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-39-0398
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 RESPONDENTS

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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

On March 4, 2014, the City of Clemson Board of Architectural Review (BAR) approved a proposed building project presented to them by Appellant Tom Winkopp. Respondents appealed the decision of the BAR pursuant to S.C. Code Ann. §6-29-900 by means of their Petition and Notice of Appeal filed April 2, 2014. (R. pp. 11-24) On May 12, 2014, Appellant Tom Winkopp, named simply as a necessary party, filed his Answer denying the allegations of the Petition. (R. pp. 25-30) Within the same pleading, he also filed his Counterclaim claiming Respondents' actions gave rise to a cause of action sounding in Abuse of Process. *Id.* Respondents then filed their Motion to Dismiss Appellant's Counterclaim pursuant to Rule 12(b)(6), SCRCP on June 5, 2014. (R. pp. 44-45)

A hearing on Respondent's Motion to Dismiss was conducted in front of Judge Letitia H. Verdin on June 20, 2014. (R. pp. 84-106) Judge Verdin dismissed Appellant's Counterclaim by her Order filed on July 10, 2014. (R. pp. 2-6) Appellant filed his Motion to Reconsider, Alter, or Amend on July 24, 2014 which Judge Verdin denied through a Form 4 Order filed August 5, 2014. (R. pp. 67-77 and 7-8) Appellant then filed his Notice of Appeal on August 14, 2014.

FACTS

In addition to the facts noted above, the entirety of Appellant's Counterclaim is listed below:

FOR A SEVENTH DEFENSE
AND BY WAY OF COUNTERCLAIM
(Abuse of Process)

25. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

26. It is patently clear that this property was properly re-zoned and no appeal was taken for the re-zoning. Therefore, as a matter of law, Winkopp is entitled to all of the uses of the property as allowed by the re-zoning classification of the property. Further, the decision of the BAR is limited to ensuring compliance with the minimum architectural requirements imposed upon this district. It is patently clear from the record in this matter that Winkopp and the BAR complied with the requirements set forth for evaluation and determination by the BAR.

27. Therefore, this appeal is wholly without merit and is frivolous. Winkopp is informed and believes that the Petitioners are aware that their Petition is frivolous and without merit. He 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.

28. These acts by the Plaintiffs were willful and intentional.

29. As a direct, proximate and foreseeable result of this abuse of process by each of the Petitioners, Winkopp has been compelled to suffer significant damages with respect to impairment of his Project and his funding, thereby causing him economic loss with regard to the profitability of this Project. Winkopp is informed and believes that he is entitled to actual and punitive damages in this matter.

WHEREFORE, the Defendant Tom Winkopp prays that the Petition of the Petitioners be dismissed with costs and that he be granted actual and punitive damages against each of them jointly and severally under his foregoing Counterclaim for abuse of process.

(R. p. 28, lines 21-23, p. 29 and p. 30, lines 1-5)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' RULE 12(b)(6) MOTION TO DISMISS APPELLANT'S COUNTERCLAIM AS IT DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE THE CAUSE OF ACTION FOR ABUSE OF PROCESS

The tort of abuse of process is intended to compensate a party for harm resulting from another party's *misuse* of the legal system. *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) (emphasis added). 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.

In *Doe v. Marion*, the Court set forth the standard of review for cases that are dismissed based upon a 12(b)(6), SCRCP motion, stating:

> In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham,* 292 S.C. 415, 357 S.E.2d 8 (1987).

When faced with a Motion to Dismiss under Rule 12(b)(6), SCRCP, the Court must dispose of it based solely upon the allegations pled in the claim and with the allegations of the claim being viewed as admitted. *Hambrick v. GMAC Mortgage Corporation*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct. App. 2006). That being said, "the circuit court may dismiss a claim

when the [Petitioners] demonstrate the [Counterclaimant's] 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Id.* at 121-22, 634 S.E.2d at 7.

Relative to an abuse of process cause of action, a litigant must plead "(1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Food Lion v. United Food*, 351 S.C. 65, 71, 567 S.E.2d 251, 53 (Ct. App. 2002). Appellant's Counterclaim falls short of these requirements.

Pleading an "ulterior purpose" requires an allegation that the process was, or is being, used to gain an objective not legitimate in the use of the process. *Food Lion*, 351 S.C. at 71, 567 S.E.2d at 253. However, simply alleging a party has an ulterior purpose, has a bad, incidental, or concurrent motive, or acts out of spite, such as generally alleged in Appellant's Counterclaim, does not give rise to an abuse of process cause of action. *Id.* at 74, 567 S.E.2d at 255.

In addition to having to plead an ulterior purpose, an abuse of process cause of action also requires the pleading of a 1.) willful or overt act 2.) in the use of the process 3.) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. *Food Lion*, 351 S.C. at 71, 567 S.E.2d at 254. Stated another way, the willful act required to be alleged requires misuse of the legal process by "[s]ome definite act...not authorized by the process or aimed at an object not legitimate in the use of the process." *Hainer v. Am Med Int'l*, 328 SC 128, 136, 492 S.E. 2d 103, 107 (1997).

When both the ulterior motive and willful acts are viewed together it is evident the gravamen of this cause of action centers on "events occurring outside the process" where the process "takes the form of coercion... such as the surrender of property or the payment of money" or where the process is used like "a threat or a club". *D.R. Horton v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012). Said differently, "[t]here is, in other

words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Id.* at 551, 730 S.E.2d at 352.

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. (R. p. 29, lines 9-19, lines 21-23, and p. 30, lines 1-2) However, while Respondents' Petition, and the legal process that results from it, may result in the delay, future modification, or future rejection of the Winkopp project, Appellant has not and cannot allege Respondents did anything other than what they are legally able and entitled to do under the BAR appeal statute. If an authorized appeal causes the delay of, or change to, a project, then that is simply a result of a fully authorized act. Appellant's allegations, even when deemed admitted, only show that Respondents' acts were both (a) authorized by S.C. Code Ann. §6-29-900 and (b) aimed at a legitimate objective – a review of the BAR decision and the process(es) involved with the same. If Petitioners/Respondents obtain some collateral advantage by their seeing this legal process through to its conclusion, that is the nature of litigation and a risk Appellant Winkopp or any other individual takes on when proposing this or any other project to any BAR. Further though, and more importantly, the potential to obtain this collateral advantage does not mean the process has been abused. *See Pallares v. Seinar*, 407 S.C. 359, 371, 756 S.E.2d 128, 133 (2014) (citing *Food Lion*, 351 S.C. at 74-75, 567 S.E.2d at 255-56) ("there is no abuse of process when a party seeks to gain a collateral advantage from the process").

The importance of the Court's decision on this issue cannot be overstated. Appellant Winkopp claims affirming Judge Verdin's Order will set the precedent that no abuse of process claim would lie in the circumstance of the appeal of a decision such as that of the BAR.

However, what the Appellant fails to acknowledge is that even if there is a dark or malicious intent to the initiation of the legal process, that does not, in and of itself, create a cause of action. There still must be a corresponding allegation of a definite, willful act that is not authorized by the process or aimed at misusing the legal process to obtain an illegitimate result.

Rather than creating hypotheticals to illustrate potential theories of how an abuse of process cause of action could be derived in this matter, this Court would be better served by reviewing precedent that shows what constitutes such a willful act that renders use of the legal process improper. For instance, in *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967), the Defendant, through its employee, used the legal process "for the ulterior purpose of coercing the plaintiff into paying ... for merchandise that the store manager 'felt' he had previously taken." *Id.* at 212, 153 S.E.2d at 696. There, the Supreme Court properly realized that, while the Plaintiff had in fact shoplifted some items from the store, the legal process was "tainted throughout with the ulterior and improper purpose" of coercing the Plaintiff to pay for separate, other items not involved in the legal process before the Court. Similarly in *Food Lion v. United Food*, 351 S.C. 65, 71, 567 S.E.2d 251, 53 (Ct. App. 2002), this Court properly recognized that Defendants' previous filing and participation in a lawsuit against Food Lion did not give rise to an abuse of process cause of action when Food Lion did not show the filing of the lawsuit was done in such a manner to misuse the legal process to obtain a result not legitimately available through that process.

Just as in *Food Lion*, while Appellant Winkopp claims that Respondents' Petition was filed with an ulterior motive and that "this [ulterior motive] constitutes a willful act in the use of process not proper in the conduct of these proceedings", he does not specify any other separate willful act that was coercive or similarly improper and done to achieve a result separate and apart

from that legitimately expected from the process. (R. p. 29, lines 9-19). Instead, Appellant's claim presupposes that someone, specifically him, has the right to preliminarily assess the merits of an appeal of the BAR with respect to one of his projects. If he finds the appeal to be without merit (and why would he ever find an appeal of the approval of a project of his to be meritorious?), the appeal then becomes actionable. That is in direct derogation of the rights of the public with respect to the authorized appeal of a decision of the BAR, effectively depriving members of the public of their statutory and due process rights. It also serves to make the Appellant party-jury-judge with respect to the approval process of his projects. If Appellant Winkopp's claim stands, *anyone* who files an appeal of any BAR decision is subjected to being sued for damages by an interested party, dramatically modifying the clear language of S.C. Code Ann. §6-29-900. With his claim, Appellant seeks to chill the right of the public to take lawful exception to the approval of the projects he seeks to build, and, more importantly, the process by which his project was approved to be built. If there is the potential for a coercive act with which the Court should concern itself in this matter, one could not be clearer.

To put a final point in the issue, at oral argument counsel for Winkopp told the Court that even if the Respondents' appeal is successful (meaning a finding that the decision of the BAR is unlawful and therefore reversed), Winkopp would still have the right to pursue his claim for abuse of process. (R. p. 102, lines 22-25, p. 103, lines 15-19, lines 21-25, p.104, lines 1-17) That would mean that any litigant, even successful ones, could be sued for abuse of process and find themselves defending their motives in bringing successful claims. That is simply preposterous.

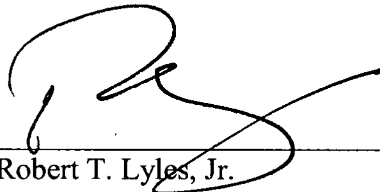
CONCLUSION

Abuse of process is recognized by our Courts to rectify situations where the legal process was misused and someone was damaged. However, when the process is rightfully initiated, such

as by following statutory authority, for the purpose outlined within that statutory authority, there is no misuse or abuse of the process. Appellant's argument, carried to its logical end, would make exercising that statutory right an invitation to strict liability. Respondents assert that such a conclusion would, in itself, be an abuse of the legal process.

Winkopp has not and cannot allege what is required to support his claim for abuse of process. Further, the lawful filing of an appeal, authorized by statute, for the purpose it is authorized, can never be the basis of such a claim. For those reasons, Judge Verdin's Order should be affirmed.

Respectfully submitted,



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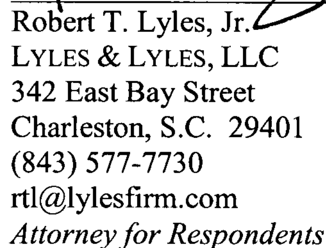
CERTIFICATE OF COMPLIANCE WITH RULE 211(B)

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), South Carolina Rules of Appellate Practice.



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I certify that I have served the (1) Final Brief of Respondents Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner and (2) Certificate of Compliance with Rule 211(b) by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2015 addressed as follows:

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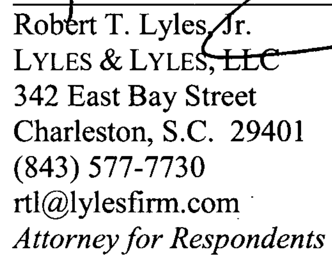

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