THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BERKELEY COUNTY COURT OF COMMON PLEAS
Roger M. Young, Circuit Court Judge
Case No. 2010-CP-08-1771

Appellate Case No. 2014-000183

North Pleasant, LLC and Vanguard Development Group, LLC, Appellants

vs.

South Carolina Coastal Conservation League and Edward Dana Beach, Defendants

Of whom South Carolina Coastal Conservation League is the Respondent.

FINAL REPLY BRIEF OF APPELLANTS, NORTH PLEASANT, LLC AND VANGUARD DEVELOPMENT GROUP, LLC

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SUMMARY OF REPLY

In essence, the Brief of Respondent, the South Carolina Coastal Conservation League ("the League"), seeks to have this Court repeat the error by the trial court of rendering judgment on conflicting evidence and conclusions that might be drawn from the evidence. The majority of the brief is devoted to presenting the evidence the League would have the Court accept as the "only" evidence a reasonable jury might consider. As explained in detail in Appellants' Brief, there was ample evidence admitted at trial from which the jury could have concluded had they been permitted to decide the case, that the League tortiously interfered with the contract between North Pleasant, LLC and Robert Pittenger's company and damaged both Appellants' by publishing injurious falsehoods. Similarly, at the summary judgment stage, there was ample evidence from which a jury could find that the League violated the S.C. Unfair Trade Practices Act, S.C. Code §39-5-10 et seq.

I.

There was Ample Evidence of What Hamilton Davis of the League told Dan Burns (Pittenger's Assistant)

Throughout its Brief, the League says that there is no proof of what Hamilton Davis told Dan Burns, Pittenger's chief assistant, other than the recording of Davis' voicemail to Burns. (Respondent's Brief, p. 6). This is simply not true. Dan Burns prepared an email detailing what he recalled Davis told him only a few days after the call. (R.p. 1186). This email was admitted into evidence. The text of the email is repeated verbatim in Respondent's Brief at page 7. The fact that in his deposition, years later, Burns said he did not remember the call, does not change the fact that the email was authenticated by Burns

and was admitted into evidence. Nor does Davis' claim not to remember exactly what he told Burns change the import of the email.

In Burns' email, he described the clear threat by Davis that the League would fight Pittenger over development of the property. It also detailed the untrue claim by Davis that the League had stopped D.R. Horton from a development on nearby property, a claim specifically rejected as false by the D.R. Horton representative responsible for that development. (R.p. 1186, 1108-1110, 1038-1039, 1052-1053). The flow of information was one-way, from Hamilton Davis to Burns, and included statements that:

1. The League "is trying to stop development in the Highway 41 corridor;"
2. The League was attempting to have the property rezoned "so it can't be develop[ed];"
3. The League was "targeting the Keystone property;"
4. The League "fought" and "halted" a D.R. Horton project.

The content of this email was testified to by Pittenger as the seminal thing that led to his cancellation of the contract. There is ample evidence from which the jury could conclude that Davis not only threatened Pittinger, but also deceived him through these statements to Burns.

II.

There was Evidence Presented to the Jury from Which it Could Have Concluded that the League's Actions Caused Pittenger to Back Out of the Contract to Buy the North Pleasant Property

Respondent does not take issue with the law governing directed verdicts on the question of causation as presented in Appellants' Brief. Causation is in all but the rarest of instances a jury question. Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644, 649 (2013); and Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910, 914 (Ct. App. 2001). Our courts have been

particularly reluctant to keep such issues out of the jury's hands. Proof of direct causation is not required. It is sufficient if there is circumstantial evidence from which the jury could conclude that the defendant's actions caused the harm complained of. Roddey, 400 S.C. 59, 732 S.E. 2d 635, 647 (2012) (quoting Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638, S.E.2d 650, 662 (2006).

Moreover, a plaintiff is only required to establish that the action was either a "substantial factor" in the harm or a "but for" cause of it. "In other words, if the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97, 101 (S.C. 2006). With respect to the cause of action of tortious interference with contract, Respondent's Brief correctly notes that it is sufficient to prove tortious interference if the defendant's actions "influenced" "one of the parties to a contract to abandon the relationship"; it is not necessary to prove that the defendant's actions were the sole cause. (Respondent's Brief, p. 20 citing Forcused Systems, Inc. v. Aerotek, Inc., C.A. No. 6:10-2899, 2011 WL 2162729 (D.S.C. 2011). In this case there is both direct and circumstantial evidence that the League's actions – Hamilton Davis' call to Daniel Burns – was one of the causes of Pittinger's cancelation of the contract to buy the property.

In their attempts to persuade this Court that the Davis call did not begin the sequence of events that led to the contract's termination, Respondent ignores evidence cited by Appellants, mis-state other evidence, and fail to address issues raised in Appellants' brief.

Appellants and Respondent agree on the standard of causation required in a tortious interference claim. At trial, Plaintiffs would need only to prove "but for" causation.

Respondent's Brief, p. 25, citing O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (App. 1987).[1] In ruling on a motion for directed verdict, the trial court is only authorized to determine the existence or non-existence of evidence. Roddey. The issue, then, is whether Plaintiffs produced **ANY** evidence at trial which, if believed, would support a finding that the Davis call was a "but for" cause of the contract's termination. Clearly, the Trial Court erred in deciding that no evidence of causation was presented.

Respondent argues as it must, that there is "no evidence" supporting Appellants' version of events, Respondent's Brief, pp. 1 and 19, and that "no one testified that the reason Mr. Pittenger terminated the contract was related to the League" Id., p. 25. These statements are clearly and demonstrably false. The record is replete with evidence supporting Appellants' claim that the Davis call was a "but for" factor in Pittenger's decision to terminate, including:

- Pittenger's group indicated that on the preceding Wednesday they were "On track for Monday" which was the end of the due diligence period, and only changed this position after the Davis call.[2]
- Josh Hulen testified that there were no unresolved issues before the Davis call.[3]
- North Pleasant was issued an ultimatum on Sunday, after the Friday Davis call, that Pittenger would terminate that day unless an extension was granted.[4] The only reason that Pittenger issued this ultimatum was the Davis call.[5]

See Also, Todd v. South Carolina Farm Bureau Mutual Insurance, 283 S.C. 155, *164; 321 S.E.2d 602, **607. (In the context of a tortious interference claim, the plaintiff only needs to establish "but for" causation.); Santoro v. Schulthess, 384 S.C. 250 (App., 2009) (Plaintiff only needed to allege "but for" causation to avoid dismissal of a tortious interference claim.)

[2] (R.p. 854, 1179).

[3] (R.p. 850-854, 859).

[4] (R.p. 795).

[5] (R.p. 795-796).

- The Davis call was only two days before the initial termination of the contract on Sunday, and only one week before the ultimate termination, and the timing alone is evidence that at least infers a relationship between the call and the termination.[6]

- Perhaps most telling, Pittenger had posted the additional $450,000 deposit on either Thursday or Friday, a clear indication that he intended to proceed to closing, but by Sunday threatened to terminate the contract;[7] the ONLY intervening factor was the Davis call.[8]

Appellants only needed to provide some evidence of "but for" causation, and any single piece of evidence cited above satisfied this requirement.[9] Tellingly, while the Respondent devotes multiple pages to presenting their view of the evidence, they fail to address any of the above evidence. The reason is clear: To acknowledge the existence of even one of these facts would be fatal to Respondent's argument.

Respondent also ignores Appellants' argument that since the proximate cause element would have been satisfied if the contract had been terminated on Sunday, it was for the jury to determine whether termination five days later could also amount to proximate cause. Appellants' Brief, p. 10.[10] Nowhere in the 35 page brief does Respondent even mention this argument, much less provide a rationale for the distinction drawn by Judge Young. It was improper for Judge Young to weigh the evidence of what happened in those five days to determine that proximate causation existed on Sunday, but somehow vanished before Friday. Defendants do not even mention this argument, much less address it.

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[6] *See, e.g., Id.*
[7] (R.p. 776, 855-856).
[8] (R.p. 873).
[9] The cited evidence is provided by way of example, and Appellants refer to their initial brief for a more detailed recitation of evidence supporting their "but for" causation arguments.
[10] "If they had pulled the plug on the deal that day, then you got but for, and I say you go to the jury…". J. Young, (R.p. 1009).

Based on the evidence cited above, a rational jury could have determined that but for the Davis call, Pittenger would not have terminated the contract. Viewed from another angle, on this record would this Court overturn a jury verdict that proximate cause existed as being unsupported by credible evidence? Clearly not, because credible evidence exists from which the jury could conclude that but for the Davis call, the contract would not have been terminated. For the same reason, this Court should reverse the Trial Court's decision.

Respondent argues that Appellants' Tortious Interference with Prospective Contractual Relations claims should be dismissed because an "at-will" contract existed between Appellants and Pittenger. This argument exceeds the scope of this appeal, and in any case is without merit. The trial court's decision was based solely on proximate cause, and no determination was made as to the existence or absence of a contract that covered all the issues to be addressed by the parties. In addition, the "at-will" status of the contract calls into question which tort was violated. It is proper to provide the option for the jury to decide, for example, that there was an at-will contract between North Pleasant and Pittenger during the due diligence period, but that the damage to Appellants occurred because the prospective binding contract between them did not come to fruition because of the Davis call. If the jury took that view, Appellants' recovery might be under the Prospective Contractual Relations theory. This option should be left open for the jury.

It is clear that the Davis call on Friday was the sole cause of the threatened termination two days later, and a reasonable jury could have found that but for the call Pittenger would have proceeded to closing. Accordingly, it was error for the Trial Court to grant Respondent's motion for directed verdict, and this case should be remanded so that the jury can decide the inherently factual question of proximate cause.

Moreover, Pittenger testified that he decided not to purchase the property, at least in part, because he would be doomed to be in a fight with the League over its development. The other reasons he listed in emails contemporaneous with his cancellation of the contract – unsatisfactory zoning density and lack of water and sewer and the number of conservation easements in the area, all stem from his concern over that fight. The testimony of Josh Hulen was that the zoning at the time Pittenger cancelled the contract was the same as it had been when he signed the contract and was consistent with Pittenger's requirement of one lot per acre. (R.p. 868-869, 881) Pittenger testified that his concern over the zoning density is what caused him concern over running utilities to the site – that is, there needed to be sufficient lots available to sell to absorb the cost of the utilities. (R.p. 1111-1114, 1117-1118, 1125, 1141-1142) Davis' call to Burns was made the Friday before the earnest money was to go "hard". (R.p. 778, 1108-1110, 1169, 1186). Only two days before that call, Pittenger was sending out letters to potential buyers of the property lauding the property as a good development opportunity. (R.p. 1160).

From this evidence the jury could readily conclude that Pittenger's contemporaneous justifications for cancelling the contract were merely "cover" for getting out of a purchase that would destine him to what he described as a long fight with the League. (R.p. 1116, 1124, 1130-1131) In other words, the jury could easily conclude the League's threat to Pittenger worked – once he understood their threats had teeth, he abandoned the contract. As the League's own people testified, use of threats and deception against a potential buyer of property is improper. (R.p. 884-885, 928) Such tactics constitute improper methods in the context of tortious interference with a contract.

III.

Whether the League Violated the S.C. Unfair Trade Practices Act is a Question for the Jury

The League claims it is purely a public advocacy organization as if this statement was somehow dispositive of the question. Many organizations claim to be something they are not and non-profit status is merely a tax designation and not an indicator of what the organization does. Many racist groups actively involved in inciting or committing violence claim to be benevolent educational organizations when they are not. The facts concerning what an organization *actually does* is what matters in determining whether it is engaged in trade or commerce and whether it has committed unfair or deceptive practices.

The classic example of this is the Ku Klux Klan. For many years, it was chartered as a non-profit corporation "as a purely benevolent and eleemosynary society" and claimed to be organized "for benevolent, religious and charitable purposes." Knights of the Ku Klux Klan, Inc. v. Strayer, 26 F.2d 727 (W.D. Pa. 1928); aff'd 34 F.2d 432 (3rd Cir. 1929). In Strayer, the Klan was complaining that other groups had misappropriated the Klan name and were profiting from it. The Pennsylvania District Court and the Third Circuit held that, in fact, the Klan was engaged in activities contrary to the "benevolent" purposes for which it claimed to be organized – specifically, organizing beatings, stirring up racial and religious prejudices, fomenting disorder and encouraging riots resulting in death. 34 F.2d at 434. Consequently, these courts refused to allow the Klan to seek equity in the form of an injunction barring others from use of its name explaining, "the plaintiff, disregarding its charter and constitution and engaging in practices antagonistic to is declared purposes, cannot hide its hands and demand equitable relief."

While the actions of the League revealed in the record of this case are not so heinous as those of the Klan, they are not actions consistent with what it claims to be its purpose, "to protect the natural environment of the South Carolina coastal plain and to enhance the quality of life of local coastal communities by working with individuals, business and government to ensure balanced solutions." (Respondent's Brief, p. 3). Appellants did not sue the League for doing those things. Appellants sued the League for deliberately threatening Robert Pittenger and for lying to him so as to induce him to abandon a contract with Appellants. Those actions are not "public advocacy." The League communicated lies and threats to Pittenger, not to a government entity. (Or at any rate, not on the record of this case). If it did these things as part of a service it offered to people who were contributing money to the League for the purpose of securing those services that is commerce within the meaning of the UTPA.

As argued in Appellants' Brief, the record at the summary judgment stage contains more than enough evidence from which a jury could conclude that the League:

1) In exchange for payment of money pursued the interests of major contributors. With respect to the North Pleasant property at issue in this case, those interests were preventing development into residential communities. The contributors, the evidence indicates, were owners of nearby plantations. (R.p. 231-236, 259-262, 295, 318-326, 395-404, 408-410, 513).
2) The League acted to advance its contributors' goal of preventing development of the North Pleasant property by making false and deceptive statements and threats to the contract purchaser so as to frighten him out of the contract. (R.p. 243-244, 251-252)

The evidence of this "quid pro quo" was sufficient to send the question of whether the League was engaged in trade or commerce to trial. Furthermore, the evidence in the record on summary judgment summarized above of threats and lies employed by the League for the purpose of inducing Pittenger to abandon his contract to purchase the Keystone Tract was sufficient to defeat summary judgment on the question of whether the League's actions constituted an unfair or deceptive act in violation of the UTPA.

IV.

Respondent's Argument on Injurious Falsehood Does not Address the Real Issues

Two of the arguments raised by the League regarding the injurious falsehood claim are not responsive to the real issues before the Court. Its argument incorrectly maintaining that there is a reliance requirement for this tort is addressed in Appellants' Brief at pages 19-20 and will not be repeated here.

Respondent claims that it is protected by the First Amendment to the United States Constitution regarding its communication of falsehoods which injured Appellants. Their argument is premised on law arising from statements made before public bodies, such as county councils or state agencies. The Appellants did not sue the League for anything it said to Berkeley County Council or any other public body. Appellants sued the League for false and misleading statements its employee made to citizens who live near the Keystone Tract and for other false and misleading statements made to Pittenger's assistant, Daniel Burns. Those statements, made to private citizens, are not protected by the First Amendment. Respondent offers no law or logic refuting this fact or the law as summarized in Appellants' Brief concerning R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) and the law generally surrounding the First

Amendment and speech which is actionable, including libel, threats and "extortionate speech."

Respondent also ignores completely Appellants' argument that the statements made by the League employee, Hamilton Davis, to Dan Burns in Pittenger's office constitute injurious falsehoods. Instead, Respondent, like the trial judge, focuses exclusively on the false statements Davis made to citizens residing near the Keystone Tract. There is ample evidence, as explained above, that Pittenger and his staff completely reversed their decision to purchase the property based on the false statements made by Davis in his call with Burns. (R.p. 1186).

V.

The Trial Judge Did Not Rule on Whether Vanguard Development Group, LLC had a Proper Claim

Respondent asks this Court to affirm something the trial court did not rule on – its assertion that the realtor, Vanguard Development Group, LLC, was not a party to the contract between North Pleasant and Pittenger and, therefore, could not have a claim against the League based on its actions. The trial judge did not address this argument at all in his order. (R.p. 1007-1015). The only two issues he addressed were causation and whether the statements by the League were without justification. The issue of whether Vanguard established a claim against the League is, therefore, not a proper issue for this appeal.

Respondent characterizes the issues as an alternate ground to sustain the grant of a directed verdict against Vanguard. Respondent's argument, however, is an entirely separate issue from that decided by the trial judge. In effect, Respondent is attempting to

appeal the trial judge's refusal to grant its request that Vanguard be held not to have a claim against it related to Pittenger's abandonment of the contract.

Contrary to the Respondent's assertions, there was evidence that the League was aware that Vanguard was the realtor representing North Pleasant in the sale of the property and, therefore, had an interest in the sale to Pittenger being consummated. Josh Hulen, a realtor with Vanguard who handled the effort by Vanguard to sell the property, testified that he was repeatedly contacted by Noel Thorn from the beginning of Vanguard's contract with North Pleasant. Thorn identified himself as representing various groups interested in conserving the Keystone Tract who were trying to arrange for either public ownership of the Keystone Tract or an agreement severely limiting its development. Thorn was the only person Hulen testified contacted him as a representative of conservation groups about preserving the property. (R.p. 823, 839-841). Hamilton Davis, the League's employee assigned the role of attempting to achieve its goal of preserving the Keystone Trace and the man who contacted Pittenger's office, testified that the League was one of the groups allied in an effort to put the property into public ownership. He also testified that he learned from persons with some of those allied groups that they had been in contact with representatives of "the Reynolds group", North Pleasant, LLC, owner of the Keystone Tract. (R.p. 905-906). From this evidence, the jury could conclude that Hamilton Davis or others at the League knew that Vanguard was the realtor representing North Pleasant in trying to sell the property.

There is also evidence that Vanguard had an agreement with Pittenger. It would not have been, therefore, merely a third party beneficiary of the North Pleasant/Pittenger contract. The contract for sale specifically provides at paragraph 9 that upon closing of the

sale to Pittenger, North Pleasant was to pay Pittenger a 3% sales commission and the same commission to Vanguard. (R.p. 1170). North Pleasant's agreement with Vanguard was for a 6% commission. (R.p. 1155-1156). Vanguard's principal, David Grubbs, testified that he had an agreement with Pittenger to split the 6% commission with Pittenger upon closing of the sale of the contract between Pittenger and North Pleasant. (R.p. 953-956). From this evidence the jury could have concluded that Vanguard was a party to an agreement with Pittenger and, therefore, had standing to seek compensation for its loss when that agreement was abandoned by Pittenger by reason of the actions of the League.

The evidence was sufficient to send both the tortious interference with contact and injurious falsehood claims to the jury on behalf of Vanguard. As to the UTPA, the statute provides for recovery of damages by any party injured by an unfair trade practice. Should a jury ultimately find that the League committed unfair trade practices that resulted in the abandonment by Pittenger of the contract to purchase the Keystone Tract, Vanguard would qualify, in the words of the statute, as "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice" in the form of loss of its 3% commission on the sale. S. C. Code § 39-5-140(a).

CONCLUSION

Appellants, North Pleasant, LLC and Vanguard Development Group, LLC, respectfully request: 1) that the directed verdict granted as to their claims against Respondent, S.C. Coastal Conservation League for tortious interference with a contract, tortious interference with prospective contractual relations and for injurious falsehood be reversed, and 2) that the grant of summary judgment as to their claim against Respondent

under the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq. be reversed and that all of these claims be remanded to the trial court for a new trial.

Respectfully submitted,

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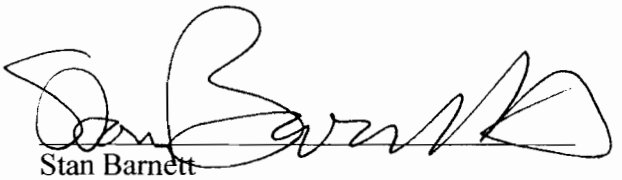
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211 (b), SCACR.



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