

Winkopp filed and served his Motion to Reconsider, Alter and Amend on July 24, 2014 (R. p. 67). Judge Letitia H. Verdin denied Winkopp's Motion to Reconsider by Form 4 Order dated August 1, 2014 and filed August 5, 2014 (R. p. 7). The Form 4 Order was received by counsel for the Appellant Winkopp on August 7, 2014.

Winkopp served Notice of Appeal on August 13, 2014 appealing the Orders of the Honorable Letitia H. Verdin, dated July 7, 2014 and entered of record on July 10, 2014, along with the Order of the Honorable Letitia H. Verdin dated August 1, 2014 and entered of record August 5, 2014.

FACTS

The Appellant Winkopp was developing a mixed-use real estate project (Project) in the City of Clemson on property being acquired by him from Dukes, and, in order to accomplish the Project, he secured the necessary rezoning from the City of Clemson. The rezoning is not under appeal.

Winkopp then secured the approval needed of the Clemson Board of Architectural Review ("BAR") that the plans and specifications complied with the zoning and architectural standards promulgated by the City of Clemson ordinances. Throughout the entire process before the BAR he was opposed by the Respondents. After the BAR had concluded that the Project met the checklist requirements of the architectural standards, it approved the construction of the Project on March 4, 2014. It is that approval from which the Respondents presently take their appeal pursuant to *S.C. Code Ann.* §6-29-900 (Supp. 2013).

When Respondents appealed the decision of the BAR, Winkopp counterclaimed for abuse of process and asserted that the appeal by the Respondents was nothing more than an effort by them to delay or kill the Project, an ulterior motive not proper in the conduct of the proceedings.

In support of its cause of action for abuse of process, Winkopp's Counterclaim alleged:

1. The *sole purpose* of the appeal by the Petitioners [Respondents] is *not* to seek an appellate review of the decision of BAR on the merits.
2. The *sole purpose* was, instead, to delay his Project for the purposes of killing it.
3. The Respondents had *no interest* in the merits of the appeal themselves.

4. This act of appealing for the sole purpose of delaying and killing the Project was a willful act in the use of process not proper in the conduct of these proceedings.

5. This act was used to gain an objective (killing or delaying of the Project), not legitimate in the use of this process.

The foregoing allegations are set forth in Paragraph 27 of the Winkopp Answer and Counterclaim. (R. p. 29).

6. This was done willfully and intentionally. (R. p. 29).

The Respondents' filed and served their Motion to Dismiss Winkopp's Counterclaim pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure (SCRCP)*.

The Trial Court heard the Respondents' Motion to Dismiss and entertained Memoranda of Law from the Respondents and Winkopp and on July 7, 2014 issued its Order ("Order") granting the Motion to Dismiss. Winkopp's Motion to Reconsider, Alter and Amend was denied by a Form 4 Order that did not set out any additional findings or conclusions. Therefore, the Trial Court's reasoning is set out fully in its Order dated July 7, 2014.

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.

The Respondents' Motion To Dismiss the Winkopp Counterclaim was based on *SCRCP* Rule 12(b)(6), which means that the Trial Court's analysis was not to weigh the evidence and make a decision on the merits but instead to look at the bare allegations of the Counterclaim to determine if they set forth facts to support the cause of action for abuse of process. "In deciding the motion, the court must view the allegations in the light most favorable to the plaintiff, 'with every doubt resolved in his favor.' [citation omitted]. The trial court, therefore, must refuse a 12(b)(6) motion if the 'facts alleged and reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'" *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-53 (Ct. App. 2002).

Therefore, the foregoing allegations of the Winkopp Counterclaim must be viewed in a light most favorable to Winkopp, resolving every doubt in his favor and making reasonable inferences therefrom. In determining if the Counterclaim sets out facts sufficient to constitute a cause of action for abuse of process, the Trial Court found that Winkopp had not pled facts sufficient to state a cause of action for abuse of process, and it erred in failing to (1) view the allegations in the light most favorable to Winkopp, (2) resolve every doubt in his favor, and (3) find that the "facts alleged and reasonably deducible therefrom would entitle" Winkopp to relief for abuse of process.

This Argument tracks the conclusions of the Trial Court's Order and juxtaposes the allegations in Winkopp's Counterclaim to establish that the Counterclaim more than adequately pled the required elements as propounded by the Trial Court and the law:

1. **The Trial Court found: "To prevail, the claimant must show the accused (1) acted with an ulterior motive and (2) performed 'a willful act in the use of the process that is not proper in the regular conduct of the proceeding.'" [citations omitted].** (R. p. 3).

Counterclaim Allegation: "He [Winkopp] is further informed and believes that *this appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing this Project in accordance with his plans.* 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 delay or killing the project....*" (R. p. 29)(emphasis added).

Therefore, the Counterclaim patently alleges the first element of ulterior motive. The question then becomes whether the Counterclaim also alleges "a willful act in the use of the process that is not proper in the regular conduct of the proceeding."

Counterclaim Allegation: "Further, Winkopp alleges that this constitutes *a willful act in the use of the 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." (R. p. 29)(emphasis added).

a. A willful overt act....

   i. **Counterclaim Allegation**: "Further, Winkopp alleges that this constitutes a *willful* act in the use of the 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." (R. p. 29)(emphasis added).

   ii. **Counterclaim Allegation**: "These acts by the Plaintiffs [Respondents] were willful and intentional." (R. p. 29).

b. In the use of the process...

Counterclaim Allegation: "Further, Winkopp alleges that this constitutes a willful act *in the use of the process* not proper in the conduct of these proceedings...." (R. p. 29)(emphasis added).

c. That is not proper in the conduct of these proceedings....

i. **Counterclaim Allegation**: "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. 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*." (R. p. 29)(emphasis added).

2. The Trial Court also found: "If one undertakes to use the judicial process to further an objective for which the process was not intended, the ulterior motive is met." [citation omitted]. (R. p. 3).

The foregoing allegations from the Counterclaim patently meet that requirement since they allege that the appeal from the Clemson BAR was done "with the ulterior motive of delay or killing the project" and as "a willful act in the use of the process not proper in the conduct of these proceedings." (R. p. 29).

3. The Trial Court further found that the complaint (sic) must meet the second element (performed "a willful act in the use of the process that is not proper in the regular conduct of the proceeding") and allege "[s]ome definite act...not authorized by the process or aimed at an object not legitimate in the use of the process." [citation omitted]. (R. p. 4).

Counterclaim Allegation: "Further, Winkopp alleges that this [the appeal from BAR] constitutes a *willful act in the use of the 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*." (R. p. 29)(emphasis added).

4. The Trial Court then held that this second element includes three components: "(1) a 'willful' or overt act which is performed (2) through the use of the process and which is (3) 'improper either because it is (a) unauthorized or (b) aimed at an illegitimate collateral objective.'" (R. p. 4)

a. As to element of "willful" or overt act,

Counterclaim Allegation: "Further, Winkopp alleges that this constitutes *a willful act* and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process." (R. p. 29)(emphasis added).

Counterclaim Allegation: "These acts by the Plaintiffs [Respondents] were willful and intentional." (R. p. 29).

b. As to element of "performed through the use of the process,"

Counterclaim Allegation: "Further, Winkopp alleges that this constitutes a willful act *in the use of the process* not proper in the conduct of these proceedings...." (R. p. 29)(emphasis added).

c. As to the element of which is (3) "improper either because it is (a) unauthorized or (b) aimed at an illegitimate collateral objective,"

Counterclaim Allegation: "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. 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.*" (R. p. 29)(emphasis added).

In the same vein, the Court also erred in its Order when it stated: "Nowhere in the Respondents' [Winkopp's] complaint [sic] do they allege facts that would give rise to the alleged misuse of the legal process by Petitioners [Respondents]." (R. p. 4) That is error. That is specifically and factually alleged as quoted above. In support of this statement, the Trial Court proceeded to state: "A complaint which neglects to allege a perversion or misuse of the process by omitting facts necessary to show an *improper* willful act in the

use of the process has not stated a cause of action for abuse of process and fails as a matter of law." (R. p. 4), quoting *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 77, 567 S.E.2d 251, 254 (Ct. App. 2002).

The Court also erred in finding: "The facts alleged are not sufficient to support an essential element of this cause of action – that Petitioners [Respondents in the present appeal] are appealing the Board's decision solely to delay, sabotage, or 'kill' the project, a purpose for which the appellate process is not intended." (R. p. 4). The foregoing allegations patently make those assertions. The very essence of the Counterclaim that is clearly alleged is that the Respondents had *no motive whatsoever* for the appeal other than trying to kill the Project and decided to pursue the appeal, not because of any merits of the appeal, but instead to delay the Project with the hopes of killing it. That is clearly "aimed at an illegitimate collateral objective."

Similarly, the Court erred in its Order in finding: "Respondents' [Winkopp's] complaint [sic] must set forth specific facts showing the Petitioners [Respondents in the present appeal] are using the appellate process in this case primarily for a purpose for which the process is not intended. The allegations of the complaint [sic] fall short of the standard." (R. p. 4). The error is that the allegations of the Winkopp Counterclaim are sufficient to specifically plead facts necessary to support the elements of the cause of action for abuse of process and do not fall short of the standard.

The Trial Court also erred in finding that the "only fact Respondents [Winkopp] allege" is that "Respondent Winkopp is 'informed and believes' Petitioners [Respondents in the present appeal] are aware the appeal is 'frivolous and without merit' and are appealing the decision of the Board only in an attempt to 'kill or delay' the development

project." (R. p. 4). That is not the only fact alleged by Winkopp. This is not a malicious prosecution case yet because the underlying appeal has not yet been terminated in favor of Winkopp, and the allegation that the appeal is "frivolous and without merit" is not an essential element of the abuse of process cause of action, but the fact that the appeal was frivolous and without merit is probative of the intent of the Respondents to use the appeals process for the ulterior motive of killing the project, a result that they could not otherwise obtain but for the appeal process.

The Trial Court in its Order further erred in finding that the Winkopp Counterclaim did not allege facts specific to show an ulterior purpose on the part of the Respondents or that they took willful acts to abuse the legal process, the error being that the allegations of the Winkopp Counterclaim did, in fact, allege such facts. Those allegations are set out above and do not need to be reiterated here yet again.

The Court also erred in failing to find and conclude that Winkopp alleged facts asserting that the Respondents "performed 'a willful act in the use of the process that is not proper in the regular conduct of the proceeding.'" (R. p. 3). That allegation is made specifically in Paragraph 27 of the Counterclaim. (R. p. 29).

The Court also errs when it appears to conclude that the Respondents herein "[have] done nothing more than carry out the process to its authorized conclusion, even though with bad intentions" (R. p. 4) or "[had] an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process," (R. p. 5), or that there was only an ulterior motive only without more. (R. p. 5).

If this Court were to affirm the Trial Court and adopt the position urged by the Respondents, the Court would hold, as a matter of law, that no abuse of process could

ever possibly lie in an appeal of a permitting or licensing decision by a governmental entity or rezoning matter, no matter how dark and malicious the intent was behind such appeal. In such an instance, the Court would be abandoning a Rule 12(b)(6) analysis of matching the allegations of a pleading against the elements of the cause of action, and the Court would effectively be ruling, as a matter of law, that an appeal from such a governmental decision could never, ever be an abuse of process regardless of the circumstances or intent. That would mean that this Court would be ruling that a cause of action for abuse of process is not a cognizable cause of action in such a case.

Stated more bluntly, if the Court affirms the Trial Court and adopts the position propounded by the Respondents, the Court will be ruling that there can never, ever be an abuse of process by such an appeal even if the Respondents themselves stood up before the Court and boldly and defiantly announced to the Court that their *sole* purpose was to ruin the Project and that they had no other interest whatsoever in the merits of the appeal. That is the effect of the Trial Court's Order. That position removes the elements of "ulterior motive" and "willful act in the use of the process not proper in the conduct of proceedings" from consideration and eliminates any cause of action for abuse of process in such a case. That is not the law of the State of South Carolina.

The South Carolina Supreme Court has implicitly recognized a cause of action for abuse of process in a zoning appeal, and there is no logical difference between a zoning appeal and an architectural board appeal. In *LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988), Punchline of Columbia, Inc. secured required variances

and permitting from the City of Columbia, which LaMotte and others appealed. While that was essentially a zoning appeal, nonetheless, it is analogous to the case before this Court. The Supreme Court upheld the Circuit Court granting summary judgment (it was not a Rule 12(b)(6) case) stating that the record indicated that "appellant had not asserted a cause of action for abuse of process because they had not alleged that respondent engaged in 'a willful act in the use of the process not proper under the regular conduct of the proceedings.'" *Id.* at 71, 370 S.E.2d at 713. Therefore, the South Carolina Supreme Court has implicitly acknowledged the validity of a cause of action for abuse of process for a "malicious appeal" and has recognized an abuse of process can lie in such an appeal. The Supreme Court in the *LaMotte* case simply found that the record did not show that the plaintiff in that case had asserted such a cause of action since they did not allege that the respondents engaged in "a willful act in the use of the process not proper in the regular conduct of the conduct of the proceedings." That allegation in *LaMotte* that the Supreme Court found deficient does in fact lie in the express wording of the Counterclaim in this matter: "He [Winkopp] is further informed and believes that this appeal is 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 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. 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." (R. p. 29). In other words, the allegation that was defectively missing in *LaMotte* was expressly alleged in the Winkopp Counterclaim.

Even if the underlying appeal of the BAR decision were decided in favor of the Respondents, nonetheless, a cause of action for abuse of process would still lie. It is the perversion of the legal process of the appeal in order to gain any collateral advantage that is the essence of the abuse of process cause of action. That is why "[i]t is settled that it is unnecessary to show that the proceeding complained of was instituted without probable cause or was terminated in favor of the defendant in order for him to recover for abuse of process." *Ransome v. Mimms*, 320 F. Supp. 1110, 1114 (D.C.S.C. 1971), citing 1 Am. Jur. 2d *Abuse of Process* §7 (1962).

It is hard to imagine a pleading more carefully tracking the established elements of an established cause of action than Winkopp's Counterclaim, and the Counterclaim specifically identifies that the ulterior purpose and the specific willful, overt act that were to use the appeal process in an effort to delay or kill the Project.

Further, the law does not require a separate and overt act accompanying the ulterior motive, and the Winkopp Counterclaim did not have to allege such facts. The law does not require an express extortion or a pronouncement of stated malicious intent or purpose. It does not require some separate and overt act to corroborate the ulterior motive and the malicious purpose of using the process. The act of using the process primarily to gain advantage or benefit on a collateral matter, such as killing a development project, is a sufficient "definite act or threat not authorized by the process or aimed at an object not

legitimate in the use of the process." *See Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

The law instead requires what the South Carolina Supreme Court said in *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967):

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club.
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> *Id.* at 209, 153 S.E.2d at 694.

Abuse of process is "usually" *evidenced* by a separate, overt threat, *id.*, but the law does not require it as an *element* of the cause of action for abuse of process.

The Trial Court misunderstood and misapplied the law with regard to abuse of process in a "hyper-technical manner...that vitiate[s] the purpose for which the cause of action exists." *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 143, 492 S.E.2d 103, 111 (1997) (Toal, J. dissenting). Such a "hyper-technical" application of *SCRCP* Rule 12(b)(6) harkens back to the old days of Code Pleading when pleadings were works of engineering art and were more scrutinized for technical errors than fair notice pleading. However, even applying the technical reading, the allegations of the Winkopp Counterclaim are carefully crafted to allege each and every element of the cause of action for abuse of process.

Justice (now Chief Justice) Toal correctly set forth the application of the law on abuse of process in her dissent in *Hainer*. There she stated:

> If we approach the tort of abuse of process only in a hyper-technical manner, then we vitiate the purpose for which the cause of action exists. As *Huggins* explained, abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect. *Huggins*, 249 S.C. at 210, 153 S.E.2d at 695. That case further stated that it is the "abuse, the perversion, of the process, not its illegality, [that] is the foundation of the cause of action." *Huggins*, 249 S.C. at 214, 153 S.E.2d at 697.
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> A reading of *Huggins* reveals that this Court employed a flexible approach to analyzing whether process had been abused.
>
> *Id.*

The Restatement (Second) of Torts §682 states it clearly and succinctly: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *Id.* It is that simple.

Consistent with this statement/restatement of the law, the "willful act in the use of the process that is not proper in the regular conduct of the proceeding" (R. p. 3) does not require a separate threat or overt act; if the process is used *primarily* to gain advantage on a collateral matter (to kill or delay the Project), a cause of action for abuse of process will lie. The act of so using and abusing the process to gain an advantage on a collateral matter is a sufficient "willful act in the use of the process not proper in the conduct of the proceeding" to support a cause of action for abuse of process. That is precisely what the Winkopp Counterclaim alleges.

The Comment to the Restatement (Second) of Torts, §682 states: "The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, *for any purpose* other than that which it was designed to accomplish. Therefore, it is immaterial

that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them...." Restatement (Second) of Torts §682 cmt. a (2014)(emphasis added).

Further Comment to the Restatement (Second) of Torts §682 addresses the word "primarily"[1] to state: "The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an *incidental* motive of spite or an ulterior purpose of benefit to the defendant.[2] Thus the entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor. *For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended.* The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." Restatement (Second) of Torts §682 cmt. b (2014)(emphasis added).

Winkopp has alleged that the appeal was done by the Respondents for the "sole purpose" of killing or delaying the project and that the Respondents had NO interest in

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[1] The Restatement Second of Torts, §682 uses the word "primarily" as follows: "One who uses a legal process, whether criminal or civil, against another ***primarily*** to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

[2] South Carolina has equivalently stated the same thing by holding: "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

the merits of the appeal. THAT is exactly what the Restatement means when it says: "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." *Id.*

The Trial Court erred in its Order in concluding: "One is not liable for abuse of process 'where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.'" (R. p. 4). When the Court focused simply on whether the process was authorized and that it had been carried to its authorized conclusion (or would be), it completely ignored the law that abuse of process in South Carolina can lie when it is "aimed at an object not legitimate in the use of the process," such as using the appeals process from the BAR to kill or delay Winkopp's Project. When the South Carolina cases talk about "even though with bad intentions," they are referring to the "incidental motive of spite or an ulterior purpose of benefit to the defendant" set forth in the Comments to the Restatement. Tracking the Restatement, if the Respondents use the appeal process against Winkopp *primarily* to delay or kill the Project, they are liable for abuse of process, even if the process is carried to its authorized conclusion. That is precisely what the Winkopp Counterclaim alleges, and the Trial Court erred in dismissing it for failure to state a cause of action for abuse of process.

CONCLUSION

Therefore, Winkopp pled facts sufficiently to establish a cause of action for abuse of process against the Respondents, and the Trial Court erred in finding that he did not and in granting the Respondents' Rule 12(b)(6) Motion To Dismiss.

The Trial Court Order dated July 7, 2014 that grants the Respondents' Motion to Dismiss should be reversed on that issue.

Thomas W. Traxler (S.C. Bar #5624)
CARTER, SMITH, MERRIAM,
ROGERS & TRAXLER, P.A.
900 E. North Street (29601)
P.O. Box 10828 (29603)
Greenville, South Carolina
(864) 242-3566 / Fax: (864) 232-1558
tom.traxler@carterlawpa.com
Attorney for Appellant Tom Winkopp and
Defendant William E. Dukes

Dated: February 17, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant Tom Winkopp, Final Reply Brief of Appellant Tom Winkopp, and the Rule 211(b) Certificate of Counsel, 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 February 17, 2015, addressed as indicated below:

Attorney for Respondents
Robert T. Lyles, Jr., Esquire
Marshall T. Austin, Esquire
LYLES & LYLES, LLC
342 East Bay Street
Charleston, SC 29401

Attorney for Defendants The City of Clemson and The Board of Architectural Review:
James W. Logan, Jr., Esquire
LOGAN, JOLLY & SMITH
P. O. Box 259
Anderson, SC 29622

February 17, 2015

Thomas W. Traxler (S.C. Bar #5624)
CARTER, SMITH, MERRIAM,
ROGERS & TRAXLER, P.A.
900 E. North Street (29601)
P.O. Box 10828 (29603)
Greenville, South Carolina
(864) 242-3566 / Fax: (864) 232-1558
tom.traxler@carterlawpa.com
Attorney for Appellant Tom Winkopp
and also Defendant William E. Dukes

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

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

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

APPELLANT'S RULE 211(b) CERTIFICATE OF COUNSEL

The undersigned attorney for Appellant certifies that the Final Brief and Final Reply Brief complies with Rule 211(b), *South Carolina Appellate Court Rules.*

February 17, 2015

Thomas W. Traxler (S.C. Bar #5624)
CARTER, SMITH, MERRIAM,
ROGERS & TRAXLER, P.A.
900 E. North Street (29601)
P.O. Box 10828 (29603)
Greenville, South Carolina
(864) 242-3566 / Fax: (864) 232-1558
tom.traxler@carterlawpa.com
Attorney for Appellant Tom Winkopp
and also Defendant William E. Dukes